CMA Consultation
"Application of the Chapter 1 prohibition in the Competition Act 1998
to environmental sustainability agreements"

Brief Comments to the CMA regarding Measurement of Benefits and Disclosure regarding Climate Related Alliances*

by

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As financial economists and management scholars from Oxford University, Harvard University, and IMD, we have been studying climate change and business alliances that address climate change. We have identified over 150 global environmental alliances, with about half working to reduce emissions and address climate change. Our work involves understanding the theories of change of these alliances, levers of their effectiveness, the leadership of alliances, and their potential antitrust challenges. Our work is ongoing and will produce more papers over the course of this year, but in the interest of providing timely counsel, we are providing these comments in response to your consultation. We have recently written a short piece, "When climate collaboration is treated as an antitrust violation," for HBR.org, which we have attached as *Appendix A*.

We welcome the opportunity to comment on the CMA's consultation on draft guidance on the application of the Chapter I prohibition to environmental sustainability agreements (the "**Draft Guidance**"). Rather than offer an exhaustive review of the Draft Guidance, given our research and expertise, we confine ourselves to two specific areas: (i) the appropriate method for calculating the benefits flowing from sustainability agreements for UK consumers; and (ii) alternative approaches the CMA might consider to encourage firms to disclose their initiatives to the CMA and other regulators at an early stage, before legal issues might arise. These comments are made with the following considerations in mind, borne from our research.

- **The benefits of alliances**. Most climate-related alliances, including those that might raise potential concerns under competition law are fairly new. As a result, there is little work that can definitively state their *ex post* benefits. *Ex ante*, they embody variety of theories of change and may produce a range of potential benefits. These include but are not limited to: (a) improved and standardized disclosure standards; (b) improved and lower emissions operating standards; (c) joint research projects; (d) joint investment projects; (e) consolidation of buying power—or potential buying power, to send signals to regulators and innovators about the future demand for products, such as carbon capture and storage/removal products; and (f) joint engagement strategies for investment managers and asset owners to encourage firms to decarbonize. Some of these would be automatically excluded from your consideration under the Draft Guidance. In general, our research to date is consistent with the potential for climate alliances to have salutary social benefits. In some cases, these benefits could include reducing members' emissions; permitting joint action that would reduce emissions by others; advancing the development of emission reduction technologies though joint funding, advance market commitments, or technology development; or voluntary precursors of public rules and regulations, such as the private initiatives that paved the way for the International Sustainability Standards Board (ISSB).

  A 2020 Linklaters study of 200 sustainability leaders in the UK, USA, France, Germany and The Netherlands highlights that the two most important activities that would be enabled are pooling resources and know-how (selected by 68% of respondents) and changing ingrained industry practices (64%); the area that was most likely to benefit was reductions in CO_2 emissions (65%).[1]

- **The chilling prospect of competition and antitrust***.* Measuring a phenomenon that does not take place (the proverbial dog that doesn't bark) is nearly impossible from a research perspective. Some authors have put numbers to this non-phenomenon with one survey suggesting that 57%[2] of firms have walked away from sustainability projects fearing competition challenges. While we can't rigorously verify this figure, we have seen examples of where the prospect of competition and antitrust enforcement actions, or at a minimum, politically-motivated threats of these actions, have had a chilling effect on participation in climate alliances. In another piece (Gasparini, Haanaes, and Tufano, 2022) we summarize some of this evidence:

> *To decarbonize, firms must often not only agree to standards, but also make substantial investments and take other costly actions. While these actions may lower costs in the long run, in the short term they may lead to higher prices or lower margins. First movers may find themselves at a competitive disadvantage. Collective action can address this; hence, climate collaborations are increasingly the norm. Yet moving together has a risk. More ambitious climate collaborators have sometimes found a surprise — the long arm of the law. In some jurisdictions, interpretations of current antitrust laws and interpretation generally don't consider socially desirable outcomes, meaning increased prices typically cannot be offset against broader environmental benefits to society. This means collaborating around shared climate goals might be simply illegal. In other jurisdictions, there is real uncertainty and concern around the legality of certain cooperative activities. The fear of prosecution can have a chilling effect: by one estimate, it discourages up to 60% of companies from engaging with climate coalitions. This may explain why some collaborations seem relatively toothless.*
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> *Does this sound far-fetched? In the U.S., the Department of Justice recently closed an antitrust investigation into voluntary agreements among carmakers and the state of California to reduce emissions. In March 2022, the Arizona attorney general, in a* Wall Street Journal *op-ed entitled "ESG May Be an Antitrust Violation," announced that he was using antitrust statutes to go after "a coordinated effort to allocate markets." He singled out a climate collaboration (Climate Action 100+) and proudly announced that he was launching "an*

[1] https://lpscdn.linklaters.com/-/media/files/document-store/pdf/uk/2020/april/linklaters_competition-law-needs-to-cooperate_april-2020.ashx?rev=2c2c8c7d-91a8-496f-99fb-92a799c55cb2&extension=pdf&hash=6641BEDB36EC877CA43C7D995BD6EEDA

[2] https://one.oecd.org/document/DAF/COMP/WD(2020)94/en/pdf and https://www.linklaters.com/en/about-us/news-and-deals/news/2020/april/92-percent-of-businesses-call-for-changes-to-competition-rules-to-boost-climate-change-collaboration

investigation into this potentially unlawful market manipulation." In July 2022, we saw an alliance of insurers pull back from collectively moving away from insuring thermal coal projects on the basis of antitrust considerations. The Financial Times has reported that the UN's Race to Zero amended its interpretation guide — written by a peer expert review group — that had called for financial firms to not fund new coal projects. The language "no new coal projects" was removed in part due to antitrust concerns. A recent piece by an insider in this process details the legal pressure they faced. Not so far-fetched.

Even in the last few weeks, we have spoken to members of coalitions who are attempting to distance themselves from work that they otherwise support, for fear of political reprisal which can take the many forms: threats of anti-trust actions, state level boycotts, political investigations, and political targeting. Two of the most recent alliance defectors are Zurich Insurance Group and Munich Re, which both exited from the Net Zero Insurance Alliance. Munich Re's CEO explained rationale:

> "In our view, the opportunities to pursue decarbonisation goals in a collective approach among insurers worldwide without exposing ourselves to material antitrust risks are so limited that it is more effective to pursue our climate ambition to reduce global warming individually," says Joachim Wenning, CEO of Munich Re.[3]

The *uncertainty* about potential enforcement may have an even more chilling impact than clear but restrictive rules. With the latter, firms can confidently work together up to a certain point; but with uncertainty and ambiguity—combined with conservative legal counsel, firms are likely to self-impose even greater restrictions. Perhaps this is why, according to a 2020 Linklaters survey, 92% of firms call for changes and clarification to competition rules to encourage climate change collaboration.[4]

Against this backdrop and the potentially valuable and unique contributions of alliances, we applaud the CMA for their efforts to provide clearer guidance on the application of competition law to environmental sustainability agreements. The proposed guidance is very helpful in clarifying conditions where agreements would be exempt. The proposal to invite firms to bring forward potential cases for review is equally welcome. We hope that our comments below will provide useful to the CMA in further developing their thinking in two areas.

[3] See https://www.munichre.com/en/company/media-relations/media-information-and-corporate-news/media-information/2023/media-release-2023-03-31.html.

[4] https://www.linklaters.com/en/about-us/news-and-deals/news/2020/april/92-percent-of-businesses-call-for-changes-to-competition-rules-to-boost-climate-change-collaboration

1. Calculation of the "Fair Share to Consumers" Condition: Adopt HMT Carbon Values as defaults in your analysis.

The CMA is well practiced in analyzing the costs of anti-competitive activity. Chapter I of the Competition Act of 1998 provides you with opportunities to consider the consumer and social benefits of collaborations. For climate-related alliances, the Draft Guidance in para 6.4 makes it clear that you will consider a fair share of benefits to *all* UK consumers:

> *The CMA therefore considers it appropriate, in the case of climate change agreements, to depart from the general approach and exempt such agreements if the 'fair share to consumers' condition can be satisfied taking into account the totality of the benefits to all UK consumers arising from the agreement, rather than apportioning those benefits between consumers within the market affected by the agreement and those in other markets.*

We applaud your broadening the benefit to "*all UK consumers*" for the logic you lay out in para 6.4 of the Draft Guidance and fully agree that the nature of the climate threat is such that climate change represents a special category that requires a different approach.

You go on in para 6.6 to call for quantification of these benefits, referring back to earlier sections:

> *As set out in paragraphs 5.23 to 5.25 above, we would expect businesses to apply the same considerations as to whether there is a need to quantify and, in cases where there is a need to quantify, for them to apply appropriate quantification techniques in a way commensurate with the relative size of the agreement's effects and to follow best practice recognised in the industry in which they operate and appropriate for the nature of environmental benefits and effects on competition at hand.*

Returning to para 5.25, you write:

> *For many of the challenges of quantifying environmental and competitive benefits and negative effects, there are established techniques that can be employed to overcome these. First, there are methodologies for the quantification of many types of environmental benefits (Ref to FN 37)…For instance, in relation to greenhouse gas emissions reductions, there are established instruments for carbon pricing such as the UK Emissions Trading Scheme, which may be applied to convert the reduction in greenhouse gas emissions into monetary values.*

Footnote 37, referenced above, references Section 9 of the Green Book, which is guidance published by HM Treasury ("**HMT**") on appraising public policy options. We presume that you are referring to Table 3 of Section 9.

We would recommend that you consider adopting as the ***default*** for evaluation of climate change benefits the **carbon value calculations given in Section 9 of the Green Book**, for a number of reasons.

Elsewhere[5], HMT provides both the rationale and details of its calculations of greenhouse gas ("**GHG**") emissions values. The conclusion is very clear that for ***all*** policy decisions, the carbon values provided in Section 9 of the Green book should be used, even relative to ETS values:

> *Greenhouse gas emissions values ("carbon values") are used across government for valuing impacts on GHG emissions resulting from policy interventions. They represent a monetary value that society places on one tonne of carbon dioxide equivalent (£/tCO2e[6]). They differ from carbon prices, which represent the observed price of carbon in a relevant market (such as the UK Emissions Trading Scheme).*

We believe that this guidance is particularly apt for the CMA and our recommendation for the final published guidance is as follows: We would suggest that you **use (and explicitly support the use of) the HMT supplied carbon values as the *default* metric to measure benefits from climate change in the first instance, whilst allowing firms to propose other metrics for your consideration where appropriate**.

The HMT figures are produced through a rigorous process, are clearly specified (providing low, central and high series figures), and would enable transparent and consistent analysis of emissions benefits. More importantly, we believe that they are calculated to represent the **appropriate benefits to UK consumers and taxpayers for the purposes of your analysis**.

The UK carbon values represent *the marginal cost to reduce greenhouse gas emissions* or the *marginal abatement cost*. Given that the UK has committed to reduce emissions under its commitment to achieve Net Zero by 2050 and to meet its five year carbon budgets, the carbon values are a measure of the *marginal* cost (on a £/tCO2e basis) to achieve this goal and align with the broader policy objective. Figure 1, taken from HMT's description of carbon values, illustrates the marginal nature of the calculation:

[5] https://www.gov.uk/government/publications/valuing-greenhouse-gas-emissions-in-policy-appraisal/valuation-of-greenhouse-gas-emissions-for-policy-appraisal-and-evaluation

[6] Greenhouse gases include Carbon Dioxide (CO_2), Methane (CH_4), Nitrous Oxide (N_2O), and others. Each has a different impact on global warming both in terms of the level of immediate warming and their half-life in the atmosphere. In order to create a consistent measure for greenhouse gases, scientists and policy makers aggregate the different gases using CO_2-equivalents or CO_2e, where each gas is weighted according to its global warming impact relative to CO_2.

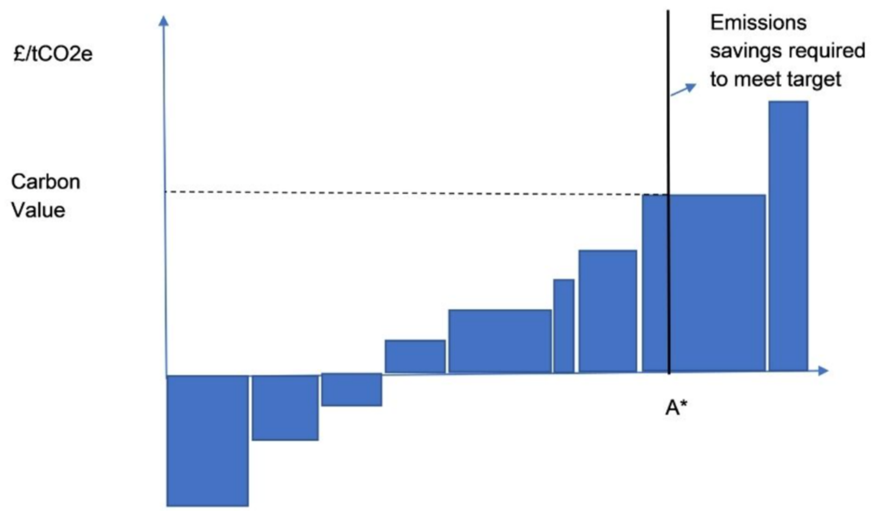

Figure 1: illustrative MAC curve

The cost to abate (reduce) emissions will vary depending on the technology employed. To meet the UK's targets, it will need to abate certain levels of CO2e, denoted above as the quantity A* along the horizontal axis. It will meet this goal by using the least expensive means available first (to the extent possible), moving sequentially onto higher cost abatement approaches until the total goal is met at the marginal abatement cost represented by the "carbon value" on the vertical axis. The carbon value figures are updated periodically by HMT

For the purpose of the CMA's analysis, the "*fair share*" of benefits to UK consumers should represent *the costs that they would otherwise have borne in order to achieve the emissions reduction*. These are precisely measured by the carbon value. The costs of meeting the UK's ambitious Net Zero targets would be met by consumers in one of two ways. Either consumers would be worse off by (a) bearing increased costs of goods and services if the emissions reduction was carried out by the private sector; or (b) suffering reductions in income and spending as a result of having to pay higher taxes to pay for the abatement if carried out by the government. The carbon value represents the government's best estimate of the cost of emissions reduction regardless of how they will be implemented—and whether by UK consumers in the form ofby higher prices or increased taxes. While the CMA should be willing to consider privately provided estimates[7] that varied from this government figure, it seems to us that – for simplicity, comparability, and consistency—it would be appropriate to use carbon values as the default for

[7] While the UK has opted to use carbon values, parties might bring forward benefit estimate based on the "social cost of carbon", which is a monetary calculation of the benefits of emissions reductions. Social costs of capital are used by other countries, for example, the US. Social costs of carbon are typically calculated on a global scale and are difficult to apply on a national scale. For an extended discussion of the reasons to use global vs. national calculations, see Section 2 of the recent US White House paper (https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocumentSocialCostofCarbonMethaneNitrousOxide.pdf). The discussion therein reviews the complexities of trying to assess national level costs (see esp. p. 25) due to the spillovers both to and from other countries and due to the lack of research and consensus on how to calculate national costs.

calculations of the benefits to UK consumers of emissions reductions. **This figure seems to exactly measure the benefits to UK consumers of avoided emissions**.

It may be worthwhile to clarify what criteria you would use to evaluate alliances which attempt to *thwart* progress toward climate change. Your Draft Guidance focuses on concerted activity that seeks to accelerate progress toward climate goals, but some groups may be joining together to slow or delay emissions reduction or other Net Zero goals. Will you use the "fair share" calculation described above to estimate the costs of these activities that fail to reduce emissions? Consistency would seem to suggest this approach.

2. Ongoing disclosure processes vs. *Ad hoc* approaches: Consider alternative ways for alliances to routinely share experiences, to benefit both the CMA and the alliances.

The CMA can compel *ex post* disclosure through its enforcement processes. Section 7 of the Draft Guidance lays out a new "open-door" policy which offers private parties who choose to disclose their sustainability initiatives *ex ante* the possibility of obtaining informal guidance from the CMA. We applaud this approach and your clear proposed rules, as they reduce the uncertainty in the process.

We note, however, that both the traditional and proposed approaches are essentially *ad hoc*, initiated by one or the other party at specific points in time – typically when concerns have already been raised (in the case of CMA enforcement) or before an initiative gets underway (in the case of approaches for informal guidance). We would suggest you consider encouraging more regular disclosure by collaborations throughout their lifespan, either through revisions to the Draft Guidance or otherwise as part of the Sustainability Taskforce's ongoing work. With this in mind, we bring two ideas for your consideration.

First, we are preparing a new paper that proposes a new disclosure regime for alliances. We plan to circulate this paper soon, but in the interests of the time frame of this consultation, we are sharing the broad outlines with you in this short note.

Based on our work, we feel that while many of alliances are well run, others are lacking in organizational structure. Furthermore, we find that disclosure practices vary considerably depending on whether the alliances are formal organizations (non-profits or charities) or short-lived projects. We propose a set of **voluntary disclosures** that are in part intended as a checklist or reminder of good organizational practice. We propose disclosures that are at the heart of the issues that the CMA considers: **who is involved, what are they attempting to do, whom do they seek to benefit, how might these benefits be measured, and what are their conflicts of interest**. The purpose of this voluntary disclosure is to increase the public's trust in these alliances, but a side benefit would be to ***routinely*** make **standardized information available to the CMA** and other public bodies which could be useful in their understanding of this landscape. We consider that regular disclosure of this kind could greatly assist the CMA's 'Sustainability Taskforce' with "develop[ing] formal guidance, lead[ing] discussions with government, industry and partner organisations and continually review[ing] the case for legislative change, particularly in light of market developments".[8] We will share a copy of the working paper with the public and with the CMA in short order and would benefit from informal comments.

Second, we note with interest the concept of **regulatory sandboxes**, which have been used in the UK and US in conjunction with financial innovation and fintechs. In these sandboxes, regulators reach out to innovators and invite firms into a process whereby both sides learn about the other and in so doing, benefit. One of the regulators involved in this process at the U.S. Consumer Financial Protection Bureau has written about the pros and cons of sandboxes, the design issues in setting up and running them, and the relationship between sandboxes and rulemaking..[9] His conclusion is that they can benefit consumers and regulators:

> *A regulatory sandbox is an interesting regulatory innovation of its own. If used smartly, it can benefit consumers and the economy. The FCA sandbox is one such good example. Unfortunately, too often sandboxes are misunderstood, misused, or mismanaged. Regulatory agencies should use sandboxes to keep up to date with fast-paced innovation and promote market competition without sacrificing consumer protection. Real innovation-minded regulatory agencies see sandboxes as means, not ends. Real innovation-minded regulatory agencies shun the glitz of sandboxes; rather they take the insights gained from sandboxes to improve rulemaking, supervision, and enforcement policies so that the entire market can benefit.*

We believe that the concept of a climate sandbox deserves serious consideration. This could be a sandbox established by the CMA's Sustainability Taskforce itself, but equally we believe that a wider UK climate sandbox, set up by a variety of UK agencies and regulators, would prove beneficial to both government officials and to innovators and alliances. The innovators and alliances would get information that could make their work more effective and less likely to invoke any legal issues; while the regulators would get valuable insight into the workings of these groups to develop their understanding of how they can contribute to tackling the climate crisis.

We hope you find these comments useful and constructive, and we would welcome the opportunity to discuss further with the CMA if that would be helpful.

[8] https://www.gov.uk/government/news/cma-publishes-environmental-sustainability-advice-to-government

[9] See https://pacscenter.stanford.edu/a-few-thoughts-on-regulatory-sandboxes/, Dan Quan, A Few Thoughts on Regulatory Sandboxes. Stanford Center on Philanthropy and Civil Society, online.

Harvard Business Review

Antitrust Laws

When Climate Collaboration Is Treated as an Antitrust Violation

by Matteo Gasparini, Knut Haanaes, and Peter Tufano

October 17, 2022

Kate Ili/Getty Images

Summary. Carbon emissions transcend firms and borders—they are a massive, unpriced externality. Companies across industries are increasingly waking up to the need to cooperate in the fight against climate change but the law might get in the way. Across Europe and... **more**

What do Covid-19, the Russian invasion of Ukraine, and the climate crisis have in common? All three challenge our sense of safety and illuminate the interconnected nature of the modern world. Each also calls for a reconsideration of boundaries between government and business, and the appropriate balance between competition and cooperation in business — and in antitrust law. In some jurisdictions, antitrust authorities see climate cooperation as a means to support greener economies; elsewhere, their counterparts see them as a violation of antitrust law that must be stopped.

Pandemics, invasions, and carbon emissions have effects that spill over national borders. These "wicked" problems are caused by, and in-turn produce, complex webs of interacting forces. Their solutions, therefore, require collaboration across national borders and sectors. Society has considerable experience in cross-national coordination through multi-lateral organizations, treaty negotiations, and more. We encourage cross-sectoral cooperation between business and government, as well as between academia and government. We generally believe that these collaborations make a material difference in addressing broad systemic issues.

While our societies are comfortable with these collaborations, we generally have institutionalized prohibitions on cooperation amongst rivals through antitrust laws. Introductory economics teaches that a monopolist will set prices to maximize their profits, raising prices and lowering quantities relative to a competitive outcome, and thereby transferring wealth from consumers to producers. And even when there is no single monopoly, if companies are allowed to collude together they can collectively act as if they were one. That's why, throughout history, laws have banned companies from acting collectively to restrain trade. This principle is enshrined in the antitrust laws of all major jurisdictions, prohibiting agreements between firms that lead to higher prices, lower output, lower quality, or less innovation.

There are legitimate reasons to ban collusion, yet collaboration is needed to battle climate change. A recent BCG study argued that to achieve sustainability, "companies must act aggressively — and collectively — to transform their ecosystems." The same study noted that collaborations in sectors ranging from sustainable apparel to sustainable agriculture have produced some concrete outcomes. Our own research has identified more than 150 business climate collaborations ranging from common carbon accounting frameworks and principles for responsible investments to shared net zero objectives.

To decarbonize, firms must often not only agree to standards, but also make substantial investments and take other costly actions. While these actions may lower costs in the long run, in the short term they may lead to higher prices or lower margins. First movers may find themselves at a competitive disadvantage. Collective action can address this; hence, climate collaborations are increasingly the norm. Yet moving together has a risk. More ambitious climate collaborators have sometimes found a surprise — the long arm of the law. In some jurisdictions, interpretations of current antitrust laws and interpretation generally don't consider socially desirable outcomes, meaning increased prices typically cannot be offset against broader environmental benefits to society. This means collaborating around shared climate goals might be simply illegal. In other jurisdictions, there is real uncertainty and concern around the legality of certain cooperative activities. The fear of prosecution can have a chilling effect: by one estimate, it discourages up to 60% of companies from engaging with climate coalitions. This may explain why some collaborations seem relatively toothless.

Does this sound far-fetched? In the U.S., the Department of Justice recently closed an antitrust investigation into voluntary agreements among carmakers and the state of California to reduce emissions. In March 2022, the Arizona attorney general, in a *Wall Street Journal* op-ed entitled "ESG May Be an Antitrust Violation," announced that he was using antitrust statutes to go after "a coordinated effort to allocate markets." He singled out a climate collaboration (Climate Action 100+) and proudly announced that he was launching "an investigation into this potentially unlawful market manipulation." In July 2022, we saw an alliance of insurers pull back from collectively moving away from insuring thermal coal projects on the basis of antitrust considerations. *The Financial Times* has reported that the UN's Race to Zero amended its interpretation guide — written by a peer expert review group — that had called for financial firms to not fund new coal projects. The language "no new coal projects" was removed in part due to anti-trust concerns. A recent piece by an insider in this process details the legal pressure they faced. Not so far-fetched.

How do antitrust laws balance their traditional concern for consumer welfare (consumers of a certain product might pay more) against externalities (*everyone* is hurt by greenhouse gas emissions)? Competition agencies — especially in Europe — are now considering how to ensure that antitrust law can contribute to greening our economies. Some European regulators, such as the Dutch Authority for Competition and Markets, have led the way, for example permitting competitors Shell and Total to cooperate on re-adapting empty North Sea gas fields for CO2 storage. The European Commission is consulting on changes to its guidelines to clarify when climate collaborations are legal. In the UK, the Competition and Markets Authority has recently established a "sustainability taskforce" to prepare new guidance and consider the case for changes in the law. The Ukraine invasion and Covid-19 pandemic provide pertinent models of the proactive role antitrust agencies can play — prompted by the rapid onset of these crises, safe harbors were quickly introduced to enable rivals to collaborate to address supply chain issues.

Yet, antitrust agencies are rightly wary that sustainability exceptions might permit anti-competitive behavior or "greenwashing," as the recent EU fines on car manufacturers for colluding to avoid using certain technologies to reduce emissions shows. In the U.S., the greenwashing conversation is being led by the SEC, but federal discussions about green antitrust policy seem to be lagging behind Europe. Yet with the passage of the Inflation Reduction Act, which has elements of sustainable industrial policy, it is likely that American firms will need to collaborate more, not less, in the future. Policymakers across the globe need to join up these strands of activity. One incomplete action might be to explicitly consider the benefit of greenhouse gas reduction, as measured by the social cost of carbon, against any increases in price. A broader step would be to explicitly require the tradeoff of the public benefits of sustainability against the private costs to consumers.

What can firms do? If you operate in the UK or EU, weigh into the ongoing consultations on green antitrust policy. Some competition agencies are also actively encouraging alliances to bring forward concrete cases that they can review. Formal and informal input from industry and third parties can help agencies evaluate which collaborations will advance climate goals and to clarify their interpretations of the law. Wherever you are, as you enter into climate collaborations, discuss with your lawyers. In some instances, simple changes in language are important. Knowing red lines and potential safe harbors is essential. Most importantly, we must continue to decarbonize our economies and protect our planet for future generations. Given the recent projection that we will breach the 1.5° C barrier within the next five years, we must find a way to mitigate global warming—while meeting the current needs of our economies and societies. We can't have legal chilling of collaborations that address the physical warming of our planet.

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