PRACTICAL GUIDE

COMPETITION LAW AND SUSTAINABILITY AGREEMENTS

High-level guidance on the application of competition law to sustainability agreements in the European Union, United Kingdom, United States and more

iccwbo.org/TheBusinessOfClimate

International Chamber of Commerce

Disclaimer

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This document does not purport to contain full, accurate, or complete information required to evaluate individual circumstances and is provided strictly on the basis that no reliance should be placed on it for any purpose. Formal legal advice is recommended before entering into any restrictive agreement.

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Table of contents

A. Introduction

This high-level guidance explores the application of competition law to sustainability agreements in the European Union (EU), United Kingdom (UK) and United States (US). This is a rapidly evolving area that has attracted increasing levels of attention in recent years.

Competition law regulates commercial behaviour to ensure markets function efficiently and deliver benefits to consumers.

This includes resolving market failures such as climate change, which may require cooperation to overcome collective action problems. Cooperation among firms can help them clean up and future-proof their operations and realise sustainability goals more effectively. However, such cooperation must not restrict competition more than is necessary to achieve these goals.

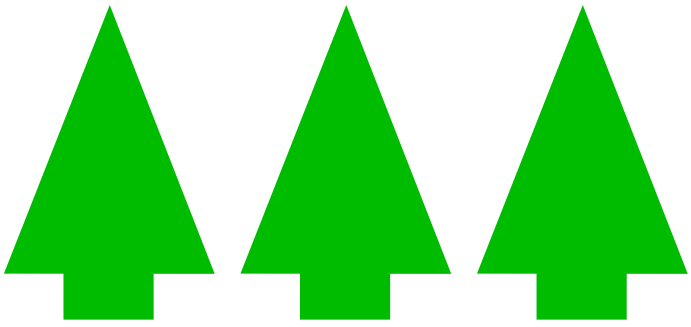
While anti-competitive agreements between competitors have traditionally been a key focus of enforcement, there is increasing recognition of the role that agreements between competitors can play in combating climate change and supporting a resilient and sustainable economy. Several competition authorities are therefore clarifying that competition law does not necessarily impede legitimate cooperation aimed at the promotion or protection of environmental sustainability. Some have issued guidelines on sustainability agreements and invited businesses to seek informal guidance on specific agreements.

Countries where competition authorities have published final or draft guidance on sustainability agreements include **Australia**, **Austria**, **Belgium**, **China**, **France**, **Greece**, **Japan**, **the Netherlands**, **New Zealand**, **the Republic of Korea**, **Portugal**, **Singapore**, the **United Kingdom** and **the European Union**.

For the purposes of this guidance, sustainability agreements refer to forms of cooperation between competitors pursuing sustainability, biodiversity and climate goals, including:

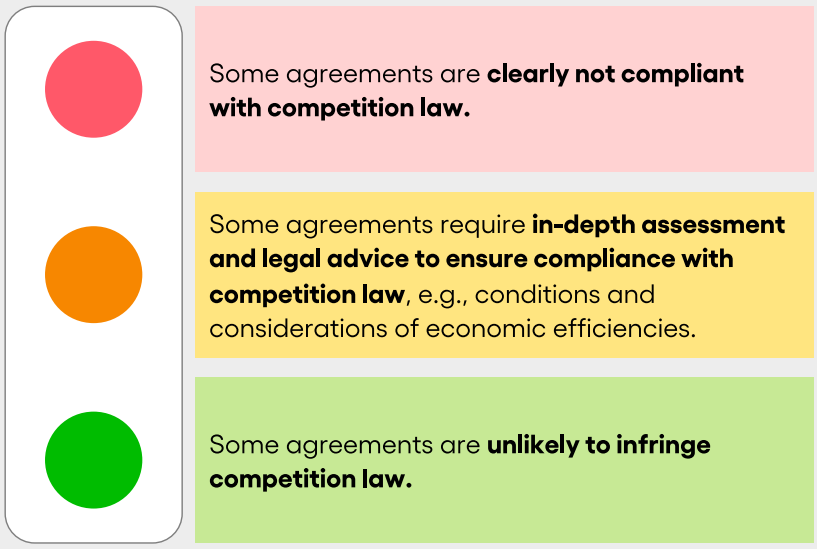
- Improving water/air quality or eliminating pollution;
- Reducing greenhouse gas emissions, to fight climate change;
- Promoting the sustainable use of natural resources;
- Protecting biodiversity.

For convenience, this guide is divided between Europe and the US but, in practice, the extra-territorial reach of competition laws is considerable, and the laws of several jurisdictions will apply at the same time.



B. Competition law and sustainability agreements: European Union and United Kingdom

Figure 1: Compliance risk levels for agreements under competition law to be used as a caption for the subsequent figures.



Source: ICC (2025), Practical Guide on Competition Law and Sustainability Agreements

Since the launch of the European Green Deal in 2019, businesses' sustainability goals have become increasingly relevant for cooperation between competitors. Competition authorities like the **European Commission** (EC), the **UK Competition and Markets Authority** (CMA) and the **Dutch Competition Authority** (ACM) have released guidelines on sustainability agreements and have indicated a willingness to issue opinions on initiatives and therefore protect the parties involved from enforcement action and fines if they take advantage of this open-door policy.

Prohibited agreements

Greenwashing and cartels

Sustainability agreements that are considered by regulators to **have as their object or effect a restriction of competition** are deemed harmful to competition and are therefore prohibited. These include price-fixing, market or customer allocation, output restrictions or limiting quality or innovation. You should note that the concept of an "agreement" covers oral agreements, "gentlemen's agreements" and other informal arrangements. Furthermore, those agreements that are used to disguise infringements of competition law (or which unintentionally or "accidentally" do so) are prohibited, and authorities are not afraid to probe deeper to ensure the goals pursued are legitimate.

Figure 2: Examples of agreements clearly not compliant with competition law

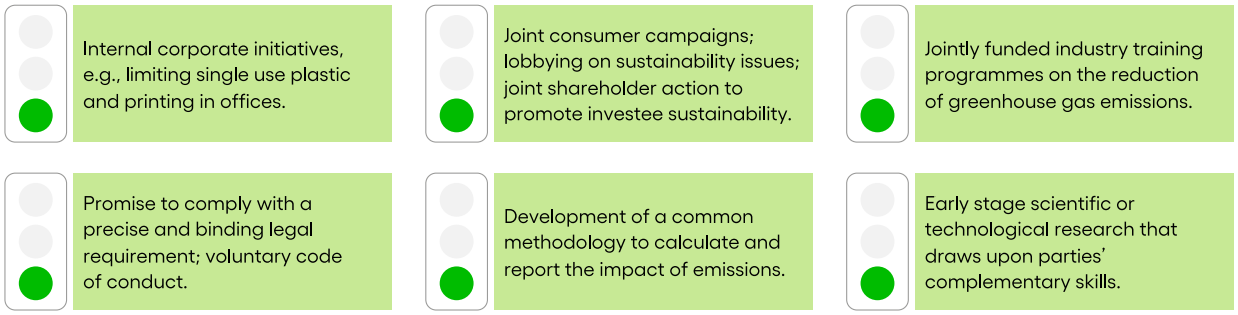
Source: ICC (2025), Practical Guide on Competition Law and Sustainability Agreements

These may be "by object" infringements and are therefore unlikely to benefit from a sustainability exemption under competition law.

Greenwashing is likely to be pursued under consumer protection legislation. For example, recent enforcement by the EC and national consumer authorities has targeted airlines for potentially misleading claims about carbon offsetting and sustainable fuel use.

Agreements unlikely to infringe antitrust law

Figure 3: Examples of agreements that are normally not considered to negatively impact the parameters of competition (*i.e.* price, quantity, functionality, choice or innovation)



Source: ICC (2025), Practical Guide on Competition Law and Sustainability Agreements

If in doubt, you should seek legal advice.

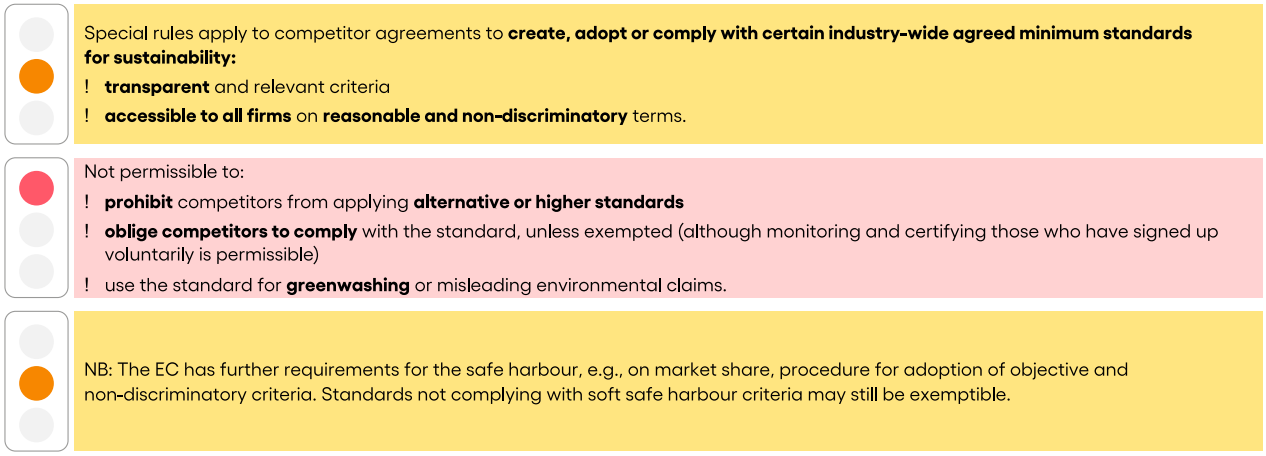
Agreements that require in-depth assessment

Agreements that go beyond the likely permissible goals set out above or combine likely permissible goals with other aspects will require legal advice to establish how they might be treated by competition regulators. Some examples of these types of agreements, and a high-level summary of the legal analysis which might be required, is set out below.

Sustainability standardisation agreements may sometimes qualify for a "soft safe harbour"

A soft safe harbour is a non-binding indication by a competition authority that certain conduct is unlikely to attract enforcement action.

Figure 4: When sustainability standardisation agreements may qualify for a "soft safe harbour", according to the EC

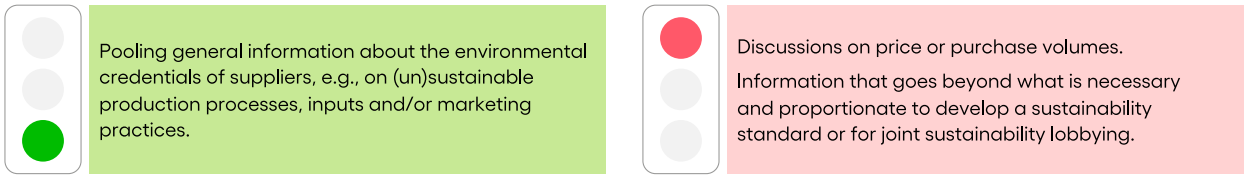


Source: ICC (2025), Practical Guide on Competition Law and Sustainability Agreements

Sharing information may be allowed if reasonably necessary for a permissible sustainability goal

The exchange (or sometimes mere disclosure) of competitively sensitive information between competitors is typically a problematic area under competition law. However, the authorities have recognised that pooling sustainability information can help further legitimate objectives.

Figure 5: When sharing information may be permissible



Source: ICC (2025), Practical Guide on Competition Law and Sustainability Agreements

Sharing confidential, commercially sensitive information between competitors, formally or informally, including through trade associations, requires great care. The safest approach is to seek legal advice, which may, for example, recommend that data is collected by an independent third party and disclosed only on an aggregated, historical basis.

Other agreements and sustainability (self-)assessment under 101(3)

Beyond the approaches set out above, agreements will otherwise require an in-depth balancing of benefits and competitive impact in order to determine how they might be considered by regulators. Concepts and their application vary between each initiative and jurisdiction.

Figure 6: Sustainability agreements that meet the following criteria might be permissible, according to the EC

Source: ICC (2025), Practical Guide on Competition Law and Sustainability Agreements

Generally speaking, any justification of sustainability agreements will need to be analysed robustly and supported by economic data to ensure compliance. Exceptionally, even agreements in the “red boxes” (see all of the above figures) may meet the criteria for exemption, but this requires legal advice, careful consideration and good evidence.

Figure 7: Examples of sustainability agreements that require in-depth consideration to ensure compliance with competition law

Source: ICC (2025), Practical Guide on Competition Law and Sustainability Agreements

C. Competition law and sustainability agreements: United States

US antitrust law—enforced by the **Federal Trade Commission** (FTC), the **Department of Justice** (DOJ) and State Attorney-Generals and US courts—regulates the behaviours of companies and other actors in the market, with a particular emphasis on eliminating anti-competitive agreements between competitors.

While European competition authorities like the EC and the UK CMA have indicated a willingness to issue advisory opinions on initiative to protect parties to sustainability agreements from enforcement action and fines, there has been no similar approach in the US.

US antitrust policy generally, and particularly with respect to climate change and other sustainability initiatives, has become increasingly partisan and political.

Private sector efforts to advance environmental, social and governance (ESG) goals have come under antitrust scrutiny. For example:

- **20 March 2023:** President Biden vetoed a bill overturning the US Department of Labor rule allowing retirement fiduciaries to consider ESG factors when making investments.
- **31 March 2023:** 21 State Attorneys General issued an open letter to asset managers, expressing a concern that they may be "pushing" political goals of the Climate Action 100+ and Net-Zero Asset Managers Initiative.
- **16 May 2023:** 22 State Attorneys General issued requests for documents to the Net-Zero Insurance Alliance and Net-Zero Asset Owner Alliance.
- **15 December 2023:** The House Judiciary Committee subpoenaed BlackRock and State Street regarding "left-wing environmental, social and governance goals".
- **31 July 2024:** The House Judiciary Committee demanded disclosures from 130 Climate Action 100+ participants.
- **11 June and 13 December 2024:** The US House Judiciary Committee issued majority and minority reports.
- **21 August 2025:** Texas et al. v Blackrock et al. motions to dismiss were denied, and the Court applied the rule of reason. The request to treat the alleged coordination on ESG issues as per se illegal was rejected.

Sustainability agreements

There is no safe harbour under US antitrust laws for sustainability agreements, and so compliance efforts must be proactive in avoiding pitfalls.

Sustainability agreements, if challenged, are subject to review for compliance with Section 1 of the Sherman Antitrust Act, which prohibits "agreements in restraint of trade."

Per se analysis

Agreements that always, or almost always, have anti-competitive effects are deemed to be per se unlawful. These tend to be horizontal agreements in cases where firm precedent exists, indicating that the agreements cannot, or are rarely, justifiable. If an agreement is per se unlawful, a court needs only to find that the agreement exists before imposing liability; there is no need to prove actual anticompetitive effect.

Examples of such agreements are:

- Price fixing
- Bid rigging
- Market allocations
- Output restrictions
- Horizontal group boycotts

Rule of Reason

If an agreement is not *per se* unlawful, it may be anticompetitive under the Rule of Reason (RoR). It is very hard to establish an unlawful agreement in RoR analysis. To be unlawful, actual anti-competitive effects must substantially outweigh any procompetitive benefits.

Factors assessed include:

- Nature and purpose of agreement;
- Market power of the parties involved;
- Competition in the relevant market;
- Existence of a market failure.

Sustainability standards

Standards adopted by an industry group are unlikely to pose serious antitrust risk

Industry-wide self-regulation is analysed under RoR, meaning it is permissible under the Sherman Act unless its anti-competitive effects significantly outweigh any pro-competitive benefits.

Factors used to assess industry self-regulation under RoR include:

- Whether promulgators of the standards are competitors of the businesses harmed by the application of the standards;
- Whether the intent behind the standards is to suppress competition in the relevant market, create market power, or raise profit margins;
- Whether the standards are reasonably necessary to achieve legitimate goals;
- The extent of the economic detriment suffered by the injured business resulting from the application of the standards.

Industry-wide climate standards are likely permitted by US antitrust law so long as they are (i) not purposely designed to suppress competition, (ii) reasonably tied to a climate goal, (iii) applied consistently and (iv) not mandatory.

Note that although a violation is harder to prove under RoR, investigations defending against allegations of an infringement (which can be politically motivated) can be resource intensive and distract from the focus of the organisation.

Best practices for standard setting

Standards and guidelines should:

- Target objective business practices and effects that have ecologically detrimental effects, rather than targeting specific businesses or companies;
- Be developed for the purpose of addressing the ecological crisis facing the world today, rather than for the exclusion or elimination of particular businesses or companies;
- Rely on sound, documented scientific evidence;
- Develop suggestions, wherever possible, for companies and businesses affected by the guidelines to mitigate the negative consequences of ecologically responsible investment;
- Call for investors to apply standards and guidelines objectively and consistently across the spectrum of their investment activities, and not in an arbitrary or capricious manner that targets only some, but not all, similarly situated polluters;
- Be open and accessible to all potential implementers; and
- Not be mandatory.

Information sharing agreements

Information sharing agreements pose some risk under US antitrust laws

US antitrust law typically prohibits companies from sharing commercial sensitive information with their competitors where that information may facilitate collusion.

Information that could be problematic if shared includes:

- Pricing;
- Detailed margins and costs;
- Inventory levels;
- Customer identities;
- Bidding information;
- Detailed product development plans;
- Sales and marketing plans;
- Production and capacity figures.

Intermediaries that facilitate unlawful information sharing arrangements can themselves be held liable for violating antitrust laws—even if the intermediary is a trade association or a non-governmental organisation (NGO). This reflects the "hub-and-spoke theory", in which a central hub (the intermediary) acts as a link between the spokes of a wheel (the competitors) and thus facilitates collusion along the rim of the wheel.

However, competitors and NGOs may organise and participate in information sharing agreements provided that they do not involve the exchange of information which could be used to collude, boycott or divest.

Agreements targeting specific entities should be carefully vetted

An agreement between competitors not to do business with specific individuals or firms can create antitrust exposure where the boycott restricts competition in the market in which the parties compete and lacks a legitimate business justification.

Boycotts are permitted by the First Amendment freedom of speech clause where: (i) the purpose is to achieve social change or advances political, religious or other non-commercial goals, rather than to harm competition; and (ii) it is organised by firms that are not competitors of those who suffer from the boycott. Refusals to buy from or sell to firms engaged in unsustainable business practices upstream or downstream present litigation risk, but are subject to a rule of reason analysis.

Political activity cannot be used as a shield for price-fixing or other anti-competitive agreements between competitors (including in a hub-and-spokes situation).

Boycott and divestment agreements championed by climate action groups are likely protected from antitrust liability by the First Amendment provided they are not used as cover for anti-competitive conduct.

Advocacy group and trade association meetings

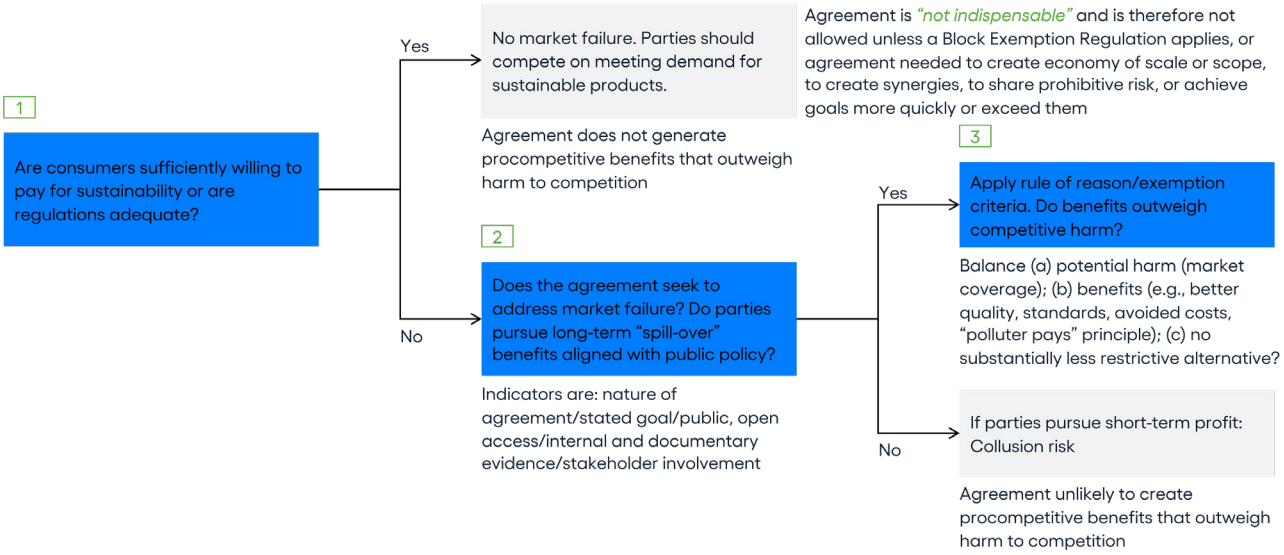
A disclaimer can be used to remind participants of their competition law obligations, helping ensure the meeting remains compliant and that everyone feels confident in participating.

A disclaimer could read: *"Participants attending this meeting should be aware of their competition law obligations including with respect to the exchange or discussion of commercially sensitive information/ topics. If there is any doubt as to the application of these guidelines, participants should seek independent legal advice"*.

D. Additional content relevant to the European Union, United Kingdom and United States

Assessing restrictions

Figure 8: Decision tree to assess the legality of sustainability agreements



Source: Dolmans, Lin and Hollis (2023), Sustainability and Net Zero Climate Agreements – A Transatlantic Antitrust Perspective, with design modifications by ICC

The decision tree does not serve as legal advice nor does it replace legal consultation.

Further information

- EC, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 21 July 2023.
- Dutch ACM, Oversight of sustainability agreements, 4 October 2023.
- UK CMA, Green Agreement Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements, 12 October 2023.
- Dolmans, Lin and Hollis, Sustainability and Net Zero Climate Agreements – A Transatlantic Antitrust Perspective (draft, CLPD), October 2023.

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