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STRIKING A BALANCE: COMPETITION LAW IN THE AGE OF ENVIRONMENTAL SUSTAINABILITY

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INTRODUCTION

Businesses have an oversized role to play in mitigating climate change, some businesses are joining efforts in setting sustainability standards and criteria for their supply chain and operations. Some argue that such collaborations are anti-competitive because they could raise prices and harm consumers.¹ Sustainability here refers to the harmony between the environment, fairness, and the economy.² The concern between sustainability and competition arises when companies form alliances or collectively try to work toward more sustainable products or methods which can lead to anti-competitive concerns and be seen as an example of cartelization by anti-trust agencies. The Consumer-Detergents Cartel of the European Union serves as an example of this circumstance, in which the implementation of an environmental effort connected to laundry detergents resulted in cartelization and price increases. Furthermore, market participants want to minimize the impression that their objectives are completely dependent on one item. According to a recent Linklater's poll, while most firms want to collaborate, 60% are unwilling to work together on ESG issues owing to concerns about breaking competition regulations and facing legal action.³ Companies are concerned about the risk of antitrust liability, whether from a regulatory agency or a lawsuit, when forming alliances with rivals on environmental, social, and governance problems.

a) When Green Turns Red: Where Sustainability and Competition Collide

There may be contradictions between the purposes of competition law, which seeks to promote free markets and punish anti-competitive activity, and sustainability objectives, which sometimes

1 Sustainability and competition law: friends or foes? Sustainability and Competition Law: Friends or Foes? | Faculty of Law. Available at: <https://www.law.ox.ac.uk/content/event/sustainability-and-competition-law-friends-or-foes> (Accessed: 20 March 2024).

2 What is sustainability? UCLA Sustainability. Available at: <https://www.sustain.ucla.edu/what-is-sustainability/> (Accessed: 20 March 2024).

3 Competition law remains a barrier to sustainability collaborations: News: About Us Linklater's. Available at: <https://www.linklaters.com/en/about-us/news-and-deals/news/2023/october/competition-law-remains-a-barrier-to-sustainability-collaborations#:~:text=30%20October%202023-,Competition%20Law%20remains%20a%20barrier%20to%20sustainability%20collaborations,and%20the%20risk%20of%20litigation.> (Accessed: 20 March 2024).

necessitate collaborative efforts and may include anti-competitive tactics. For example, corporations may need to collaborate to establish industry-wide sustainability standards, which might be interpreted as a breach of antitrust rules that ban coordination among rivals. Furthermore, sustainability programs such as environmental legislation or carbon pricing may raise expenses for firms, potentially leading to increased consumer prices that are regarded as anti-competitive. Striking the correct balance between sustaining market competitiveness and permitting sustainable business practices is a difficult task that necessitates thorough evaluation of the trade-offs and potential unexpected consequences on both sides. In some cases, businesses may need to work with competitors, needing clear direction from competition authorities. Balancing sustainability and competition may be difficult, forcing us to make trade-offs.⁴ One example is when a pro-competitive conclusion may affect sustainability, such as an anti-competitive merger that results in the shutdown of a polluting facility. Currently, there is no agreement that competition law should have a role to play in advancing sustainable development goals, or in bringing about positive change in the process. This lack of consensus stems from the belief that there may be a clash between the objectives of competition law and the achievement of sustainable development.

Regulators are needed to address the tension between sustainability aims and competition legislation in specific areas. The dilemma is whether corporations may collaborate and pool resources to achieve long-term economic growth while not breaching competition regulations. Companies may be hesitant to embrace “green business models” because they are concerned about being at a competitive disadvantage or that others would exploit their efforts. On the other hand, if competitors collaborate to achieve sustainability goals, they risk violating competition regulations and facing fines. Competition policy cannot be and must not be entrenched; any objective it establishes will likely need to be adjusted in order to accommodate practical considerations and specific circumstances.⁵ This is especially true when considering sustainability, as the urgency of the climate crisis demands significant changes to markets.

⁴ Competition law tackling sustainability goals : An analysis of international practices and the challenges ahead (2023) Cyril Amarchand Mangaldas. Available at: <https://www.cyrilshroff.com/articles/competition-law-tackling-sustainability-goals-an-analysis-of-international-practices-and-the-challenges-ahead/> (Accessed: 20 March 2024).

⁵ ‘The economics of competition policy’, EU Competition Law and the Information and Communication Technology Network Industries: Economic versus Legal Concepts in Pursuit of (Consumer) Welfare [Preprint]. doi:10.5040/9781472561138.ch-003.

BRIDGING THE GREEN DIVIDE: GLOBAL SOLUTIONS FOR SUSTAINABLE COMPETITION

Up until now, the European Union has been the primary driver of sustainability initiatives.⁶ The European Union Commission has initiated a consultation pertaining to Research and Development (R&D) and Specialization. In a similar vein, in 2021, the Authority for Consumers and Markets (ACM) which is a regulator in the Netherlands has released its 2nd draft Guidelines on sustainability agreements.⁷

In 2021, both the Netherlands Authority for Consumers and Markets (ACM) and the Hellenic Competition Commission (HCC) released a Technical Report on Sustainability and Competition. Following this, the HCC started a consultation called "Sustainable Development Sandbox" in July 2021. Recently, the ACM published a Policy Rule regarding its oversight of sustainability agreements on 4 October 2023.⁸ The Agricultural Competition Monitoring has taken several actions to promote fair competition in the farming industry. These actions include guidelines for collaborations between farmers, preventing the use of illegal pesticides in garden centres. On June 23rd, 2023, the ACM found that this agreement actually limited competition.⁹

While existing competition laws may deter cooperation in sustainability endeavours for some, there has been encouraging progress thanks to recent guidelines issued by competition agencies worldwide. In case of India, while the Competition Commission of India (CCI) has yet to join in the debate over the relationship between competition law and sustainable development, it can gain useful insights by studying the ongoing debate in other EU competition regimes.

⁶ Ad hoc expert meeting on competition, Consumer Protection and Sustainability (2022) UNCTAD. Available at: <https://unctad.org/meeting/ad-hoc-expert-meeting-competition-consumer-protection-and-sustainability> (Accessed: 20 March 2024).

⁷ Markt, A.C.& (2022) Guidelines on sustainability agreements are ready for further European Coordination, ACM.nl. Available at: <https://www.acm.nl/en/publications/guidelines-sustainability-agreements-are-ready-further-european-coordination> (Accessed: 20 March 2024).

⁸ Beetstra, T. et al. (2022) Dutch regulator actively facilitating sustainability developments, Kluwer Competition Law Blog. Available at: <https://competitionlawblog.kluwercompetitionlaw.com/2022/03/10/dutch-regulator-actively-facilitating-sustainability-developments/> (Accessed: 20 May 2024).

⁹ Gassler, M. et al. (2022) New Draft Sustainability Guidelines for the new Austrian Sustainability Exemption, Kluwer Competition Law Blog. Available at: <https://competitionlawblog.kluwercompetitionlaw.com/2022/06/02/new-draft-sustainability-guidelines-for-the-new-austrian-sustainability-exemption/> (Accessed: 20 March 2024).

a) Are These Guidelines Enough for a Sustainable Future?

The International Chamber of Commerce (ICC) in its 2020 report has urged competition agencies to address the chilling impact of present competition laws on objectives related to sustainability, as there are differing opinions on the effectiveness of recent guidelines.¹⁰ Some argue that these guidelines are inadequate in terms of timing, scope, and cohesiveness. Furthermore, there are already discrepancies among agencies. The “chilling effect” happens when individuals or groups stop from expressing themselves for fear of violating a law or rule.¹¹ This can occur when a legislation is overly ambiguous or broad. In legal contexts, the chilling effect occurs when the prospect of legal action inhibits individuals from exercising their inherent and legal rights.

What is presently followed by these anti-competitive agencies is a narrow approach, the concern associated with this is that agencies may only focus on a smaller subset of agreements, overlooking significant out-of-market sustainability and environmental benefits. Unlike agencies in Europe and Asia, the United States has refrained from providing any form of guidance. This could be attributed to factors such as political opposition, divisions within the federal and administrative sectors, doubts regarding collaborative motivations, and concerns about potential litigation and accusations of group boycotts. As a result, there is now increased uncertainty, discouraging companies from considering global sustainability initiatives and hence warming the globe.¹²

b) Current position in India

The relationship between Indian competition law and ESG cooperation has not been thoroughly explored due to a lack of guidance and legal development.¹³ The CCI has yet to release any guidelines or regulations to aid companies in collaborating to achieve ESG objectives. Nevertheless, the Competition Act of 2002 contains various provisions that could be interpreted as promoting ESG cooperation among rivals. The Act's preamble situates its provisions within

¹⁰ International Chamber of Commerce (2022) When chilling contributes to warming. Available at: <https://iccwbo.org/wp-content/uploads/sites/3/2022/11/when-chilling-contributes-to-warming-2.pdf> (Accessed: 20 May 2024).

¹¹ Chilling effect overview, The Foundation for Individual Rights and Expression. Available at: <https://www.thefire.org/research-learn/chilling-effect-overview> (Accessed: 20 May 2024).

¹² Boris Bershteyn et al. (2023) Antitrust and Sustainability: EU, UK and US take divergent enforcement approaches: Insights: Skadden, arps, slate, meagher & flom LLP, Insights | Skadden, Arps, Slate, Meagher & Flom LLP. Available at: <https://www.skadden.com/insights/publications/2023/11/antitrust-and-sustainability> (Accessed: 20 May 2024).

¹³ Verma, V. (2024) Competition and sustainability: way forward for India, Tccr. Available at: [https://www.tccr.com/post/competition-and-sustainability-way-forward-for-india#:~:text=Competition%20law%20in%20India%2C%20recognizing,within%20the%20existing%20legal%20framework.\(Accessed:20May2024\).](https://www.tccr.com/post/competition-and-sustainability-way-forward-for-india#:~:text=Competition%20law%20in%20India%2C%20recognizing,within%20the%20existing%20legal%20framework.(Accessed:20May2024).)

the broader context of “economic development of the country” and acknowledges “consumer interests” as one of its objectives. Moreover, there is Sec. 19(3) of the Act enabling the Competition Commission to assess ESG norms of agreements.¹⁴ Similarly, Section 20(4) empowers the CCI to evaluate the potential anti-competitive consequences of ESG-facilitating mergers.¹⁵ Parties who wish to use efficiency as a defence must present compelling evidence of particular advantages and demonstrate how this will benefit current consumers in the foreseeable future. Nonetheless, ESG-related collaborations present three significant challenges.

The current framework restricts competitors from collaborating on environmental and social initiatives, without considering the long-term advantages of such partnerships. Moreover, businesses are left to evaluate the potential negative impacts of these collaborations on their own, without any guidance from the CCI. This lack of clarity often results in companies taking a conservative approach, which could hinder ESG interests. However, competition regulators in Greece, the Netherlands, and the UK have addressed these concerns by releasing comprehensive guidelines that permit competitors to work together on sustainability agreements, as long as the benefits to society outweigh any negative impact on competition. These guidelines dictate that sustainability benefits must be proven, benefits must be fairly distributed, competition must be restricted only when necessary to achieve benefits, and competition in the market should not be significantly reduced. Consequently, the guidelines have led to an increase in collaborative ESG initiatives across industries. The North Sea region is seeing a collaborative effort to store CO₂ in depleted natural-gas fields, with the aim of reducing emissions while keeping competition in the market largely unaffected. These guidelines offer stakeholders some clarity on the stance of competition authorities, enabling them to work together more effectively to achieve sustainability goals.¹⁶

Vipul Shah’s case is an example where CCI opted not to penalize AIFEC’s alleged cartelization as it involve daily-wage earners and craftsmen. Similarly, in FCI’s case, CCI followed similar ruling.¹⁷ Similarly, in the FCI v. SAPPL & Ors. case, the CCI avoided punishing small to medium

¹⁴ Competition Act of India, § 19(3).

¹⁵ Competition Act of India, § 20(4)

¹⁶ Markt, A.C.& (2022) ACM: Shell and totalenergies can collaborate in the storage of CO₂ in empty north sea gas fields, ACM.nl. Available at: <https://www.acm.nl/en/publications/acm-shell-and-totalenergies-can-collaborate-storage-co2-empty-north-sea-gas-fields> (Accessed: 20 May 2024).

¹⁷ Vipul A. Shah v. All india film Employee Confederation ,2017 SCC ONLINE CCI 53.

enterprises for their violations by acknowledging the economic challenges faced by MSME.¹⁸ Lastly, the National Company Law Appellate Tribunal (NCLAT) directed the CCI to reassess the imposed penalty and to think about implementing a reformatory penalty that would not harm the industry in the *Ceat Ltd v. CCI & Ors* case.¹⁹

The competition commission is yet to evaluate the effects of conduct that supports Principles related with ESG, it has demonstrated attentiveness to wider socio-economic objectives in its decisions. India's competition legislation, which acknowledges the right associated with a healthy environment, can help to relieve the climate crisis by including sustainability. Green ideas can be promoted by the Competition Commission of India within the present statutory framework. Despite the lack of specific sustainability criteria under the Competition Act of 2002, the current Indian legislation, the CCI can play an important role in defining and balancing such activities. The CCI can help enterprises implement sustainable practices by promoting environmental goals and competition rules, as well as interpreting sustainability in the evaluation of negative implications on competition.

CHALLENGES ON THE ROAD TO ECO-FRIENDLY COMPETITION

Competition authorities may encounter several obstacles in various circumstances. One issue is of determining whether the consumer welfare standard is suitable for analyzing the integration of sustainability considerations.²⁰ Additionally, there is a question of whether certain types of agreements can be exempted on a case-by-case basis if the benefits of sustainability outweigh any negative impact on competition. It is also important to consider how these benefits should be measured, in terms of which market and timeframe they should materialize in. Another challenge is how competition authorities should adjust their analysis when consumer demand does not align with their preferences. Furthermore, the relationship between competition law and public policy poses a question as to whether competition agencies have a role in addressing market failures or if this responsibility falls under the purview of other regulatory activities. Lastly, international convergence may be necessary if sustainability initiatives have an impact across multiple

¹⁸ *In re: Food Corporation of India v. Shivalik Agro Poly Products Limited and Others*, Reference Case No. 07 of 2018, Order dated October 29, 2021.

¹⁹ *Ceat Ltd. v. CCI*, 2022 SCC OnLine NCLAT 1594.

²⁰ Markus W. Gehring, *Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law*, 15 REV. EUR. COMP. & INT'L ENVTL. L. 172 (2006).

jurisdictions. While new guidelines for companies, even in a limited number of jurisdictions, are a positive initial step, it is important to note that these guidelines are still a work in progress and have limitations.

Companies must evaluate the advantages of sustainability initiatives in comparison to the potential harm caused by anticompetitive practices, with a focus on ensuring fair compensation for consumers.²¹ This evaluation process can be challenging and risky for companies as they try to find the right balance. It is important for companies to demonstrate that consumers are receiving a reasonable share of the benefits from sustainability agreements and that these benefits outweigh any negative effects on competition. Additionally, companies should determine the type of consumer benefit that arises from these agreements, whether it is direct, indirect, or collective.

a) Leading the Charge: How Companies Can Champion Sustainable Practices While Staying Competitive

When discussing or developing new sustainability initiatives, companies should take into account the risk of antitrust issues. However, they should be open to consulting the new guidelines during this process. It would be beneficial for companies to actively engage with competition agencies. For instance, the Competition and Markets Authority (CMA) of UK has implemented an “open-door” policy that permits companies to seek informal guidance from the CMA regarding proposed environmental sustainability agreements (not existing ones).²² The advantage of this is that if the CMA determines that the agreement does not pose any competition concerns, as long as the parties have not withheld crucial information from the CMA's evaluation, they will be protected from enforcement action.

Antitrust regulators must distinguish between genuine sustainability initiatives and those exploited as a cover for cooperation. A focus on the impact on customers and the environment can assist in form enforcement choices. Sustainability certifications are one example of a market-based solution that may be implemented. Independent third-party certifications for sustainable practices can help businesses differentiate themselves without needing collaboration.

21 Sustainability and competition - OECD. Available at: <https://www.oecd.org/daf/competition/sustainability-and-competition.htm> (Accessed: 20 March 2024).

22 Chapman, A. et al. (2023) Antitrust and sustainability - UK CMA consults on new guidance for businesses entering into environmental sustainability agreements, Lexology. Available at: <https://www.lexology.com/library/detail.aspx?g=b241412e-5a82-4bd8-9218-c42331e5ee59> (Accessed: 20 March 2024).

Furthermore, rising customer demand for environmentally friendly products and services can encourage businesses to develop and implement sustainable practices without having to collaborate with rivals.

Private enforcement can also help by establishing a set piece of standards in practice, so the interest of affected parties can be dealt with. This is especially important in a sustainability setting, considering how quickly climate challenges and corporate policies which are evolving.²³ Companies may consider modifying their internal regulation regarding trade association and the exchange of competitively sensitive information to allow for increased collaboration with competitors solely on sustainability initiatives. Nevertheless, there is still much more to be done in order to encourage businesses to cooperate in a procompetitive manner on sustainability initiatives.²⁴

CONCLUSION

Competition law and environmental protection go hand in hand because both anti-competitive behaviour and environmental harm happen simultaneously. One example can be of the greenwashing cartel, where companies collectively overcharge consumers under the guise of environmental protection. Another example is when companies intentionally reduce competition by not differentiating their sustainable products. Anti-competitive practices can also occur when companies collude to delay the introduction of green technologies or agree not to advertise the environmental benefits of their products. However, achieving sustainability goals often necessitates industry-wide agreements, technological collaborations, and substantial investments.

The cautious approach towards collaborative efforts in competition law arises from concerns about market distortion and the formation of cartels. These cartels have negative implications for the market, including reduced output and limited innovation. If opportunities are granted to companies to work together, they could collectively adopt green packaging, creating a higher demand. As a result, consumers would have fewer choices and may be willing to pay higher prices since the costs of green packaging would be incorporated by all companies. This can prove

²³ BICCILOLO, G.B. (2024b) Competition law and sustainability: The case for coherence, Hausfeld. Available at: <https://www.hausfeld.com/en-de/what-we-think/competition-bulletin/competition-law-and-sustainability-the-case-for-coherence/> (Accessed: 20 May 2024).

²⁴ Sundardas, A.A. (2021) Sustainability and competition: Recognizing potential in competition law to promote Green Future, IRCCL. Available at: <https://www.irccl.in/post/sustainability-and-competition-recognizing-potential-in-competition-law-to-promote-green-future> (Accessed: 20 March 2024).

to be not fair on account of consumers, as their welfare in terms of price takes a backseat. However, it is important to recognize that engaging in environmentally harmful practices comes with a much greater cost. Climate change impacts encompass social, economic, and environmental damages, leading to increased living expenses and scarcity of resources like food, energy, and healthcare infrastructure. Therefore, either we have to face increase in prices or rely on ineffective and unsafe alternatives which can be cheaper on scale.

Regarding competition, there may be many agreement on including climate change aspects, like carbon emissions, in the efficiency gains category. However, there are still uncertainties about whether competition laws should be waived in sustainable matters, such as biodiversity, which are considered efficiency improvements under Austrian competition law and its draft Guidelines. To encourage businesses to adopt sustainability initiatives while maintaining market efficiencies, international organizations like UNCTAD should actively engage in facilitating discussions and promoting information sharing.

