

REBOOT 2020

The Future of Business

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WHAT ROLE CAN COMPETITION LAW PLAY IN TACKLING CLIMATE CHANGE?

Competition law has long been regarded as an obstacle to achieving environmental goals through cooperation between businesses, since competition enforcers have historically taken account of environmental objectives only under narrow circumstances. In the face of the climate crisis, this is about to change: the European Commission and many national competition authorities are currently rethinking their approach towards environmental agreements.

The European Commission has put the fight against climate change at the top of its political agenda. The European Green Deal presented by the European Commission in December 2019 aims to make the European Union climate-neutral by 2050.

Margarethe Vestager, Executive Vice-President of the European Commission and Commissioner for Competition, recently stated at a conference in Brussels that "*all of Europe's policies – including competition policy – will have their role to play*" in achieving the objectives of the European Green Deal.

COLLABORATION BETWEEN BUSINESSES TO TACKLE CLIMATE CHANGE

Contributions from the private sector will be key to implementing the green transition outlined in the European Green Deal.

In many instances, **businesses may however not be in the position to pursue environmental objectives effectively when acting individually.** For example, this may be the case where substantial investments in research and development are required to develop new green technologies. Businesses may also be reluctant to engage in environmental-friendly behaviour on their own when they fear that going-it-alone would create a first-mover disadvantage vis-à-vis their competitors.

Consequently, cooperation amongst businesses – including cooperation amongst competitors – may often be necessary to achieve environmental objectives in an effective manner.

IS COMPETITION LAW AN OBSTACLE TO ACHIEVING ENVIRONMENTAL GOALS?

Cooperation agreements between businesses are subject to competition law scrutiny. Broadly speaking, EU competition law (as well as the national competition law regimes in the CEE/SEE region) prohibit agreements between businesses which harm competition. However, these same competition law regimes also provide for an exemption **if such agreements produce benefits which outweigh the harm.**

Many cooperation agreements between businesses which pursue environmental objectives will not harm competition and are therefore lawful. Certain environmental agreements between competitors may however have anti-competitive effects, e.g., when they lead to a price increase due to higher production costs. For such an agreement to be lawful, the parties to the agreement must show that the agreement produces benefits which outweigh its harmful effects on competition.

In recent years, the European Commission has been increasingly criticized for an **unnecessarily narrow interpretation of the conditions under which environmental agreements may be exempted** from the prohibition of anti-competitive agreements.

The European Commission's 2004 *Exemption Guidelines* and its 2010 *Horizontal Cooperation Guidelines* have been widely perceived as excluding non-economic public policy goals such as environmental protection from the scope of the benefits that can be taken into account when weighing anti-competitive effects and the benefits of a cooperation agreement. The general perception of the European Commission's guidelines has been that environmental benefits are only relevant when and to the extent that they benefit the customers of the products in question. On the other hand, benefits to society as a whole (so the conventional wisdom went) should not be taken into account.

RETHINKING APPLICATION OF COMPETITION RULES TO ENVIRONMENTAL AGREEMENTS

As climate change becomes increasingly regarded as an existential threat, both **the European Commission and many national competition enforcers are rethinking their approach** towards those cooperation agreements which aim to contribute to environmental goals. This is an encouraging development.

The European Commission is currently reviewing its *Horizontal Block Exemption Regulations* and its 2010 *Horizontal Cooperation Guidelines*. In the public consultation on the evaluation of these regulations and guidelines (which ended in February 2020), a substantial number of businesses have called for clearer guidance on when environmental agreements between competitors do not infringe EU competition law. We expect the European Commission to provide such guidance in revised *Horizontal Cooperation Guidelines*.

The Dutch competition authority published draft guidelines on sustainability agreements for consultation in early July 2020. These draft guidelines propose a broad interpretation of the exemption conditions under Dutch competition law. This would enable the Dutch

antitrust watchdog to balance anti-competitive effects of certain environmental agreements against benefits resulting from the agreement for society as a whole (e.g., a reduction of greenhouse gas emissions).

The Austrian legislator is currently considering whether the objective of a sustainable and climate-neutral economy should be explicitly mentioned in the *Austrian Cartel Act*. This would make it easier for the Austrian competition authorities to consider this objective in the assessment of environmental agreements. Furthermore, many competition enforcers in Europe have expressed their **willingness to provide individual guidance to collaboration initiatives** that pursue environmental objectives.

OUTLOOK: COMPETITION AUTHORITIES LIKELY TO ATTACH MORE WEIGHT TO ENVIRONMENTAL OBJECTIVES

Climate change and the green transition will continue to be high on the political agenda of the European Commission and most national governments in Europe. This will also have an impact on how competition authorities will assess environmental agreements between businesses in the future. **We expect competition enforcers to attach increasingly more weight to environmental objectives** when balancing the anti-competitive effects and the environmental benefits of cooperation agreements.

This would be a welcome development as companies should no longer have to refrain from the legitimate collective action urgently needed to fight climate change due to the risk of competition enforcement. With careful planning, many collaboration initiatives which genuinely aim to contribute to environmental objectives can be structured in a way which will allow companies to tackle climate change without breaking competition rules.

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