

**COMPETITION LAW TACKLING SUSTAINABILITY GOALS: AN ANALYSIS OF INTERNATIONAL
PRACTICES AND THE CHALLENGES AHEAD**

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Abstract: *The ever-increasing awareness of the climate change has put the need for a responsive and pro-active competition law regime fostering sustainability into the limelight. Many competition authorities / regulators have been looking at ways to go green in recent times. Sustainability and the revision of competition framework have gained significant importance in recent times.*

It has become clearer over the past few years that sustainability goals can be achieved when companies, including the regulators, cooperate to establish industry-wide sustainability goals and put them into practice.

The sustainable goals of the United Nations along with the promise of the various nations to achieve sustainability in the coming decades, will frame the future course for development keeping in mind the Paris Agreement. Green antitrust policy combined with economic progress is now one of the highly debated topics by regulators of various jurisdictions

The time is ripe for the Competition Commission of India to provide concrete competition policy for sustainability initiatives as well a detailed guidance to the companies in order to achieve the sustainability goals. The path to a sustainable antitrust policy is covered with various hindrances such as economic development, innovation, jurisdictional challenges and India's international commitments.

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I. INTRODUCTION

“Competition policy, if appropriately designed and effectively implemented according to the economic, social and environmental circumstances in a country, is expected to complement other government policies in achieving sustainable and inclusive growth and development.”¹

“Companies today face powerful incentives to find more sustainable ways to do business. Consumers are demanding greener products from them. And environmental taxes and rules make it expensive for companies to operate in ways that harm the planet. But it’s competition that actually transmits those pressures to the boardroom. It’s the need to compete that pushes companies to do more to meet consumers’ needs, and use less costly resources – changing business models, for instance, or investing in green innovation...”²

The decade of action for sustainability has seen many countries taking a closer look at their policy frameworks and set ambitious goals to meet climate change challenges. While some have already brought about amendments to their existing laws, others are in the process of assessing the possibilities of meeting sustainability goals through existing regimes. The ever-increasing awareness of climate change has put the need for a responsive and proactive regime fostering sustainability into the limelight.

This article aims to assess the interplay between sustainability and competition laws, witnessed through the international developments in the area of law to address the challenges in meeting sustainability goals. It also discusses the competition concerns which are yet to be resolved and highlights certain policy-level steps that may be taken to meet sustainability goals. Finally, it concludes with some suggestions on how the Indian competition authority, the Competition Commission of India (‘CCI’), may contribute in meeting India’s sustainability commitments.

¹ UNGA, ‘Transforming our world: the 2030 Agenda for Sustainable Development’ (21 October 2015) A/RES/70/1.

² Margarethe Vestager, ‘Competition policy in support of the Green Deal’ (*European Commission*, 10 September 2021) <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en> accessed 26 December 2021.

II. SUSTAINABILITY AND COMPETITION

Any satisfactory policy on sustainability must primarily address its three pillars, *viz.*, environmental protection, economic growth, and social inclusion. To quote the Brundtland report of the World Commission on Environment and Development, sustainability can be simply defined as “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*”.³ Thus, sustainability and its three pillars have become the universal goal to be achieved with everyone including the state and the private sector holding crucial responsibilities.⁴

For the private sector, the focus on sustainability, which is likely to become one of the new theories of assessing competitive harm to be used by competition authorities, indicates an increased responsibilities on the businesses.⁵ With enhanced requirements for internal checks and compliances, businesses are now mandated to disclose the environmental impacts of their supply chain.⁶ Further, actions such as colluding to restrict development leading to causing harm to the environment,⁷ or making misleading sustainability claims⁸ can come at a high price, ranging from reputational risks, threat to financing opportunities, denial of market access and trade opportunities, to outright sanctions imposed by regulators. Therefore, the need of the hour is for the enterprises to proactively engage with the community and the state in setting targets for fostering sustainability.

³ World Commission on Environment and Development, *Brundtland Report* (1987) 43.1

⁴ Katriina Soini, Joost Dessein, ‘Culture-Sustainability Relation: Towards a Conceptual Framework’ (2016) *Sustainability Journal* 8(2) <<https://www.mdpi.com/2071-1050/8/2/167>> accessed 26 December 2021.

⁵ The Austrian Federal Competition Authority, the Competition and Markets Authority, United Kingdom, the European Commission and the Authority for Consumers and Markets, Netherlands are presently at the stage of conducting public consultations on the proposed guidelines and/or changes which can be brought about to the existing regulations in relation to sustainability.

⁶ Jurisdictions such as China, France, United Kingdom, Australia have mandatory ESG disclosures for the businesses. Please see: Philipp Krueger, Zacharias Sautner, Dragon Yongjun Tang and Rui Zhong, ‘The Effects of Mandatory Disclosures around the World’ (*Finance Working Paper N° 754/2021*, 2021) 57.

⁷ The European Commission found that Daimler, BMW and Volkswagen group breached EU antitrust rules by colluding on technical development in the area of nitrogen oxide cleaning and imposed a fine of € 875,189,000. The Commission noted that such type of cartel can directly impact the European Green Deal and the Commission will proceed to take action against the same. Please see: ‘Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars’ (*European Commission*, 8 July 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581> accessed 29 November 2022.

⁸ The Authority for Consumers and Markets, Netherlands has initiated investigations against greenwashing. The Competition and Markets Authority, United Kingdom has also mentioned that investigations will be initiated against any misleading sustainability claims.

One way in which enterprises can further the sustainability agenda is through collaborating with the other players in the market. This can be done by entering into sustainability agreements.

III. SUSTAINABILITY AGREEMENTS: ARE THEY COMPETITION COMPLIANT?

Firstly, businesses can attempt to individually adopt sustainability goals in their practices. That said, collaborating with other players in the market can significantly reduce risks and lead to extensive research and development. For instance, businesses making substantial investments in innovative but unproven green technologies can mitigate the associated risks by executing long-term agreements for cooperation between actual or potential competitors, or even exclusive supply or purchasing arrangements.⁹ Specifically, for meeting the ambitious environmental targets, it has been recognized that competitor collaboration may become essential especially in cases where the objectives cannot be met alone and the first mover disadvantage is extremely high.

Having said that, competition laws pose major red flags to such types of agreements. These collaborations, if not done right, may violate the competition laws leading to investigations by the authorities. In such investigations, the authorities will assess if such collaboration agreements restrict competition to a significant degree (the test for which is different in different jurisdictions).¹⁰ More specifically, the agreements will have to be scrutinised keeping in view any impact on prices, increased coordination, reduction in the range of available options or affecting the markets in the favour of the parties without any corresponding procompetitive effects.

For instance, the German competition authority, Bundeskartellamt, while assessing an agricultural policy project which proposed a financing model in favour of the raw milk producers (essentially, agreeing on surcharges which would be passed along the supply chain right down to the milk shelf), noted that it was not acceptable under competition law as it was

⁹ ‘Environmental sustainability and the competition and consumer law regimes: Advice to the Secretary of State for Business, Energy and Industrial Strategy’ (Competition and Markets Authority, 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021364/CFI_-_sustainability_advice_.pdf> accessed 26 December 2021.

¹⁰ ‘Guidance on Environmental sustainability agreements and competition law’ (Competition and Market Authority, 27 January 2021) <<https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law>> accessed 3 January 2022.

essentially a price agreement disadvantageous to the consumers.¹¹ Similarly, the ‘Chicken for Tomorrow’ initiative in the Netherlands, which entailed an industry-wide cooperation aiming to improve the living standards for broiler chicken sold in supermarkets, was observed to be restrictive of competition by the Dutch competition authority, i.e., Authority for Consumers and Markets (‘ACM’).¹² The initiative resulted in increased prices of chicken for consumers.¹³

However, this should not deter the private sector from taking the necessary steps towards achieving sustainability. Many forms of collaboration between businesses for the achievement of sustainability goals are unlikely to raise any competition law issues. Ultimately, what needs to be kept in mind is that such agreements may deliver certain quantifiable and specific benefits from the perspective of sustainability/environment protection that outweigh the potential consequence of restricting competition. The authorities are likely to assess these agreements on a case-to-case basis.

Considering this, competition authorities in many jurisdictions have been actively initiating the discourse on sustainability. Many authorities have now acknowledged that their main objective should be to establish a conducive framework. This has led to plethora of policy papers getting published and discussions being conducted globally. The authorities are aware of the consumer benefits arising from such sustainability agreements and are focused on developing quantitative measures for assessing accrual of such benefits.

The next section provides a snapshot of the changes witnessed in the recent few years in different jurisdictions in relation to sustainability.

IV. POLICY CHANGES: RECENT DEVELOPMENTS IN THE COMPETITION SPACE

¹¹ ‘Surcharges without improved sustainability in the milk sector: Bundeskartellamt points out limits of competition law’ (*Bundeskartellamt*, 25 January 2022) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/25_01_2022_Agrardialog.html> accessed 31 October 2022.

¹² Jan Peter van der Veer, ‘Valuing Sustainability? The ACM’s analysis of “Chicken for Tomorrow” under Art. 101(3)’ (*Kluwer Competition Law Blog*, 18 February 2015) <<http://competitionlawblog.kluwercompetitionlaw.com/2015/02/18/valuing-sustainability-the-acms-analysis-of-chicken-for-tomorrow-under-art-1013/>> accessed 01 November 2022.

¹³ Murco Mijnlief, ‘Dutch Supermarkets Offer Chicken Meat That is More Sustainable Without Any Anti-Competitive Agreements’ (*Authority for Consumers and Markets*, 1 September 2020) <<https://www.acm.nl/en/publications/dutch-supermarkets-offer-chicken-meat-more-sustainable-without-any-anticompetitive-agreements>> accessed 1 November 2022.

Most of the countries have now adopted a multi-disciplinary approach towards imbining sustainability. In 2015, the United Nations member states adopted the Sustainable Development Goals ('SDGs'). The SDGs are popularly known as Agenda 2030 and comprise 17 goals for sustainable development which set out a 15-year plan to achieve the goals. While most countries have aligned their SDGs with the Agenda 2030,¹⁴ implementation and success of the SDGs depend heavily on the countries' own policies, plans and programmes.

Accordingly, the interplay between competition laws and sustainability have also come under the focal lens of governments in various countries/blocs, with certain countries/blocs taking a lead. Authorities such as the European Commission ('EC'), Austrian Federal Competition Authority ('AFCA'), and the Dutch ACM have taken proactive measures to assess whether sustainability should be imbibed in the competition space to incentivize private players in the markets. Some of the key measures taken by the authorities have been summarized below.

A. Austria

The front runner in the race of imbining sustainability by amending the existing competition law is the AFCA. In September 2021, the Austrian Cartel Act, 2005 was amended to include a unique legislative development internationally. The amendment was attributed to the Austrian legislature inviting the AFCA to include sustainability considerations in its enforcement practice.

The previous regime exempted agreements from the cartel prohibition if they "*contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit*". This clause was further amended to explicitly state the following: "*consumers are granted a fair share of the benefit resulting from the improved production of goods, its distribution or the promotion of the technical and economic progress if the agreement significantly contributes to an ecologically sustainable and climate neutral economy*".¹⁵ The amendment was accompanied with legislative materials spanning three pages. The legislative material lists

¹⁴ The SDGs provided in Agenda 2030 act as a compass for aligning countries' plans with their global commitments. United Nations Sustainability Development Goals Overview (*United Nations Department of Social and Economic Affairs*, 2020) <<https://unstats.un.org/sdgs/report/2020/overview/>> accessed 3 January 2022.

¹⁵ Cartel Act 2005 2005/61, section 2(1).

illustrative factors to assess sustainability efficiencies which may outweigh the cartel prohibition, such as:

1. Climate protection, sustainable use and protection of water resources, transition to a circular economy and the protection and restoration of biodiversity and ecological ecosystems;
2. Such environmental benefits may accrue towards the society as a whole and need not be related to solely the market in which the relevant measure is implemented;
3. The beneficiaries of the advantages arising out of the measures taken today can be future generations as well.¹⁶

Whilst the application of the amendment may not be as straightforward as businesses would wish for, AFCA has certainly made a very significant start in the direction of using competition rules in promoting the sustainability agenda. The Austrian legislature and AFCA have taken commendable steps towards incorporating sustainability goals within the express wordings of the law. However, much guidance will be required to bring this provision into force and allow it to lead to any tangible changes. Still, while awaiting further guidance from the authorities on the amendment, businesses have been presented with sufficient roadmaps through the legislative materials to start the process of ‘going green’ from their end.

B. United Kingdom

On 27 January 2021, the Competition and Markets Authority (‘CMA’) published an information sheet on sustainability agreements and competition law.¹⁷ Further, the CMA also conducted public consultations seeking inputs specifically on competition law enforcement, merger control, consumer protection law, and market investigations. While the guidance provided by CMA so far is similar to the developments taking place in the other jurisdictions, some unique points can still be highlighted. Firstly, the CMA has outlined the scope of a sustainability agreement in the following terms:

“Cooperation agreements between businesses (including industry-wide initiatives and decisions of trade associations)

¹⁶ Viktoria H.S.E. Robertson, ‘The New Sustainability Exemption in Austrian Competition Law’ (2021) *Journal of European Competition Law & Practice* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3957551> accessed 25 January 2022.

¹⁷ ‘Guidance on Environmental sustainability agreements and competition law’ (*Competition and Markets Authority*, 27 January 2021) <<https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law>> accessed 15 January 2022.

for the attainment of sustainability goals, such as tackling climate change. For example, businesses may decide to combine expertise to make their products more energy efficient or agree to use packaging material that meets certain standards in order to facilitate package recycling and reduce waste.”¹⁸

It has further provided clarity on the CMA’s aim behind providing such guidance, which can be summarised as follows -

1. To ensure that competition policy does not create an unnecessary obstacle to sustainable development; and
2. That businesses are not deterred from taking part in lawful sustainability initiatives from the mistaken belief that they may breach competition law.

The CMA has even provided a ‘framework for assessment’ flowchart which would help businesses in assessing how to structure their agreements to make it competition compliant and further enhance sustainability goals.¹⁹

That said, the prevalent regime in UK has scope for allowing sustainability agreements to not be assessed as anti-competitive. Under the applicable Competition Act, 1998 (‘CA98’), Schedule I provides for certain block and individual exemptions. In case businesses cannot avail of the same, CA98 also provides scope for exempting such agreements which lead to consumers enjoying a fair share of the resulting benefit.²⁰ Moreover, the courts have also ruled in favor of agreements which have restrictive effects on competition but still fall outside of competition law entirely where there exist justifications in the form of legitimate objectives.²¹

Further, in the context of merger control, the CMA also noted that mergers which advance the sustainability goals may lead to ‘rivalry enhancing efficiencies’ or ‘relevant

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ Competition Act 1998, s. 9(1).

²¹ *Wouters and Ors.* [2002] Case C-309/99; *P Meca-Medina and Majcen v Commission* [2006] Case C-519/04; ‘Environmental sustainability and the competition and consumer law regimes: Advice to the Secretary of State for Business, Energy and Industrial Strategy’ (Competition and Markets Authority, 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021364/CFI_-_sustainability_advice_.pdf> accessed 15 January 2022.

customer benefits'. In such a scenario, the authority may view such merger favorably despite anti-competitive effects resulting from the merger. But this presents its own challenge, since weighing the two factors against each other may not be entirely accurate and will require analysis on a case-to-case basis.²² Lastly, CMA's call for inputs has laid down a list of questions which captures almost every point of discussion on sustainability and competition law. With the final assessment of the inputs so received yet to be published, only time will tell how the CMA will enforce the sustainability goals through their guidelines.

C. European Union ('EU')

The EC has conducted public consultations coupled with a conference to assess how EU competition rules can support the environmental and climate policies in light of the European Green Deal, which is a roadmap for making the EU's economy sustainable by turning climate and environmental challenges into opportunities across all policy areas.²³

The EC recently published a competition policy brief in support of Europe's green ambition ('**EC Policy Brief**').²⁴ The EC Policy Brief provides clarity on certain major concerns which the authorities are grappling with while incorporating the sustainability goals, such as:

1. They noted that any policies coming into play will only be effective if the markets react to the signals and incentives without creating any distortions to competition.
2. At the same time, the EC must be cognizant of the different situations across member states in order to get the transition to a green economy right and ensuring continued social and political acceptance.
3. Basis the inputs received from various stakeholders, the EC noted that in the absence of clarity on antitrust assessment of sustainability objectives, the risk of breaching the competition rules would prevent businesses from investing in sustainable products or processes.

²² *ibid.*

²³ 'A European Green Deal' (*European Commission*, 2019) <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en> accessed 30 November 2022.

²⁴ Alexandra Badea, Marin Bankov, Graça Da Costa, José Elías Cabrera, Senta Marenz, Kevin O'Connor, Ekaterina Rousseva, Johannes Theiss, Andrea Usai, Sofia Vasileiou, Alexander Winterstein and Marc Zedler, *Competition policy brief* (European Commission 2021) <https://content.mlex.com/Attachments/2021-09-10_4425K2MR3317JTAH/Competition%20Policy%20Brief%20-%20Green%20Deal%201-2021.pdf> accessed 25 January 2022.

4. In the merger control space, the EC also took into account the views of the stakeholders regarding continued application of innovation theories of harm as a means of preventing loss of “green” innovation.²⁵

Ultimately, the EC Policy Brief provides the roadmap ahead for the EC. The EC will continue to enforce the existing law, viz., Articles 101 and 102 of the Treaty on the Functioning of the European Union, 1958 (as amended) (‘TFEU’) and European Merger Regulation. The changes with respect to sustainability is proposed to be built into guidance provided in its existing guidelines on horizontal cooperation and vertical agreements.

D. The Netherlands

Certain competition authorities, like the ACM, have exercised their powers to take benefits from sustainability into account when assessing consumer benefits, in spite of an absence of the clear wording of the law. Following in the footsteps of the other authorities, the ACM has also issued draft sustainability guidelines. Although, in contrast to the other authorities, the ACM has also published, in cooperation with the Greek competition authority, an economic technical report which provides ways to quantify the efficiency gains of environmental sustainability initiatives.²⁶ The methodology adopted can be simplified in the following manner: *“The general approach for estimating the welfare gains attributable to improvements in environmental sustainability is to compare the Total Economic Value (TEV) of two scenarios, one with and one without the considered restrictions to competition.”*²⁷

The report essentially recommends to analyse counterfactual scenarios/data which could be conducted for quantifying the benefits arising from a sustainability agreement. The report draws on concepts and tools from environmental economics to answer the question of what forms of quantitative assessment could be applied to take account of the broader social benefits, as well as benefits for future generations, in competitive assessments.²⁸ With the

²⁵ *ibid.*

²⁶ Roman Inderst, Eftichios Sartzetakis and Anastasios Xepapadeas, Hellenic Competition Commission, *Technical Report on Sustainability and Competition* (Netherlands Authority for Consumers and Markets 2021) <https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf> accessed 30 November 2022.

²⁷ *ibid.*

²⁸ *ibid.*

consultation process currently underway, the ACM has proactively initiated investigations against businesses which are making misleading sustainability claims^{29,30}.

E. Germany

The German antitrust authority, Bundeskartellamt, has dealt with the question of whether environmental factors can be considered with regard to the prohibition of anti-competitive agreement. In 1999, the German Competition Act was amended to introduce a new exemption rule which expressly related to cooperations implementing take-back under the environmental law. The take-back and recovery obligations essentially focus on the agreements and decisions which contribute to improving the taking back and disposal of goods while allowing the consumers a fair share of the resulting benefits. These agreements and decisions were then exempted from prohibition under the German Competition Act provided that the improvement could not be achieved otherwise by the participating undertakings and was of sufficient importance when compared with restraint of competition connected with it and the restraint of competition did not result in creation or strengthening of dominant position.³¹

Recently, the Bundeskartellamt concluded its examination of two separate business cooperation and sustainability initiatives related to the banana sector and animal welfare initiative. The examination was the authority's attempt to advise businesses on cooperation and provide guidance especially on how to ensure that sustainability strategies are embedded in competition law. The sector examinations pertained to (i) food retail sector's voluntary commitment to set common standards for wages in the banana sector;³² and (ii) the labelling of meat products in line with animal welfare criteria and development of the existing

²⁹ For instance, the ACM contacted around 70 companies in the clothing sector for making misleading claims such as claiming a t-shirt to be made of organic cotton which was in reality made of 50% organic cotton; or where an online store offered its customers the option to filter their choices based on sustainability, but the website did not provide any explanation for why the filtered products were considered sustainable. See: Saskia Bierling, 'ACM launches investigations into misleading sustainability claims in three sectors' (*Authority for Consumers and Markets*, 03 May 2021) <<https://www.acm.nl/en/publications/acm-launches-investigations-misleading-sustainability-claims-three-sectors>> accessed 01 November 2022.

³⁰ Sari van Grondelle, 'Dutch competition authority to investigate misleading sustainability claims' (*Pinsent Masons*, 11 May 2021) <<https://www.pinsentmasons.com/out-law/news/dutch-competition-authority-to-investigate-misleading-sustainability-claims>> accessed 30 November 2022.

³¹ 'Sustainability and Competition – Note by Germany' (*OECD*, 1 December 2020) <[https://one.oecd.org/document/DAF/COMP/WD\(2020\)63/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)63/en/pdf)> accessed 1 February 2022.

³² The Bundeskartellamt noted that for this initiative, no information on procurement prices, other costs, production volumes or margins was exchanged. Further, there were no compulsory minimum prices or surcharges introduced at any point of the supply chain.

financing model for the animal welfare initiative.³³ The authority also considered the EU legal framework for assessing these initiatives to implement sustainability standards. It noted that any cooperation or initiative which involve price-fixing agreements, which are not aimed at a higher sustainability standard than stipulated by EC or any national law cannot be exempted under the German antitrust laws. That said, the authority approved the food retail sector's voluntary commitment for setting common standards to improve living wages in the banana sector. However, the same cannot be said for the animal welfare initiative, as the authority has raised concerns towards the project and the project is currently under development for the next phase.³⁴

V. COMPETITION CONCERNS YET TO BE RESOLVED

Some western authorities have taken steps towards bringing sustainability to the limelight and shown their willingness to adapt their assessment methodology. While the stakeholders await the formal guidelines/guidance to be issued, there are certain concerns which should also be addressed at the preliminary stages. Some of these concerns have been highlighted below:

A. Killer green acquisitions

Killer acquisitions have been a contentious issue for competition authorities for quite some time. It has been a heavily debated topic especially in the context of theories of harm. Killer acquisitions essentially involve firms with more market power acquiring nascent competitors only to discontinue the target's innovation projects, thereby pre-empting the emergence of future competition.³⁵ This, in the context of the green acquisitions has drastic implications which the authorities must be wary of. The EC emphasized on the need to prevent killer green acquisitions in the EC Policy Brief but has not offered any redressal mechanism just yet. It remains to be seen how the authorities will clamp down on killer acquisitions, especially where they affect sustainability goals.

³³ It was observed that standard premium paid by businesses to livestock owners who improved the conditions in which the animals were kept was tolerated for the transitional period. However, emphasis was laid on the competition elements which were proposed to be gradually introduced.

³⁴ 'Achieving sustainability in a competitive environment – Bundeskartellamt concludes examination of sector initiatives' (Bundeskartellamt, January 2022) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html> accessed 1 February 2022.

³⁵ 'Start-ups, killer acquisitions and merger control' (OECD, 11 June 2020) <<https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm>> accessed 25 January 2022.

B. Incentive to innovate

Authorities have acknowledged that the current regime does not incentivise businesses enough to innovate and become sustainable. With the guidelines from most jurisdictions yet to be published, businesses may still tread the waters with caution and any substantial change in practices may not be witnessed immediately. Since the assessment of sustainability claims (be it in the form of a sustainability agreement or a green merger) requires the authorities to assess efficiencies on a case-to-case basis, the lack of practical application of any upcoming guidelines in preliminary stages may even deter the businesses from actively participating and innovating.

C. Legitimacy of sustainability defence

Yet another aspect which needs a thorough analysis by authorities is how sustainability defence will be judged against the anticompetitive practice. There cannot be one yardstick for defining what is right or wrong. Yet, quantitative measures (as ACM has attempted to provide) may be helpful for businesses as well to self-assess and build sustainability defences accurately. Whether these defences will hold any ground in the eyes of authorities can only be seen through the jurisprudence as it develops.

D. Jurisdictional challenges

Sustainability defence will also present its unique set of jurisdictional challenges. For instance, what will be the assessment criteria in the event claimed sustainability benefits do not accrue directly in the jurisdiction where the assessment is taking place? Additionally, a sustainability agreement encompasses multiple jurisdictions, which provides further leeway for non-adherence. The global nature of supply chains in today's world must be factored in while determining how sustainability claims may practically work out. This will ultimately depend on increased international cooperation amongst the regulators and proactive disclosures to be made by the private players.

E. Greenwashing

The practice of making misleading sustainable claims by companies related to their products, services or other business practices is termed as greenwashing. Companies often boast about carrying out sustainable activities even when their contribution is miniscule.

Several authorities, including the CMA and the EC have observed that misleading claims carry a higher risk of deviation from the SDGs. The ACM has initiated investigations against greenwashing practices in several sectors such as energy, clothing, etc. The CMA has warned businesses that a review will be carried to investigate misleading claims in 2022.³⁶

The CMA in its guidance note has specified that the businesses which make or consider making environmental claims, should:

1. stop making false or deceptive statements;
2. amend their claims to ensure they are compliant;
3. ensure that they have the evidence to substantiate their claims; and
4. ensure that they give consumers the information they need to make informed choices.³⁷

1. Definition of Claims

While the terms ‘sustainability’ and ‘greenwashing’ have attained certain level of clarity, the term “sustainable claims” have not been interpreted and therefore lacks a clear definition. A lack of definition keeps a loophole in the accomplishment of the SDGs. However, a clear definition may not be necessary due to the subjectiveness of the concept and traditional interpretation of Article 101(3) TFEU may be used on a case-to-case basis.³⁸

Though there is no particular definition of sustainable claims, jurisprudence has suggested various principles that must be kept in mind in order to make sustainable claims. The claims must be:

1. Truthful and accurate;
2. Clear and unambiguous;

³⁶ Saskia Bierling, ‘ACM launches investigations into misleading sustainability claims in three sectors’ (*Authority for Consumers and Markets*, 03 May 2021) <<https://www.acm.nl/en/publications/acm-launches-investigations-misleading-sustainability-claims-three-sectors>> accessed 25 January 2022.

³⁷ ‘CMA Guidance on environmental claims on goods and services’ (*Competition and Markets Authority*, 20 September 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018820/Guidance_for_businesses_on_making_environmental_claims_.pdf> accessed 25 January 2022.

³⁸ David Wouters, ‘Sustainability Agreements vs Greenwashing under Article 101 TFEU’ (*Kluwer Competition Law Blog*, 3 June 2021) <<http://competitionlawblog.kluwercompetitionlaw.com/2021/06/03/sustainability-agreements-vs-greenwashing-under-article-101-tfeu/>> accessed 01 November 2022.

3. Must not omit or hide important information;
4. Make fair and meaningful comparisons; and
5. Must consider the full life cycle of products or services.³⁹

2. *Effects of Greenwashing*

From an antitrust perspective, the actions of greenwashing can also result into a situation where false sustainable claims of one company maligns the competitors' business and denigrates competitors' products. Additionally, in certain cases competing companies use an environmental claim or agreement as a convincing ground to engage in anti-competitive collaboration.

Further, an environmental agreement amongst competing companies would be unlikely to restrict competition as long as: (i) it does not place any individual obligation on the parties, or if parties only commit loosely to contributing to a sector-wide environmental target, or (ii) the agreement stipulates environmental performance with no effect on product and production diversity, or (iii) it gives rise to genuine market creation.

The EU in its Press Release in early 2021 highlighted that in more than 50% cases, the company could not provide sufficient information to the customer to assess the accuracy of their claims and in 42% cases the claims were exaggerated, false or deceptive.⁴⁰

3. *Consequences of Non-compliance with Claims*

Companies have often failed to comply with their sustainable claims and sometimes underachieved their claims which leads to various proceedings and penalties under consumer protection and antitrust laws.

The cost and time spent in investigations by multiple authorities for potential violations by companies result into denigration of products and services of other players as well in the market. Reputational damage to the companies due to fines and penalties, and

³⁹ 'CMA Guidance on environmental claims on goods and services' (*Competition and Markets Authority*, 20 September 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018820/Guidance_for_businesses_on_making_environmental_claims_.pdf> accessed 25 January 2022.

⁴⁰ 'Screening of websites for 'greenwashing': half of green claims lack evidence' (*European Commission Press Corner*, 28 January 2021) < https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269> accessed 25 January 2022.

negative impact on the supply chain relationship could also be a result of false sustainable claims.

VI. NEXT STEPS IN POLICY CHANGE

The case for sustainable competition practices by various stakeholders is very abstract and lacks definitive evidences and guidance. The EC in its Policy Brief has reported that stakeholders are facing difficulties in providing real life examples of sustainability issues and their solutions.⁴¹

In the past, it has been witnessed that companies under the garb of cooperative sustainable agreements have resorted to cartelisation which came under the scrutiny of the regulators.⁴² Until recently, authorities were largely focusing on hardcore cartels which involved price fixing and competition distortion and therefore cooperation agreements for achieving sustainability usually did not get investigated/prosecuted by the authorities as often as they should have been even though they may have been deceptive and false in a number of occasions.

However, over the last few years, the authorities have become increasingly cognizant of the environment impacts and have investigated legitimate technical cooperation which went wrong. For example, in 2021, EC fined BMW, Daimler and Volkswagen group for colluding to limit the development and roll-out of emissions cleaning technology for new diesel and petrol cars thereby denying the opportunity to consumers to purchase less polluting cars.⁴³ In fact, the EC even previously in 2012 and 2017 had prosecuted certain cartels that rigged the market for environmental inputs such as supply of water management services⁴⁴ and car battery recycling,⁴⁵ the its perspective and outlook was slightly limited at that time.

⁴¹ Alexandra Badea, Marin Bankov, Graça Da Costa, José Elías Cabrera, Senta Marenz, Kevin O'Connor, Ekaterina Rousseva, Johannes Theiss, Andrea Usai, Sofia Vasileiou, Alexander Winterstein and Marc Zedler, *Competition policy brief* (European Commission 2021) <https://content.mlex.com/Attachments/2021-09-10_4425K2MR3317JTAH/Competition%20Policy%20Brief%20-%20Green%20Deal%201-2021.pdf> accessed 25 January 2022.

⁴² '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 30 November 2022.

⁴³ *Car Emissions* (2021) Case AT.40178; 'Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars' (European Commission, 8 July 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581> accessed 29 November 2022.

⁴⁴ *Water Management Products*, (EC) (2012) Case/COMP 39611.

⁴⁵ *Car Battery Recycling*, (EC) (2017) Case AT.40018.

One of the widely discussed arguments in the above cases was that competition does not encourage greater sustainability because of the ‘first mover disadvantage’. Any investment in sustainable products costs much higher and is deterred by the prospects that the competitors will continue to offer cheap and less sustainable products.

Another thought from a policy change perspective is required for the ‘green inflation’. Increase in sustainability and environmental control will inevitably result into increased prices. Sustainability, de-carbonization of the economy, and various ambitious green deals or cooperative agreements will raise industry costs.

The concerns under antitrust laws for social and environmental benefit may require the competition authorities in various jurisdictions to trade myriad objectives with muted enforcement. Policy makers and businesses would always confront the issue of uncertainty with such developments including the discretion of the authority, cost benefit analysis and a case-to-case approach could prove to be more practical.

The primary task of competition authorities is to ensure fair competition. The EC has emphasized that the sustainable business practices and fair competition in the market can go hand in hand.

Competition authorities will also need to bargain with the private sector for sustainability on behalf of the consumers apart from providing exemptions to various sustainability agreements. The authorities will therefore have to strictly and constantly supervise the agreement to ensure that sustainability is in fact being delivered, and that price increases do not exceed what is needed to cover the cost of the sustainability increase.

Further, even the approaches of the authorities towards imbuing sustainability in the competition law, have not been consistent with each other. For example, on the one hand, the ACM proposes to lower the threshold for exempting sustainability agreements, on the other hand, the EC has made it clear that it would not ease the competition enforcement to achieve the Green Deal.⁴⁶

That said, the urgency of the climate crisis and the apparent failure of many governments to meet the Paris Agreement objectives have led inspired competition law

⁴⁶ Margrethe Vestager, ‘Competition policy in support of the Green Deal’ (*IBA Competition Conference*, 10 September 2021) <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en> accessed 25 January 2022.

scholars to push for ‘green antitrust policy’. The most concrete idea till date to use the antitrust policy to further the idea of minimising climate crisis is to exempt sustainability agreements from the cartel related provisions. It also suggests that sustainability factors must also be considered as ‘economic progress’.

VII. CONCLUSION: THE INDIAN APPROACH

At the COP26 Summit in Glasgow, the Indian government recently announced its goals in relation to climate change. India aims to achieve the target of net zero by 2070, along with meeting 50% of its energy requirements from renewable energy by 2030.⁴⁷

The Indian government is pursuing its SDGs by considering the possibility of revamping the existing environmental laws.⁴⁸ On the corporate side, the Ministry of Corporate Affairs in collaboration with the Indian Institute of Corporate Affairs came up with the National Guidelines on Responsible Business Conduct in 2018 (‘**NGRBC**’).⁴⁹ The NGRBC serves as an update to the existing National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business, 2011 (‘**NVG**’) and provides guidance to the businesses in their efforts to implement the SDGs within their organizations.

The NGRBC provides a major push to the businesses to conduct their businesses responsibly and sustainably while furthering the agenda amongst their suppliers, vendors, distributors, partners and other stakeholders and collaborators.

The Securities and Exchange Board of India (‘**SEBI**’) has also proactively taken steps since 2012 in ensuring that businesses made the necessary disclosures towards the environmental, social and governance implications. In 2012, under the Listing Regulations, SEBI instructed the top 100 listed entities by market capitalization to file Business Responsibility Reports (‘**BRRs**’) from an environmental, social and governance perspective. These BRRs enabled business to demonstrate the adoption of the NVG principles and the attendant core elements with the intent of engaging businesses more meaningfully with their

⁴⁷ ‘National Statement by Prime Minister Shri Narendra Modi at COP26 Summit in Glasgow’ (*MEA Media Center*, 2 November 2021) <<https://www.mea.gov.in/Speeches-Statements.htm?dtl/34466/National+Statement+by+Prime+Minister+Shri+Narendra+Modi+at+COP26+Summit+in+Glasgow>> accessed 25 January 2022.

⁴⁸ Jayashree Nandi, ‘India’s umbrella environment law idea triggers renewed concerns’ *Hindustan Times* (18 March 2021) <<https://www.hindustantimes.com/environment/indias-umbrella-environment-law-idea-triggers-renewed-concerns-101616052674150.html>> accessed 30 November 2022.

⁴⁹ Ministry of Corporate Affairs, *National Guidelines on Responsible Business Conduct* (Government of India 2019) <https://www.mca.gov.in/Ministry/pdf/NationalGuideline_15032019.pdf> accessed 30 November 2022.

stakeholders going beyond regulatory financial compliance. This was extended to top 500 companies in FY 2015-16. This, for the first time, introduced voluntary sustainability reporting among companies in India which is still in a nascent stage.⁵⁰

Recently, SEBI issued a circular on business responsibility and sustainability reporting ('**BRSR**') by top 1000 listed entities (by market capitalization) with an aim to bring sustainability reporting at par with financial reporting.⁵¹ While the BRSR reporting is voluntary for FY 2021-22, it will be mandatory from FY 2022-23 and will include extensive disclosures covering aspects such as resource usage, pollutant emissions, transitioning to circular economy, waste generated and waste management practices, disclosures related to workforce, value chains, communities and consumers, etc.

VIII. SUGGESTIONS FOR THE CCI

In terms of competition law as a tool to achieve sustainability, the objectives and priorities of the regulator matter. An active competition regulator such as the CCI in certain cases may consider doing favourable assessment of those combinations that are important to meet sustainability goals like the transition to a low carbon economy and ignore competitive harms if they are not of a very significant degree. This may be counter-balanced by a closer enforcement of any anticompetitive activities in that sector, hampering a sustainable development.

The CCI may also introduce formal and/or informal guidance and express their concern in particular sectors so that businesses shying away from sustainability activities due to the fear of competition law implications at least have some basic guidance. Such guidance will enable the stakeholders to approach the CCI with their own set of questions which may bring higher degree of clarity.

⁵⁰ Ministry of Corporate Affairs, 'MCA releases national guidelines on responsible business conduct' (*Press Information Bureau*, 13 March 2019) <<https://pib.gov.in/Pressreleaseshare.aspx?PRID=1568750>> accessed 30 November 2022.

⁵¹ SEBI, 'SEBI Circular on Business Responsibility and Sustainability Reporting by listed entities' (PR No.: 18/2021, 10 May 2021) <https://www.sebi.gov.in/media/press-releases/may-2021/sebi-issues-circular-on-business-responsibility-and-sustainability-reporting-by-listed-entities-_50097.html> accessed 30 November 2022.

In certain cases, where the CCI deems fit and the business environment requires, the regulator may provide guidance for individual sector or case related guidance. This approach has been used by the Japan Fair Trade Commission.⁵²

The OECD has provided ‘sandboxing’ as one of the suggestions for antitrust regulators. Under the sandboxing process, the companies can experiment under the supervision of the competition authority and would not be penalised for things that might otherwise be violations of the law.⁵³ While sandboxing is being studied, proposed and considered in various jurisdictions such as Netherlands, Greece and the EU, its implementation has not been fructified yet.

Another relevant aspect that the CCI will have to be concerned about is its jurisdiction and authority. The CCI may have to strengthen and broaden their capacities, given that sustainability is a wide-ranging field covering matters of environmental protection, economics, and the social dimension. Thus, co-operation with other regulators, relevant stakeholder, and civil society seems crucial. In this regard the CCI may take inspiration from the French competition authority which has set up a working group with different French sectoral regulators.⁵⁴

The approach to sustainability can also have an influence on monetary penalty aspects of the CCI orders. In this context, it might be worth considering whether it is possible to increase the fines where anticompetitive behaviour had particular bad effects for sustainability, or where the companies made false and deceptive sustainable claims.

The CCI in its existing framework can also consider highlighting the sustainability goals of a transaction requiring the CCI’s approval by placing emphasis on the pro-competitive effects resulting from the transaction such as green innovation, sustainable technologies, vertical arrangements, etc.

The CCI has not yet formed an opinion regarding the interoperability of competition law and sustainable development goals, however, it must keep an eye on the various developments across jurisdictions.

⁵² Guidelines Concerning Joint Activities for Recycling under the Antimonopoly Act, 2001.

⁵³ Julian Nowag, *Sustainability and Competition Law Policy, A Background Note* (OECD 2020) <[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2020\)3&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2020)3&docLanguage=En)> accessed 30 November 2022.

⁵⁴ ‘Independent public and administrative authorities develop their collaboration on the challenges of climate warming’ (*Autorite de la concurrence*, 19 December 2019) <www.autoritedelaconcurrence.fr/en/press-release/independent-public-and-administrative-authorities-develop-their-collaboration> 30 November 2022.

The debate on sustainability and competition laws will gain further traction in the coming years. Most of the authorities have promised either formal guidelines or assessment reports of calls for inputs in the first half of the next year. With heavy participation of the major stakeholders, it will be interesting to see how the competition law will transform under the umbrella of sustainability goals.

Policies, regulations, taxes, standard setting, green financing, investment are the key to achieving India's commitments, however, given the emergency of climate change, the CCI can not only contribute, but can in fact drive the agenda on the market side of things. This transformation pre-supposes that India's economy to be not only more sustainable, but also more competitive and resilient.