

**LESSONS FOR INDIA IN SUSTAINABILITY AND ANTITRUST:
SUSTAINABLE AGREEMENTS (PART I)**

– MR. VIKRAM SOBTI* & MS. RIDDHIKA DUMANE**

ABSTRACT

While many spheres of law have adapted to the shift of incorporating sustainability objectives in their application, competition law is still playing catch-up. Businesses find it difficult to achieve sustainability goals on a stand-alone basis, given the “first mover disadvantage” owing to higher risks in terms of input and production costs. To achieve sustainability objectives, businesses require cooperative efforts which can be viewed sceptically by the competition authorities.

In this part of the two-part series, the authors have analysed the factors under which cooperative efforts pursuant to a ‘sustainable agreement’ may not raise anti-competitive concerns, and why businesses should not shy away from playing an active role to achieve sustainability goals. These factors and principles can act as guidance tools in the assessment of anticompetitive effects under the law, as it stands today, given the dynamic nature of the Indian competition law.

* Mr. Vikram Sobti is a Partner at Chandhiok & Mahajan Advocates & Solicitors, New Delhi.

** Ms. Raddhika Dumane is an Associate at Chandhiok & Mahajan Advocates & Solicitors, New Delhi.

I. INTRODUCTION

The need to be more sustainable has now rightfully gained traction. Private and public entities across the globe have the responsibility to strengthen their commitment to the UN Sustainable Development Goals. Of the 17 sustainable goals, Goal 12.6 encourages the private sector to adopt sustainable business practices by either being a part of the ‘*green economy*’ or by ‘*being sustainable*’. Society as a whole has woken up to the fact that working towards a sustainable environment is no longer an option but a necessity. Companies have also noticed a shift in consumer preferences towards sustainable products. To cater to the needs of the corporations to achieve their sustainability goals, various relaxations, under taxation and other regulatory laws, depending on the sector, size and resources, human capital, and other factors, have been given.

To remain competitive, companies are feeling the need to join forces and align themselves to achieve the sustainability goals. But such an alignment, from a competition perspective garners attention of the competition authorities which might derail the sustainability efforts. Anti-trust laws have never been at the forefront in helping achieve these goals.¹

However, it is believed that a clear and goal-oriented anti-trust regime would help achieve these sustainability goals at a faster pace. The dual objective of protecting the consumer interests and the competition process² and the adversarial powers [of the competition authorities] make competition law best suited to fillip these efforts.

In the two-part series, the authors aim at understanding the relationship between the role of sustainability in assessing anti-competitive agreements and combinations. In this article, the authors have limited the study to the relationship between sustainability and anti-competitive agreements.

II. SUSTAINABLE AGREEMENTS

There have been apprehensions that coordination amongst businesses for achieving sustainable goals would be looked at as ‘cartelization’, which derails such efforts. To address

¹ Jay Modrall, Sustainability, Anti-trust and the EU Green Deal, NORTON ROSE FULBRIGHT (2021) <<https://www.nortonrosefulbright.com/en-nl/knowledge/publications/4d7ef55a/sustainability-antitrust-and-the-eu-green-deal>> accessed 10 October 2022.

² Thomas Eilmansberger, *How to distinguish good from bad competition under Article 82 EC: In search of clearer and more coherent standards for anti-competitive abuses*, 42 COMMON MARK. LAW REV., 129, 132 (2005).

such a concern, competition authorities are now looking at ‘sustainable agreements’ which are aimed at mitigating the impact of economic activities on the environment.

‘Sustainable agreements’ have not been conclusively defined by any of the competition authorities as of date. However, the decisional practice, across jurisdictions, gives us an indication of how such agreements might be assessed. We can infer that sustainable agreements can be agreements that (1) aim at contributing to mitigate the harm to the environment, (2) are non-binding on the individuals/undertakings giving them a leeway to determine their contributions and activities to realize them, (3) aim at removing less sustainable products from the market without adversely affecting the price or product diversity and (4) do not restrict competition in the efforts to promote sustainability.³

A. Why are businesses for it?

Making businesses more sustainable works in the best interest of not only the entity but also the society at large. Shifting to a green business has many advantages, namely:

1. *Long-term capacity building*: Companies are facing hurdles in their manufacturing process due to resource depletion. Investing in processes promoting sustainable consumption might address this concern to some extent.
2. *Economies of scale*: Sustainable consumption requires investment in clean raw materials and advanced technology which turns out to be expensive. Suppliers/manufacturers with their collective demand for clean raw materials might be able to reduce their average fixed costs to achieve economies of scale and scope.⁴
3. *Innovation and business opportunities*: Redesigning product and manufacturing capacities not only serves as a risk management tool, but also opens new avenues for innovation in the allied markets.
4. *Consumer loyalty*: Consumers view sustainability as a qualitative improvement that doesn’t harm the environment. Investing in such sustainable products would not only open new avenues for businesses but at the same time offer consumers more options

³ Jay Modrall, Sustainability, Climate change and sustainability disputes: Antitrust considerations, NORTON ROSE FULBRIGHT (2021) <<https://www.nortonrosefulbright.com/en-in/knowledge/publications/3633ff51/climate-change-and-sustainability-disputes-anti-trust-and-competition-perspective#section2>> accessed 13 October 2022.

⁴ Simon Holmes, et. al, Competition Policy and Environmental Sustainability, (INTERNATIONAL CHAMBER OF COMMERCE, (2020) <<https://iccwbo.org/content/uploads/sites/3/2020/12/2020-compolicyandenvironsustainability.pdf>> accessed 19 December 2022.

to choose from.⁵ Also, the new wave of sustainably conscious purchasing plays an important role in the purchasing patterns of consumers. Thus, brands that play their part by engaging and investing in the causes that consumers feel strongly about, generate a more loyal consumer base.

5. *Tax benefits*: Many countries, including India, are bringing in policies in the form of providing incentives, grants, rebates, and reliefs for green and clean technology and infrastructure. In India, these reforms have been introduced to accelerate the country's journey toward net-zero carbon emissions by 2070.⁶

This goes on to show that the incorporation of sustainable methods in the production and supply chain will help the business, and no doubt the environment, in the long run.

Sustainable Agreements are not in violation of Competition Law

Sustainable agreements can be divided into two categories:

The first category of agreements are those that attract relaxations under the competition law as they protect the social policy objectives⁷. These type of agreements by their very nature may not be considered to be violative of the competition law. Examples of such agreements could include agreement or statements to voluntarily set common objectives where the specific contribution of each participant is not binding; agreements to improve the quality of the products without an increase in the cost for the consumers or reduction in the choices available; agreements where the manufacturers require the businesses in the supply chain to abide by the standards that apply to them.

The second category are sustainable agreements that (1) are entered to achieve a sustainable goal⁸ (2) use a fair standard-setting process, where (3) the standard is not made binding on the members to the agreement, and (4) there are no restrictions on competition.⁹ These types of agreements are entered to achieve a sustainable objective such as setting a standard or a

⁵ Autoriteit Consument Markt, Guidelines on Sustainability Agreements: Opportunities within Competition law 4 (ACM, 2020).

⁶ PWC, 'Green Taxes and Incentives Tracker' <<https://www.pwc.com/gx/en/services/tax/green-tax-and-incentives-tracker.html>> accessed 12 November 2022.

⁷ Albany International BV v Stichting Bedrijfspensioenfond Textielindustrie [1999] C-67/96 ECR 1999; Geert Goeteyn, When Does Sustainable Co-operation Become an Anti-competitive Agreement? REED SMITH (2021), <https://www.antitrustandcompetitionreport.com/2021/03/antitrust-compliance/when-does-sustainable-collaboration-become-an-anticompetitive-agreement/#_ftn1> accessed 26 December 2022.

⁸ Susan Black, et. al., Competition Law and Sustainability, Thomson Reuters (2022) <[https://uk.practicallaw.thomsonreuters.com/w-035-2035?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-035-2035?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed on 14 October 2022

⁹ Simon Holmes (n 4).

code of conduct to promote environmentally conscious practices, improving product quality, removing less sustainable products from the market, and enter into a joint venture to achieve sustainable objectives by achieving sufficient scale.

In essence, agreements that (1) set standards that are transparent, non-discriminatory, non-exclusionary, and non-binding; or (2) are entered into with the objective of sustainability at its core, and which (3) do not restrict competition, might not be in violation of the competition law.

B. Greenwashing

With consumers becoming more conscious of their footprints and opting for greener and healthier lifestyles, the preference for “green” and “sustainable” products has increased. Consumer protection authorities have also started to crack down on companies for their false “green” and “sustainable” claims and misleading consumers.¹⁰ Such “green-washing” has a different connotation when it comes to competition law. While there is a push for sustainability and anti-trust to reinforce each other, there is a risk that companies might distort the prevailing competitive conditions under the guise of sustainability, which under competition law is termed as “Green Washing.”¹¹

Such agreements would include collective boycott / phasing out of products using or promoting sustainability goals, imposition of industry-wide standards and denying access to the use of set standards, imposition of binding commitments resulting in an increased price for the consumers, exchanging competitively sensitive information under the garb of discussing sustainable initiatives and restricting market entry of green technologies.¹²

¹⁰ Press Release, Competition & Markets Authority, Misleading environmental claims (2020) <<https://www.gov.uk/cma-cases/misleading-environmental-claims>> accessed 13 October 2022; Zaneta Sedilekova and Isabelle Merchat ‘DWS and Deutsche Bank raided over greenwashing allegations’ LEXOLOGY (2022) <<https://www.lexology.com/library/detail.aspx?g=80ebdc10-5617-4d8c-b78b-05ce4ae2495d>> accessed 10 October 2022.

¹¹ Markus Röhrig, et. all, ‘Green Deal and Anti-Trust: Less Red Tape for Green Cooperation?’ HENGELLER MUELLER (2021) < https://www.hengeler.com/fileadmin/news/Newsletter/2021_02_BRX.pdf> accessed 18 October 2022.

¹²Competition & Markets Authority, Environmental sustainability and the competition and consumer law regimes – advice to the Secretary of State for Business, Energy and Industrial Strategy (Call for inputs document, CMA 148con, 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021364/CFI_-_sustainability_advice_.pdf> accessed 19 October 2022.

A commonly cited example is the European Commission's decision in *Consumer Detergents Case*¹³ where the anti-competitive conduct was linked to the implementation of an environmental initiative concerning laundry detergents which led to a cartel for increasing prices.

European Commission has in the recent past fined a few car manufacturers for actively avoiding competing based on technology that could have been used to reduce harmful emissions beyond what was legally required, and for colluding on the development and consumption of 'AdBlue'. The Commission also provided the parties with guidance on the aspects of standardisation of AdBlue filler neck, quality standards or joint development of an AdBlue dosing software platform. This was the first time when the Commission noted that the agreement restricted competition on product characteristics relevant for the customers.¹⁴ This case is an instance where the collusion was by object on a non-price aspect, and the Commission opined that the agreement did not require an examination of the effects of the agreement on the market.

Though the sustainability agenda of companies is always viewed sceptically owing to the high chances of green-washing, the competition authorities by evaluating and assessing the aim, competitive factors, efficiencies, and consumer benefit may be in a position to rule out such a possibility and help promote sustainability initiatives.

C. Sustainability Agreements with benefits offsetting the restrictions on competition

There might be instances where the sustainability agreement might lead to a negative impact on the consumers and create restrictions on competition. In such cases, the competition authorities will have to test whether the benefits of cooperation agreements outweigh the negative impact on competition and consumers.

This is generally done by undertaking an economic analysis of the benefits accrued to the consumers. However, the benefits might not always be monetary. Consumers value sustainability despite the fact that the product might cost slightly more. Consumers also

¹³ Commission Decision of 13.04.2011 in COMP/39579 – Consumer Detergents, <https://ec.europa.eu/competition/antitrust/cases/dec_docs/39579/39579_2633_5.pdf>.

¹⁴ Press Release, European Commission, 'Antitrust: Commission fines car manufacturers € 875 million for restricting competition in emission cleaning for new diesel passenger cars' (2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581> accessed 31 October 2022.

respond negatively to companies with a poor commitment to caring for the environment.¹⁵ However, one must keep in mind that consumers might not be willing to spend significantly higher for the causes of sustainability.¹⁶ This goes on to show that sustainability can be termed as a ‘quality’ element having some impact on consumer purchase patterns.¹⁷

As such, sustainable agreements call for a much broader analysis. The benefits would include or extend beyond *economic benefits*, such as lower emissions, durable solutions, etc. Also, the benefit derived would not be restricted to a particular consumer, but the relevant ‘consumer group’, making it difficult to assess the benefits accrued to the consumer group as a whole.¹⁸

Such analysis would have to consider whether the benefits derived are balanced across potentially higher prices and costs or at times even lack of substitutability. There have been cases in Europe¹⁹ where agreements to stop producing lesser energy-efficient appliances were analysed. Normally such agreements harm the consumers as it leads to higher costs for the consumers, but in these cases, emphasis was placed on the fact that the environmental benefits outweighed the consumer harm.²⁰

A study conducted by the Autoriteit Consument Markt [Dutch Antitrust Authority] displayed that the consumers were willing to pay for animal and environmental concerns but not for specific measures in the sustainability agreements.²¹ Therefore, higher costs and prices have to be weighed against the benefits received by the consumers. If the benefits with regard to the environment, animals, and public health outweigh the negative effects, only then will the agreement be termed as not infringing competition laws.²² It is equally important to establish

¹⁵ Sungchul Choi and Alex Ng, *Environmental and Economic Dimensions of Sustainability and Price Effects on Consumer Responses* 104(2) J. BUS. ETHICS, 269 (2011).

¹⁶ McKinsey & Company, *How much will consumers pay to go green?* MCKINSEY & COMPANY (2012), <<https://www.mckinsey.com/business-functions/sustainability/our-insights/how-much-will-consumers-pay-to-go-green>> accessed on 5 October 2022.

¹⁷ Cristina A. Volpin, *Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)*, CPI ANTITRUST CHRONICLE (2020), <<https://www.competitionpolicyinternational.com/sustainability-as-a-quality-dimension-of-competition-protecting-our-future-selves/>> accessed 28 October 2022.

¹⁸ Julian Nowag, *Sustainability & Competition Law and Policy*, DAF/COMP(2020)3 (OECD, 2020).

¹⁹ *CECED I: Washing Machines*, Commission decision 2000/475/EC of 24 January 1999.; *CECED II: Water Heaters*, Commission decision 2001/C 250/03 of 8 September 2001.; *CECED III: Dishwashers*, Commission decision 2001/C 250/02 of 8 September 2001.

²⁰ *ibid.*

²¹ Simon Holmes (n 4).

²² ACM’s Analysis of the Sustainability Arrangements concerning the ‘Chicken of Tomorrow’, Consultation Document - 13.0195.66, Autoriteit Consument en Markt, 8 (2015).

a causal relationship between the conduct and the environmental benefits derived from the said conduct.²³

The European Commission has recently also opened an investigation into a cartel for artificially increasing the prices and restricting the supply of biofuels which contribute to the reduction of greenhouse gas emissions.²⁴

However, the challenge that remains is to differentiate between greenwashing agreements and sustainability aimed agreements. Here, India can take guidance from the Austrian sustainability guidelines²⁵ and the UK Competition Authority's guidance²⁶, which provide that:

1. the cooperation must lead to efficiency gains which requires overall social welfare;
2. these efficiencies cannot be achieved by less restrictive means;
3. the efficiency gains contribute substantially to a sustainable economy. The contributing efficiencies must outweigh the negative effects on competition;
4. constraints imposed by the cooperation are indispensable to realising the efficiency gains; and
5. cooperation does not restrict competition.

Thus, while assessing sustainable agreements, factors such as market share of the product covered under the cooperation agreement, constraints imposed upon the competitors and consumers, importance of the product from an innovation and investment standpoint, and production capacities of the members to the agreement, etc. must be considered.²⁷

III. SUSTAINABILITY AND ANTITRUST IN INDIA

While some jurisdictions have come up with separate guidelines to address the issues surrounding sustainable agreements, India is yet to join the debate on the intersection between competition and sustainability.

²³ Zaneta Sedilekova and Isabelle Merchat (n 10).

²⁴ Press Release, European Commission, 'Antitrust: Commission sends Statement of Objections to Alcogroup and Agroetanol over alleged ethanol benchmarks cartel' (2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4362> accessed 13 November 2022.

²⁵ Federal Competition Authority, 'AFCA publishes draft guidelines on the application of sustainability agreements, asking for comments (AFCA, 2022) <<https://www.bwb.gv.at/en/news/detail/afca-publishes-draft-guidelines-on-the-application-sustainability-agreements-asking-for-comments>> accessed 13 October 2022.

²⁶ Competition & Markets Authority, Environmental sustainability agreements and competition law (Guidance, 2021) <<https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law#overview-for-businesses>> 9 November 2022.

²⁷ *ibid* at 25.

Though the discussion regarding sustainability and antitrust is still premature in India, the Competition Act, 2002 [**“the Act”**], in its current form is well equipped to deal with the consequences and assess the benefits of the cooperation agreements on competition.

Cooperation agreements in the form of joint ventures can be exempted under the *proviso* to Section 3(3) of the Act. Such joint ventures set up with the aim of combating inefficiencies in the market, and not affecting competition in an adverse manner may not be seen as adversarial to the competition laws.²⁸ Further, the efficiencies of the cooperation agreement may be assessed under factors provided under Section 19(3)²⁹ of the Act.

The current legislation provides the Commission the discretion to impose penalties considering the mitigating and aggravating factors. The Commission while assessing the sustainability agreements might consider the pro-competitive and sustainability benefits in its assessment as a mitigating factor.

Thus, Indian law as it stands today is well-equipped to assess the benefits of the sustainable agreements.

IV. KEY TAKEAWAYS

The need for use of sustainable resources and backing required by competition authorities is now moving to the centre of the debate of competition policy. Some jurisdictions are seeing a greater need to incorporate the debate in the form of a policy decision and implementing it in its decisional practice.

Although sector-specific regulations, taxation regimes and alterations to the investment policy seem better placed to facilitate the transition to a green economy, there is a need to tackle the climate emergency on all fronts. Not all sustainability agreements would need anointing by the competition regulators, but only those which restrict competition should be vetted by the competition regulators.

If sustainability-related matters are to be conceptualized in the competition policy, it must be devised in a way as to provide a sense of certainty to businesses. Such agreements as long as they provide the consumers with sufficient choice in terms of the availability of products at competitive prices, it may not be in violation of competition law.

²⁸ Association of Third-Party Administrators v. General Insurers' (Public Sector) Association of India, 2011 SCC OnLine CCI 55.

²⁹ The Competition Act, 2002, § 19(3).

The jurisprudence developed in the EU and US has shown that businesses engaged in various types of co-operation arrangements will not be treated as anti-competitive provided it is in line with the standards set under the competition law.

It is encouraged that the private sector plays an equally important role in achieving sustainable development goals and not be dissuaded due to the ‘first mover disadvantage’ apprehensions. Jurisdictions around the world are realizing the importance of cooperation for achieving sustainable goals and hence such agreements might not be seen through an adversarial lens. Additionally, care must be taken that such agreements have goal of sustainability at their core, the objectives are not imposed on the members, and the standards, if any, are set in a fair and transparent manner. Further, the most important element to avoid the competition regulator’s radar is to ensure that the agreement does not have an adverse impact on competition.

In addition to assessing sustainability agreements, it is equally important that the merger control regimes also have a foothold in the newly developing sustainability and antitrust space. The risks of ‘green killer acquisitions’ and the need for incorporating ‘green factors’ in the combination assessment are gaining traction. The authors intend to assess the intersection of sustainability and antitrust from a merger control perspective in the forthcoming edition.
