

# SUSTAINABILITY COOPERATION AGREEMENTS: HOW CAN EU COMPETITION RULES SUPPORT GREEN GOALS?

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Legal Briefings

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The [European Green Deal](#), launched by Commission President Von der Leyen in December 2019, is a roadmap for making the EU's economy sustainable by addressing climate and environmental challenges. It sets out a number of far-reaching policy and regulatory proposals that aim at building a climate neutral Europe by 2050. One of the key objectives is the further decarbonisation of the energy system and the development of a power sector that will largely be based on renewable sources and energy efficiency.

In view of the significant costs and risks associated with environmental initiatives, companies are increasingly looking to join forces to achieve green objectives. Energy companies in particular, which can play a crucial role in the decarbonisation of the economy, might be keen to explore possible collaborations to pursue such objectives, e.g. by developing carbon capture and storage technologies or agreeing to production methods with lower carbon footprints.

However, companies that wish to work together to become greener might be concerned that they risk falling afoul of competition law rules that prohibit anticompetitive agreements and face significant fines. Against this backdrop, there is a growing debate as to how competition rules could be applied or adjusted to best support the rapid transition to the green economy.

**WHAT ARE COMPETITION REGULATORS DOING TO ENABLE MORE GREEN COOPERATION INITIATIVES?**

Competition authorities in Europe are increasingly alert to potential tensions between sustainability cooperation and competition laws and some of them have already sought to provide guidance to businesses. For instance, the Dutch competition authority proposed in July [new draft guidelines](#), which aim at providing more scope for sustainability cooperation between competing businesses, while the Greek competition authority published in September a [discussion paper](#) on how competition policy could further contribute to green transition.

Following these initiatives, EU Competition Commissioner Margrethe Vestager [announced](#) that the Commission will soon launch a public consultation on how competition rules and sustainability policies work together. The consultation, which will run until mid-November 2020 and will cover both antitrust and state aid rules, will enable the Commission to consider the issues from an EU-wide perspective and adopt a coherent approach. The Commission will also use the ongoing [review](#) of its guidance on horizontal agreements between competitors as another opportunity to provide more clarity on its approach to sustainability agreements (although new guidelines are not expected to be adopted for quite some time). Commissioner Vestager has also encouraged companies to seek comfort from the Commission as to whether their real-life sustainability agreements are in line with competition rules.

At this stage, it remains to be seen what approach the European Commission and the Member States might adopt regarding the assessment of sustainability agreements. Possible measures could involve guidance setting out certain types of green cooperation agreements that fall outside the general prohibition on anticompetitive agreements; or guidance on the conditions that need to be met for green cooperation agreements to be viewed as pro-competitive (e.g. in view of specific sustainability efficiencies) and thus be exempted from the general prohibition. Also, the Commission could adopt a block exemption regulation that will provide a “safe harbour” for specific categories of sustainability agreements that meet certain criteria, such as market share thresholds.

Speaking at a conference in late September, the Director-General for the Commission’s competition policy department acknowledged that competition rules can be “*adjusted*” to better serve environmental goals but noted that competition enforcement should remain strong and effective. Competition authorities will be quick to intervene if they suspect that a green cooperation agreement “masks” a cartel arrangement.

## **SO, HOW CAN COMPANIES MANAGE ANTITRUST RISK WITHIN THE CURRENT REGIME?**

To assist companies to manage antitrust risk, we have set out below some practical tips:

- Consider carefully how you frame your sustainability collaborations (making sure you focus on efficiencies and consumer/environmental benefits) and work together with antitrust advisers early on to adopt a competition compliant framework for the cooperation.

- Make sure you can explain why your substantiality objectives could not have been achieved absent the collaboration and why you do not go beyond what is necessary to achieve the green objectives.
- Do not discuss matters that fall outside the scope of the project at issue and put in place appropriate safeguards to prevent exchanges of competitively sensitive information (e.g. meeting agendas should be reviewed beforehand by antitrust counsel, meetings should be accurately recorded by minutes, and to the extent that competitively sensitive information must be exchanged, antitrust counsel should be involved).
- Consider seeking comfort from a competition authority about a contemplated project bearing in mind possible downsides (such as delays and the fact that any comfort will most likely be limited to the relevant jurisdiction).

As regulators' approaches in this area are currently evolving, companies might also want to consider the possibility of participating in public consultations to influence the regulators' thinking and persuade them to enable more sustainability cooperation. The EU consultation will be launched soon and early involvement will be key in shaping the state of the law in this area for the years to come.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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