

**A STUDY ON THE INTERFACE BETWEEN SUSTAINABILITY AND
COMPETITION LAW**

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ABSTRACT

In the era of unbridled capitalism, industries are becoming more and more competitive where the goal is profits, to achieve this goal the same firms may use means which may harm other players and consumers in the market. In such cases, Competition law plays a crucial role by balancing capitalism on one side and free competition on the other side. The importance of Antitrust laws in the economy is well recognised. This paper would seek to develop on the emerging discussion on sustainability and competition law. The urgent need to tackle climate change has urged the government and private industries to look for trade and production processes that are conducive to the goal of sustainable development.¹ This paper is designed to develop a comprehensive discourse highlighting the interface between sustainability and competition law, identifying the underlying problems and offering solutions for the same. This paper offers deep insight into the various challenges the governments and industries face while moving towards the goal of sustainability, particularly focusing on market failures. It will also attempt to look at how some cooperation agreements can exist, without hindering the competition in the market. Furthermore, it delves into agreements that use the cloak of sustainability to mask their anti-competitive practices; this practice is commonly referred to as “greenwashing”. Lastly, having a comprehensive understanding of all the problems and taking lessons from developments from competition regimes all around the world, suggestions are offered for developing a competition regime which would advance the goal of sustainability in India.

Keywords: Sustainable Development, Competition Law, Greenwashing, Cooperation Agreements, Market Failure.

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¹ United Nations, The 2030 Agenda and the Sustainable Development Goals: An opportunity for Latin America and the Caribbean (LC/G. 2681-P/Rev.), Goal 13: Take urgent action to combat climate change and its impacts.

I. INTRODUCTION

Sustainability is a multifaceted notion that includes environmental, social and economic elements. The key to sustainability is innovation, or in other words, technical progress, same is one of the core objectives of antitrust laws. Sustainability and competition law are two distinct areas that have increasingly become intertwined in recent years. Competition regimes worldwide are working towards gearing their antitrust laws to play a complementary role in promoting sustainability. A probable scenario for the industries to compete is where the consumers are aware of the impact of unsustainable products, where the consumers are willing to pay more in order to avoid the environmental impact of the product. However, the deterministic factor here is the individual income added to awareness. Firms might find it profitable to compete if the consumers are willing to pay for an expensive alternative just to mitigate the environmental costs but this scenario is practicable only in some of the wealthiest economies of the world but the same cannot be said about low to middle-income developing or underdeveloped countries where the consumers are highly price sensitive. The lack of consumers' willingness to pay leads to demand side and supply side market failures. Additionally, if a company decides to shift to a sustainable method of production it would have to incur huge expenditure which would result in an increase in the price of the product and put the company at a competitive disadvantage. This is known as the "*first mover disadvantage*". Under such circumstances, cooperation agreements between the suppliers seem to be the most viable way out. In this context, the role of antitrust laws plays a crucial role where it would be creating space for such cooperation agreements to exist and assist industries to achieve their sustainable goals. However, many competitors fear running afoul of antitrust laws if they cooperate, thus discouraging them from collaborating for green practices and adopting sustainable initiatives this fear is not unfounded. Competition regulators themselves are in a perplexing situation trying to develop methods for accommodating such agreements and technical cooperation, performing the complex balancing act of analysing the advantages arising out of such cooperation and the anti-trust concerns emerging from the same.

Given the uncertain state of affairs and the multitude of challenges, there arises a dire need to make necessary adjustments and create a framework for evaluating and accommodating collaborations amongst competitors to the extent it promotes the goal of sustainable development, includes sustainability factors in competition assessment, devises relevant

market structures to consider societal damage or benefits, develop new theories of harm to take into account non-price dimensions and analyses the benefits or harms to consumer welfare on account of sustainability factors to a greater extent. These developments will enable the regulators to carry out a holistic competition assessment while advancing sustainability goals.

To achieve this goal, the paper aims to conduct a thorough examination of the challenges posed by antitrust laws through a multi-jurisdictional analysis. This paper would deal with various aspects in which the corporations would be looking for practices that are conducive to the goal of sustainable development without going foul to competition policy. This will include a critical analysis of the interface of antitrust laws and sustainability, an assessment of market failures, sustainability agreements and their intersection with anti-competitive agreements. Proceeding further the paper seeks to develop a discourse on how anti-competitive agreements and combinations escape antitrust regulations under the grab of sustainability, along with discussing the applicability of the foreign jurisprudence in India while discussing the potential role that the competition commission of India can play in advancing sustainable development. Here, the ultimate aim is to identify comprehensive solutions that can enable competition policy to act as a catalyst for sustainable development rather than an obstacle.

II. CLIMATE ACTION AND ANTITRUST LAW: ZERO HOUR

The international community around the world is now acknowledging the impact of climate change and the expeditious need to address the same. This debate on the repercussions of global warming on the ecosystem saw a breakthrough when the Stockholm Conference of the UN in 1972² addressed the issue of human expansion at the expense of environmental degradation. What has been observed during these years is that there has been a directly proportional relationship between the economic growth of a nation and the pollution yielded in the environment for that growth whereby emissions of greenhouse gases add a substantial lump. Thus, to implement effective policies to mitigate the impact of climate change without jeopardising the growth of an economy and limiting the global temperature up to a certain threshold, there should be a significant reduction of greenhouse gas emissions across the board.

² Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF. 48/14, at 2 and Corr. 1 (1972).

Ever since the time of industrialization, private industries are the underlying drivers in the growth of any economy, however, at the same time, they are also the major contributors towards greenhouse gas emissions. The target of carbon neutrality cannot be achieved without the active participation of these private industries in mitigating the climate impact. While this need for their involvement in controlling climate change has remained indisputable, the discourse on how these private industries could contribute to achieving the set targets has taken the forefront internationally. These industries could either aim for net zero objectives individually, restructure their productions by adopting environment-friendly methods, the big players in the market could invest in green technologies, or they can cooperate as their objectives are the same. Let's take a closer look at the problems government and businesses face while implementing sustainable methods, and also understand the contributory role that antitrust laws can play in solving these problems and assisting industries in achieving sustainability objectives.

III. GOVERNMENT POLICIES AND REGULATIONS

Government regulations are a significant aspect of combating climate change. As per the 2015 OECD report,³ an integrated approach where the prices are prescribed on emissions, coupled with a regulatory framework that considers the climate impact of a certain product and the promotion of greener technologies, seems to be an effective instrument in achieving a net zero transition. Policies like subsidising green technologies, banning unsustainable raw materials and carbon trading can facilitate business players to opt for sustainable measures. However, these policies have been in existence for a considerable time, yet they fail to achieve their desired objectives. The problem lies in the implementation of these policies, where certain loopholes exist that act as a way out for the industries that, on the face of it, seem to be environment friendly but take benefit of these policies without achieving the desired objectives.

³ Directorate For Financial and Enterprise Affairs, 'Adapting to the impacts of climate change'. (OECD, 27 October 2015) <<https://search.oecd.org/environment/cc/Adapting-to-the-impacts-of-climate-change-2015-Policy-Perspectives-27.10.15%20WEB.pdf>> accessed April 8, 2023.

For instance, the policy of carbon credit trading,⁴ where the government allows a certain level of emissions on the purchase of carbon credits, which acts as a set-off for industries that claim to be environmentally friendly. In the case of a steel company that emits greenhouse gases over the prescribed limit, it must buy these carbon credits to fall under the emission cap. What happens is that these industries keep on buying carbon credits for one sector but continue emissions in their other sectors. On paper, such industries seem to be eco-friendly, but the overall emissions remain the same. Moreover, these credits are bought by industries for those projects which would have proceeded anyway. For instance, as per the 2016 study by the European Commission into UN-sanctioned offset projects, more than three-quarters of the projects would not have resulted in additional carbon emissions, but still, they are bought under carbon credits to use these credit certificates to claim exemptions for emissions happening for other projects. India too has brought an amendment⁵ to the Energy Conservation Act 2001 where carbon credit trading is a major component, and there is a big challenge ahead for the regulatory authorities to fill these loopholes for their effective implementation. As a result, while regulations and policies are effective drivers of sustainability, they are not sufficient to address the concerns of antitrust laws and their interplay with sustainable development.

A. Market Failures

As mentioned earlier, the growth of competition for sustainable products relies upon multiple assumptions varying from producers' ability to compete to consumers' willingness to pay. In certain contexts, these assumptions may or may not be true, like those where a market monopoly exists and opting for sustainable alternatives might drive small enterprises out of competition. Another hindrance to free competition is that opting for sustainable products is expensive for the consumers, particularly in the growing economies, where consumers don't have a choice but to go for unsustainable products, considering that the negative externalities of unsustainable products, like environmental degradation, is neither borne by the producers nor the consumers. In such situations, the effective allocation of eco-friendly resources by the free market could not happen, resulting in market failures. These market failures can be broadly classified into demand-side and supply-side market failures.

⁴ UNDP Climate Promise, 'What are carbon markets and why are they important' (*UNDP Climate Promise Blog* 18 May, 2022) <<https://climatepromise.undp.org/news-and-stories/what-are-carbon-markets-and-why-are-they-important>> accessed April 8, 2023.

⁵ The Energy Conservation (Amendment) Act 2022.

B. Demand Side Failures

The underlying force behind the demand side market failures is consumers, where preferences are not akin to their purchasing decisions. The production of these eco-friendly products requires plenty of investment in greener technologies and sustainable materials that would significantly raise the cost of production, commonly known as green premium,⁶ which would initially be costlier than unsustainable products. This high production costs on the supply side would be borne on the demand side i.e., by the consumers. As mentioned earlier, consumers residing in middle to lower-income markets might not be willing to incur an extra cost on such eco-products, thus opting for cheaper alternatives.⁷ Another factor is the lack of awareness of the production methods, where the consumers are sceptical of the true sustainability of a product, thus deterring their judgement in purchasing them. Adding to this is the degree of connection between the eco products and their target consumers. While consumers may be willing to pay for end products like, for instance, paper bags instead of polythene bags, in the case of intermediate goods that are used in final products, they might be deterred from paying. For instance, steel is one of the major intermediate products used in the production of many end products like automobiles. As per the IEA 2010 report 6.02% of CO₂ emissions are derived from iron and steel production.⁸ On an average, 1.83 tons of CO₂ is emitted for every ton of Steel produced, making steel production one of the major greenhouse emitters. Unfortunately, there are barely any alter eco-friendly production methods for steel and its production at such high costs might not attract consumers' willingness to pay, as they are not direct consumers of steel, leaving industries with no choice but to continue with the status quo and unsustainable methods. Thereby, these demand-side market failures might hamper the development of sustainable products which the regulatory authorities have to take care of.

C. Supply Side Failures

⁶ Bill Gates, 'How 'Green Premiums' can help us solve climate change.' (*Fortune*, 16 February 2021). <<https://fortune.com/2021/02/16/bill-gates-climate-change-research-green-premiums/amp/>> accessed April 8, 2023.

⁷ Ismail Siddiqui, Arvind Kumar Anand, 'Competition Policy and Sustainability: A Difficult Path to Tread' (*SSRN*, 13 September 2021). <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3920481> accessed April 8, 2023.

⁸ International Energy Agency, 'World Energy Outlook'. (*IEA* 2010). <<https://www.iea.org/reports/world-energy-outlook-2010>> accessed April 8, 2023.

So far, we have discussed how consumers on the demand side can slacken the competitiveness of sustainable products and lead to market failure. This market failure is not one-way driven and there can be distortion from the supply end too. One of the major failures occurs at the supply end when suppliers lack coordination amongst themselves. The fear of being the only one adopting eco-friendly methods and getting cornered out by rival competitors who continue with cheaper alternatives has deterred many industries from taking an initiative towards sustainability. This fear of being the first and only one in the race is known as the "*first mover disadvantage*".⁹ For instance, the decision of a German discount retailer to only sell fair-trade bananas in Germany where the rival competitors did not follow the same method eventually, resulted in the "*first mover disadvantage*" and the reluctant reversal of the decision.¹⁰ The problem of market failure is further escalated with negative externalities, that is the environmental cost of a product, borne neither by the producers nor the consumers. Eminent economist Nicholas Stern explained in 2007 that "*climate change is the result of the greatest market failure the world has seen*".¹¹ The primary reason was that the price of the product does not reflect its true costs, meaning the environmental damages resulting from greenhouse gas emissions and pollution are not included in their final market costs. The result of this is consumers pay these costs later in the form of natural calamities when droughts, floods and storms are caused because of the pollution caused by the exposition of such unsustainable products.

Hence, while government policies and regulations might give a breakthrough by encouraging industries to prefer sustainable methods, however, there are certain gaps in the implementation of such policies. In such a scenario, the need for private sectors to equally participate in this fight against climate change has been recognised more than ever. However, the market failures owing to multiple reasons, as discussed above, acts as an obstacle to changing the status quo and shifting towards a more sustainable methodology. Therefore, without genuine

⁹ William Boulding, Markus Christen, 'First-Mover Disadvantage'. (*Harvard Business Review*, October 2001). <<https://hbr.org/2001/10/first-mover-disadvantage>.> accessed April 8, 2023.

¹⁰ 'Lidl goes Fairtrade bananas in Germany and Switzerland'. (*BananaLink*, 27 September, 2018). <<https://www.bananalink.org.uk/news/lidl-goes-fairtrade-bananas-in-germany-and-switzerland/>.> accessed April 8, 2023.

¹¹ Nicholas Stern, 'Climate Change Ethics and the Economics of the Global Deal.' (*Economistsview.typepad*, 29 November, 2007) <<https://economistsview.typepad.com/economistsview/2007/11/nicholas-stern.html> > accessed April 8, 2023.

coordination, neither government regulations nor competition among private industries can facilitate the nations towards achieving their SDG commitments.

IV. SUSTAINABILITY AGREEMENTS AND ANTIRUST INTERPLAY

A well-recognized competition policy can contribute to the goal of sustainability by actively promoting the development of green technologies and making businesses responsive to consumers' demands for sustainability. One of the most efficient ways to do that is cooperation, in the form of sustainability agreements between the industries, where these industries come together and synergize their manpower and resources to encourage the innovations of sustainable products. While doing so, any one industry would not fear getting cut off from the competition or bearing the first mover disadvantage. Moreover, these industries would be assisted by well-regulated government policies to bring overall standardisation to the market. The problem commences when antitrust laws act as a barrier to such sustainability agreements, where industries hesitate to cooperate thinking they might be running afoul of the antitrust laws. For instance, the Indonesian Antitrust Authorities have threatened action against palm oil traders who have collectively refused to buy products from firms engaged in deforestation. Another example is when car manufacturers in California agreed on higher vehicle emission standards but were later investigated by the US Department of Justice (DOJ).¹² Such restrictions on business discourage cooperation where it is necessary to reduce pollution or carbon emissions. Nevertheless, in some cases, such cooperation sometimes leads to cartelization and other anti-competitive agreements, resulting in a monopoly. The role of antitrust laws is to check on such anti-competitive agreements, but concurrently, it should not act as a barrier to genuine sustainability agreements that could effectively promote the innovations of eco-friendly products. In this section, we would discuss how some sustainability agreements do not restrict competition and even if it does, such agreements can be exempted from the regulations imposed by antitrust laws so that industries and businesses are not discouraged to opt for such sustainability agreements.

¹² Julian Nowag, Alexandra Toerell, 'The antitrust car emissions investigation in the U.S. – some thought'. (*Competition Policy International* July 2020) <<https://www.competitionpolicyinternational.com/wp-content/uploads/2020/07/07-The-Antitrust-Car-Emissions-Investigation-in-the-U.S.-%E2%80%93-Some-Thoughts-From-the-Other-Side-of-the-Pond-Julian-Nowag-Alexandra-Toerell.pdf>> accessed April 8, 2023.

A. Non-Restrictive Sustainability Agreements

Some sustainability agreements do not restrict competition at all and are outside the purview of Antitrust laws. The EU's 2001 Horizontal Guidelines defined such unrestrictive sustainability agreements where there is not an individual obligation on the parties, and they can contribute to sustainability goals by adopting any suitable methods according to their abilities. For instance, the JAMA and the KAMA agreements between the car manufacturers to reduce emissions without putting any individual obligation on the methods of achieving.¹³

Moreover, agreements that give rise to genuine market creation, like the development of greener technologies, are also unrestrictive. Multiple sustainability agreements like this promote sustainability without restricting competition.

B. Sustainable Agreements that can be exempted

The Treaty on the Functioning of the European Union ["TFEU"]¹⁴ forms the detailed basis of European Union (EU) laws by defining the principles and objectives of European Union ("EU") laws and treaties. Article 101(1) of the TFEU lays down the provisions for anti-competitive agreements, while Article 101(3) of the TFEU lays down certain conditions where such agreements can be exempted from antitrust laws. In India, The Competition Act, 2002¹⁵ is based on the model clauses of TFEU where Section 3(3) and 3(4) of the Act talks about horizontal and vertical anti-competitive agreements respectively, and Section 19(3) lays down the conditions to check the Anti competitiveness of an agreement, granting certain exceptions. Under Article 101(3) TFEU, an agreement would be exempt from the prohibition of anticompetitive agreements if inter-alia the following conditions are met i.e. (1) The agreement "continues to improve the production OR distribution of goods OR to promoting technical and economic progress" or (2) Consumers get a "fair share of the resulting benefit."

Section 19(3) of the Indian Competition Act 2002 lays down the parameters that the regulation authorities check while determining the appreciable adverse effect on competition.¹⁶ Under

¹³ European Commission, *XXVIIIth Report on Competition Policy* (1998).

¹⁴ Consolidated Version of The Treaty on the Functioning of the European Union [2008] OJ C115/49.

¹⁵ The Competition Act 2002.

¹⁶ The Competition Act 2002 s. 19(3).

that, clauses (d), (e) & (f) lays down the conditions where the impugned agreement may be exempted from antitrust regulations if it results in the overall benefits for the consumers or leads to the improvement of production or distribution of goods or promotion of technical, scientific, and economic development.

Conditions 1 & 2 of Article 101(3) TFEU and conditions (d), (e) and (f) of Section 19(3) of the Indian Competition Act 2002 are based on similar reasoning. The sustainability agreements can benefit from such exemptions, commonly known as the exemption route, if the provisions are interpreted in a wider way. Let us examine the above criteria in detail.

i. Improvement and Progress

Here, the "economic" factor is one of the four facets, and not a standalone factor, in which an agreement can benefit under this condition. Thus, reducing all the terms of the condition into "economic consideration" would not be the appropriate way in analysing the Anti competitiveness of a sustainability agreement.

Again, even if the "economic" factor is taken as the sole consideration, even then many sustainability agreements would fall within the said condition. For instance, an agreement between two automobile manufacturers to produce an engine that would cost \$1000 but reduce the emissions by half of its previous model, would be resulting in less pollution and better efficiency, thus falling under the criteria of economic and technical progress. Moreover, consumers interpret sustainability with improved quality of products and as per the Organisation for Economic Cooperation and Development (OECD) report, "cost savings, innovations, improved quality and efficiency" is recognized as "direct economic benefits".¹⁷ Most of the sustainable benefits are likely to fall within one or more heads. Additionally, as per the EU Report on Competition Policy, it was expressly acknowledged that improving the

¹⁷ Centre For Tax Policy and Administration, '2010 Report on The Attribution of Profits to Permanent Establishments', (OECD, 2020) < <https://www.oecd.org/ctp/transfer-pricing/45689524.pdf>> accessed April 8, 2023.

environment would be regarded as a promotion of technical, economic, and scientific progress,¹⁸ which is also highlighted in the CECED washing machine case.¹⁹

ii. Consumers get a fair share

Another important condition for an agreement to be exempted from anti-competitive regulation is when consumers get a fair share of benefits arising out of the restriction imposed by such an agreement. The question that needs to be addressed is who the relevant consumers in such a case should be. In the CECED decision,²⁰ the Commission gave a wider interpretation to the word consumers by explicitly acknowledging the overall societal benefits arising out of the sustainability agreement, which would benefit the entire population, rather than just limiting the focus on the individual consumers of the product. This view is like the 2004 Horizontal Exemption Guidelines²¹ given by the EU, where the focus is placed primarily on the societal benefits of an agreement, not limited to just the consumers of that product. Another concern while examining the fair share for the consumers is whether future consumers can be considered. While considering this possibility, one should remember that the essence of sustainability is meeting the demands of the present generation without compromising the needs of future generations. The need to consider future generations (future customers) is the very essence of sustainability agreements, where private industries alongside government policies shall figure out amicable ways of calculating the area and period for such future customers.

V. ANTITRUST AGREEMENTS IN THE GRAB OF SUSTAINABILITY

OECD Competition Committee held a meeting to moot solutions for the challenges and discuss the compatibility of sustainability and competition law.²² It Identified that companies can be

¹⁸ Directorate for Financial and Enterprise Affairs, 'Annual Report on Competition Policy Developments in the European Union', (OECD, 2021) <[https://one.oecd.org/document/DAF/COMP/AR\(2022\)39/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2022)39/en/pdf)> accessed April 8, 2023.

¹⁹ Conseil Europeen de la Construction d'appareils Domestiques CECED [1999] L187/47OJ 2000.

²⁰ *Id.*

²¹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/03.

²² Cristina Volpin and Robert Horney, 'Executive Summary of the Hearing on Sustainability and Competition' (OECD, 11 October 2022) < [https://one.oecd.org/document/DAF/COMP/M\(2020\)2/ANN2/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/M(2020)2/ANN2/FINAL/en/pdf)> accessed April 8, 2023.

driven to compete for producing “greener” goods and services and adopting sustainable processes in their supply chain. On the flip side, it took into consideration the impact of engaging competition enforcement and policy to prevent transactions which may harm sustainability. This includes practices such as cartelization, killer acquisitions, and abuse of dominant position by enterprises to restrict sustainable development. Developing on the discussion in the previous sections concerning sustainability agreements, this section will take a closer look at cartelization and greenwashing of agreements and analyse how such agreements negatively impact the efforts towards sustainable development; along with putting forth measures on how competition policy can be utilised to mitigate these concerns.

One of the best examples where technical cooperation went wrong and gave way to cartelization was the prominent case from the EU where Daimler, BMW and Volkswagen Group²³ colluded on the technical development of nitrogen di-oxide cleaning, in the case Daimler, BMW and Volkswagen Group possessed technical expertise which would have allowed them to reduce harmful emissions beyond what was legally required but they refrained from using the same to avoid competing. Cooperation becomes vital in situations where consumers are not willing to pay but such cooperation as we can see can result in cartelization whereby powerful corporations are abiding by the emission standards but are refraining from faithfully contributing towards sustainability by artificial restriction.

A. The Limitations in Extant Framework

In competition assessment, efficiency gains are considered to see the extent to which benefits arising out of an agreement or M&A transaction offset the anti-competitive effects. Within the framework of sustainability, competition authorities have a very big issue on their hands that is arriving at to what extent must the efficiency gains be computed for them to offset anti-competitive factors; the question is one of methodology and the scope and extent of the interplay between out-of-market efficiencies in competition considerations. This new

²³ Hornkohl L and Jorna A, ‘Uncharted Legal Territory? – European Commission Fines Volkswagen and BMW for Colluding on Technical Development in the Area of Emission Cleaning’ (Kluwer Competition Law Blog, 15 July 2021) < <https://competitionlawblog.kluwercompetitionlaw.com/2021/07/15/uncharted-legal-territory-european-commission-fines-volkswagen-and-bmw-for-colluding-on-technical-development-in-the-area-of-emission-cleaning/>> accessed April 8, 2023.

methodology will also need to incorporate considerations regarding future consumers i.e., the future generations which will be impacted on account of environmental degradation.

It is also important to ascertain the relevant market structure i.e., who is the target audience which will be reaping benefits out of increased sustainability. There can also be instances where the consumers of unsustainable products are few, but the harm caused by the production of such products are many. In such cases, quantifying the benefits and harms of a particular subject is important. The next challenge would be to incorporate “out of the market” or “societal benefits” while assessing the efficiency gain of anti-competitive agreements. The existing analysis is based solely on monetary terms, thereby if sustainability is to be assessed it should be assessed in a completely relevant market structure which will include societal harm or benefit. The methodologies used for current analysis will prove to be insufficient for the same.

Another concern is regarding merger control, and how sustainability concerns are to be taken into account in mergers and acquisitions. There may also arise cases of “killer acquisitions” when the development of competing sustainable technologies is in the hands of smaller companies, incumbent companies may acquire the other players or startups to shut down operations or change their eco-friendly practices to make them more profitable rather than integrate them into their business. This will discourage innovation in the first place itself. Extant competition policy limits its analysis of mergers and acquisitions to economic analysis which is based on turnover and assets of the parties involved or the deal value, it is important to ascertain the practicability of including consideration of sustainability or broadly non-economic factors in the equation and how the benefits should be measured in terms of sustainability.

It is important to distinguish between beneficial cooperation and greenwashing of anti-competitive practices. We have broadly identified the following issues:

- There is an inherent difficulty in accounting for efficiency gains in terms of increased sustainability or greener processes.
- It is important to devise a relevant market structure to assess the impact of sustainability.
- There is a need to develop new non-economic methodologies in analysing benefits or harms arising out of M&A activities to accommodate sustainability considerations.

- Beneficial cooperation should be distinguished from greenwashed agreements which end up harming competition and the environment.

VI. THE WAY FORWARD

Now that we have identified the problems that exist in competition policy concerning accommodating sustainability factors, it becomes important to identify the right tools which the regulators can use to address them and to analyse the extent to which non-economic considerations like sustainability should be taken into consideration. Antitrust regulators around the world are using various approaches to tackle these problems but given that environmental impact is universal there should be coordinated action to fight the same.

The development of adequate methodologies to analyse efficiency gains in terms of sustainability factors is important to factor in environmental considerations, consequently, it also becomes important to develop new theories of harm to judge sustainability agreements and M&A activities on the anvil of promotion or deterioration of consumer welfare. Environmental considerations should form an important part while analysing benefits or harms arising from M&A activities, the same may be done by developing appropriate methods and using quantifiable indicators for the same.

Let us take a closer look at how we can modulate our competition assessment to ensure that it plays a contributory role in promoting sustainable development.

A. Analysing Efficiency Gains

The argument of efficiency gains is used as a defence, whereby firms argue that the agreement or merger and acquisition will lead to increased efficiency in the market thereby consumer welfare. Competition regulators need to undertake a comprehensive understanding of the transaction to balance the efficiency gains and antitrust concerns. When these efficiency gains are presented in terms of increased sustainability, antitrust regulators need to have appropriate tools to assess these claims or on the contrary develop a holistic framework taking into account any harm which may be caused to the sustainability goals as a result of the agreement.

One of the tools which antitrust regulators may use is life cycle analysis, it relates to assessing the environmental impacts of a product's life cycle, including raw material extraction,

processing, manufacturing, distribution, use by the consumer and disposal of the product. The life cycle assessment may be quantified using sustainability metrics like the carbon footprint of the product to objectively analyse the impact. Any harm caused on account of increased carbon footprint or carbon emission should be considered unfavourable and a negative aspect while analysing any efficiency gain and if there occurs any benefit on account of decreased carbon footprint or carbon it may be considered favourably and as a positive aspect validly constituting efficiency gain.

B. New Theories of Harm

Companies compete on multiple fronts, for example, price, quality, distinguishing features etc. Non-price factors are catered towards competition based on product differentiation rather than economic considerations. Sustainability is a non-price factor on which companies can compete in the marketplace.²⁴ We may look at other non-price dimensions such as product quality, innovation, and consumer choice, to extrapolate theories of harm which revolve around considering factors impacting consumer welfare in the market and/or promoting innovation or competition. For example, data privacy is another type of non-price competition, the antitrust regulators consider transactions which reduce data privacy as detrimental to the extent it is affecting consumer welfare and restrict competition in the market or consumer choice or innovation.²⁵ Similarly, sustainability can also be judged on these three dimensions, i.e., non-sustainable products will harm consumers and create negative externalities thereby reducing consumer welfare, non-sustainable products are usually cheaper and may drive sustainable competition out of the market thereby restricting consumer choices and anti-competitive agreements may choke technical progress or artificially restrict it thereby thwarting innovation.

If a transaction is aimed at increasing product sustainability, reducing carbon footprint or utilising greener technologies for production then it can be considered to have efficiency gains. Such efficiency gains may also lead other players in the market to adopt the same practice or follow the path where a major player in the industry opts for a sustainable route then its

²⁴ OECD, 'Sustainability and Competition', (OECD, 2020) <<https://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf>> accessed April 8, 2023.

²⁵ Hengeler Muller, 'Green Deal and Merger Control Sustainability – A Killer Deal Rationale', (Hengeler Muller, March 2021) <<https://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf>> accessed April 8, 2023.

competitors might also follow resulting in overall development. For example, the smartphone and handheld devices company Apple reduced its packaging and started using recyclable and recycled materials to distinguish its products based on promoting sustainability;²⁶ this has led to other manufacturers using recyclable and recycled materials to push for a greener production process.

It may be argued that in competition policy we find that if such an agreement or M&A activity is not affecting competition the regulators do not have the adequate authority to disallow such transactions. Here prima facie opinion may suggest that such transactions may be blocked, these considerations are not that far beyond the scope of regulators, we are currently looking at it through a narrow lens we need to broaden it. At this stage it becomes important to discuss the broader relevant market structures which may be used to analyse the impact of unsustainable practices as they have a societal/universal impact rather than just having an impact in the narrowly defined relevant market.

C. Developing Relevant Market Structure

The usual framework of determining the category of consumers who will be benefitted or be affected by any positive or negative environmental effect respectively is extremely difficult. The scale of this problem is immense as it will not only be present in those cases where there is a direct benefit to the relevant consumer, but benefits may also arise to other individuals or society at large which is outside the scope of the relevant market which may be under consideration. For example, if there is a sustainability agreement between fast fashion manufacturers to incorporate recycled or recyclable material or if there is cooperation to limit leather production from endangered species the benefits and impact of this will be felt far beyond the relevant market and even by the future generations.²⁷ This phenomenon is known

²⁶ Apple, 'Apple Expands the Use of Recycled Materials across Its Products' (*Apple Newsroom (India)*, April 19, 2022) < <https://www.apple.com/in/newsroom/2022/04/apple-expands-the-use-of-recycled-materials-across-its-products/> > accessed April 8, 2023.

²⁷ Directorate For Financial and Enterprise Affairs, 'Environmental Considerations in Competition Enforcement' (*OECD*, 19 November 2021) < [https://one.oecd.org/document/DAF/COMP\(2021\)4/en/pdf](https://one.oecd.org/document/DAF/COMP(2021)4/en/pdf) > accessed April 8, 2023.

as out-of-market efficiency, it means that efficiency is being raised in an interlinked or external market than the defined relevant market.²⁸

The present jurisprudence is not in favour of accepting out-of-market efficiencies as an argument. The US Supreme Court in the *Philadelphia National Bank case*²⁹ set the precedent that efficiencies arising apart from the defined relevant market are to be discarded. EU guidelines on horizontal mergers³⁰ also dictate that efficiencies must be derived in the relevant market where competition must arise, this also disregards the role of out-of-market efficiencies. Competition regulators in Australia and New Zealand use the public benefit test³¹ i.e., the regulator may grant permission to an anti-competitive merger or arrangement if it has sufficient public benefit which outweighs the anti-competitive harms. The term public benefit carries a wide definition in both regimes (reference may be made to *Air New Zealand v. Commerce Commission*).³² Generally, it means anything of value to the public which inter-alia leads to economic benefits and progress.³³

The Public Benefit principle might be one of the easiest ways to incorporate sustainability considerations in competition law. We need to move towards hard and non-flexible economic assessments and develop a holistic approach whereby the assessment of efficiency and progress is seen from a societal point of view thereby considering out-of-market efficiencies.³⁴

VII. ANTITRUST AND SUSTAINABILITY IN INDIAN CONTEXT

In comparison to the competition authorities around the world, the Indian competition regime has not gained much momentum in discussions regarding sustainability and the ability of extant competition policy to advance sustainable development. The Competition Act, 2002 (“**the**

²⁸ OECD, ‘Environmental considerations in competition enforcement’, (OECD, 2021) <<https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement.htm>> accessed 8 April 2023.

²⁹ *United States v Philadelphia Nat'l Bank* 374 U.S. 321 (1963).

³⁰ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/03, art 79.

³¹ Directorate For Financial and Enterprise Affairs, ‘Sustainability and Competition – Note by Australia and New Zealand’ (OECD, 6 November 2020) < [https://one.oecd.org/document/DAF/COMP/WD\(2020\)62/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)62/en/pdf)> accessed 8 April 2023.

³² *Air New Zealand v Commerce Commission* (No 6) (2001) 11 TCLR 347 (HC).

³³ VFF Chicken Meat Growers’ Boycott Authorisation (2006) AcompT 9.

³⁴ Directorate For Financial and Enterprise Affairs, ‘The Role of Efficiency Claims in Antitrust Proceedings’ (OECD, 2 May 2013) <<https://www.oecd.org/competition/EfficiencyClaims2012.pdf>> accessed 8 April 2023.

Act”) and even the Competition (Amendment) Bill, 2022 fail to bring sustainability concerns. But legislation is not the end-all and be-all of competition policy, its heart and soul lie in the implementation by the regulator. Competition law in India is enforced by the Competition Commission of India (“CCI”). As we have already seen how the European Commission is acting against arrangements and conducts which are harmful to the environment at large, even the CCI has enough power to consider environmental considerations.

CCI is empowered to deal with anti-competitive agreements (u/s 3 of the Act), abuse of dominance (u/s 4 of the Act) and M&A (u/s 5 and 6 of the Act). Like other jurisdictions, the defence of efficiency gains is also available in India. CCI has the statutory mandate to consider sustainability considerations in case of anti-competitive agreements, abuse of dominance and M&A activities.

Section 19(3) of the Act provides the factors to be considered while determining the appreciable adverse effect on competition (“AAEC”) because of an anti-competitive agreement. Under this, the CCI is required to consider accrual of benefits to consumers³⁵ and promotion of technical, scientific and economic development.³⁶ These provisions can empower the CCI to consider sustainability factors. For example, if an agreement which raises competition concerns results in better R&D in developing environment-friendly goods and services, the CCI may consider the development of greener technology as a benefit to consumers and allow such an arrangement.

Section 19(4) of the Act³⁷ relates to factors which must be considered while determining abuse of dominance, the CCI has the power to consider social obligation, market structure and any other factor it deems fit granting the commission ample power to consider sustainability concerns. Similarly, in case of combinations [mergers and acquisitions, (“M&A”)], the CCI may take into consideration any gain or harm to sustainability as a non-price dimension following our discussion and global jurisprudence enunciated in the previous section. The public benefit principle as used in Australia and New Zealand can also be applied in India along with including out-of-market efficiency, India has a comparatively nascent competition regime and there is no baggage of previous decisions weighing down CCI from considering out-of-

³⁵ The Competition Act 2002 s. 19(3)(d).

³⁶ The Competition Act 2002 s. 19(3)(f).

³⁷ The Competition Act 2002 s. 19(4).

market efficiencies in the case where the agreement, dominant firm or M&A transaction leads to environmental and competition concerns.

Sustainability is considered a ‘quality’ dimension in competition assessment³⁸ but the most important challenge in India will not be policy or regulator’s intent, it would be market failures and the lack of consumer willingness to pay. Unlike other developed nations the average household income in India will not permit consumers to shift to comparatively expensive sustainable products. To surpass this CCI may also create guidelines for sustainability agreements and promote sustainability agreements by creating green channels for the same as guidelines will create certainty, attract investment, promote cooperation and green channels will fast track the process exponentially increasing the benefits.

Furthermore, it also becomes crucial for CCI to expand its approach and work on mechanisms to develop a relevant market structure to consider the benefits or harms occurring to society at large on account of environmental considerations. To solve this, lessons may also be learnt from jurisdictions like New Zealand and Australia where they have adopted the public benefit principle. Given the nascency of the competition regime, there has not been a case of out-of-market efficiency, but the public benefit approach will help CCI in balancing the efficiency gains or benefits to consumers and harms or antitrust concerns. The competition regimes all around the world have a long way to go concerning accommodating environmental considerations in competition assessment and India is no exception.

VIII. CONCLUSION

Finally, in determining what should be the fair share of benefits, we should reconsider our priorities while weighing different parameters. How much is the cheap price of a product? How far are we willing to pay for the sustainable qualities of a product, even if it results in a price increase? These are some of the questions that need to be addressed collectively by the regulatory authorities and the private industries.

As discussed above, individual income and market cost of products are deterministic factors in the purchasing decisions of consumers. Most consumers would be ready to switch towards

³⁸ Volpin, C., ‘Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)’ (2020) CPI Antitrust Chronicle < <https://dx.doi.org/10.2139/ssrn.3917881> > accessed 8 April 2023.

sustainable alternatives if their cost is on par with unsustainable products. To encourage the purchase of sustainable products, one way is to reduce the prices of such products through government aid and subsidies. The other way could be to increase the price of unsustainable products at par with the sustainable products. This could happen if the environmental degradation caused by the production of unsustainable products are also included in the final market value. Initially, this might be expensive for the consumers, particularly in developing economies, but with proper government support and regulations, the additional expenses can be operated. The result would be that the industries will not be opting for cheaper unsustainable alternatives due to lack of demand and this will eventually result in the elimination of unsustainable products from the market.

We need to consider the benefits or harms accruing to the society at large while carrying out assessments in case of agreements, abuse of dominance or mergers and acquisitions. If an M&A transaction is resulting in the deterioration of sustainability or promotes an unsustainable product or production process, the transaction should be carefully scrutinised by the competition regulator and an act of balancing the competitive advantages and the environmental degradation should be carried out before approving the transaction. Given the urgency of the situation, competition regulators ought to consider relevant sustainability metrics and non-economic aspects for understanding the true nature of the impact an agreement, dominant firm or M&A can have. Lastly, it is important for the CCI to understand the grave importance of the situation and prime itself in accordance with developing jurisprudence on the topic across different competition regimes allowing it to develop the best approach for handling sustainability agreement cases, killer acquisitions and dealing with allied problems such as developing theories of harm and relevant market structure for the purpose of competition assessment.