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Sustainability Goals vs. Competition Law: Global Trends and Challenges

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***Abstract:** The growing awareness of climate change has highlighted the need for competition law to adapt and promote sustainability. Recently, many competition authorities have been exploring ways to integrate environmental considerations into their frameworks. The significance of aligning sustainability with competition regulations has become increasingly evident. Achieving sustainability goals requires cooperation from both companies and regulators to establish and implement industry-wide objectives. The United Nations' sustainability goals and nations' commitments to sustainability will shape future development in line with the Paris Agreement. Integrating green antitrust policies with economic progress is now a key topic of global debate among regulators. The Competition Commission of India is at a critical junctureto develop a clear competition policy for sustainability and offer detailed guidance to companies to meet these goals. However, the path to a sustainable antitrust policy is fraught with challenges, including economic development, innovation, jurisdictional issues, and India's internationalobligations.*

***Keywords:** Competition, Sustainability, Globalization, Stakeholder*

I. INTRODUCTION

Modern companies are increasingly driven to adopt more sustainable business practices. Consumers are pushing for environmentally friendly products but environmental regulations and taxes raise the cost of operations that harm the environment. However, it is the force of competition that translates these pressures into corporate strategies. The need to stay competitive compels companies to better satisfy consumer demands and optimize resource use—often leading to changes in business models or investments in green innovations [1].

During this critical decade for sustainability, many countries are re-evaluating their policy frameworks and setting bold goals to tackle climate change. Some have already revised their existing laws, while others are assessing how their current regulations can be adapted to meet sustainability targets. The escalating awareness of climate change has highlighted the pressing need for a flexible and proactive approach that advances sustainability.

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This article aims to explore the interaction between sustainability and competition laws by examining international legal developments designed to tackle the challenges of achieving sustainability goals. It addresses unresolved competition issues and suggests policy measures to support these objectives. The article concludes with recommendations for how the Competition Commission of India (CCI) can help advance India's sustainability commitments.

A. Integrating Sustainability into Competition Law

A comprehensive sustainability policy must primarily tackle its three fundamental aspects: environmental preservation, economic advancement, and social equity. As outlined in the Brundtland Report from the World Commission on Environment and Development, sustainability is described as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs [2]. Thus, striving for sustainability and its three pillarshas become a global aim, with both government and private entities playing critical roles.

In the private sector, the growing focus on sustainability—which is likely to become a new standard for assessing competitive harm by competition authorities—implies greater responsibilities for businesses [3]. Companies are now required to strengthen internal controls and comply with regulations, including reporting the environmental impact of their supply chains. Additionally, practices such as colluding to hinder development that harms the environment or making false sustainability claims can result in severe consequences. These may include damage to reputation, threats to financing opportunities, loss of market access and trade prospects, or even regulatory penalties. Therefore, businesses must actively engage with the community and government in setting and achieving sustainability objectives.

B. Assessing the Compatibility of Sustainability Agreements with Competition Rules

Initially, businesses can independently set and incorporate their sustainability targets into their operations. However, collaborating with other market participants can greatly reduce risks and enhance research and development efforts. For example, companies heavily investing in new and untested green technologies might minimize risks by forming long-term partnerships with current or potential competitors or establishing exclusive supply or procurement deals [4].

Such cooperation is particularly important for meeting ambitious environmental objectives, as individual efforts alone may be inadequate and the drawbacks of being a pioneer can be significant.

Nonetheless, these collaborations often raise important issues under competition law. If not handled with care, such agreements could potentially violate competition rules, leading to investigations by regulatory bodies. During these investigations, regulators will assess whether the collaborations significantly restrict competition, with criteria varying by jurisdiction. They will specifically examine how the agreements affect prices, coordination among parties, availability ofchoices, and any market impacts that benefit the participants without providing corresponding competitive advantages.

For instance, the Bundeskartellamt, Germany's competition authority, examined a proposed agricultural policy that included a financing model benefiting raw milk producers by implementingsurcharges to be passed through the supply chain to the final retail price [5]. The authority ruled thismodel non-compliant with competition law, as it constituted a price agreement that was detrimental to consumers. In a similar vein, the Dutch Authority for Consumers and Markets (ACM) scrutinized the ‘Chicken for Tomorrow’ initiative, a collaborative industry effort aimed at improving the welfare conditions of broiler chickens sold in supermarkets [6]. The ACM determinedthat this initiative was restrictive of competition and resulted in increased chicken prices for consumers.

Nevertheless, this should not discourage the private sector from pursuing sustainability initiatives. Many collaborative efforts between businesses aimed at achieving sustainability goals are unlikely to conflict with competition laws. It’s important to recognize that these agreements may offer significant, measurable benefits in terms of environmental protection that can outweigh any potential competitive drawbacks. Regulatory authorities are expected to review such agreements individually. In response, competition authorities across various jurisdictions have increasingly engaged in discussions about sustainability. Many have acknowledged the need to create supportive frameworks for these initiatives, resulting in a surge of policy papers and global conversations. Regulators are aware of the consumer advantages of sustainability agreements andare working on developing metrics to assess these benefits.

C. Recent Trends in Competition Policy: Key Developments and Changes

Countries around the world have increasingly adopted a multi-disciplinary approach to sustainability. In 2015, the United Nations member states endorsed the Sustainable Development Goals (SDGs), commonly referred to as Agenda 2030 [7], which outlines 17 objectives for sustainable development to be achieved within 15 years. While many nations have aligned their strategies with Agenda 2030, the realization and effectiveness of these goals depend significantly on the specific policies, plans, and programs implemented by each country.

Consequently, the interaction between competition laws and sustainability has become a key focusfor governments and regulatory bodies around the world, with some countries and regions taking the initiative. Agencies such as the European Commission (EC), the Austrian Federal CompetitionAuthority (AFCA), and the Dutch Authority for Consumers and Markets (ACM) have taken proactive steps to explore how sustainability can be incorporated into competition regulations to motivate private sector participation.

On January 27, 2021, the Competition and Markets Authority (CMA) released a guidance document addressing the intersection of sustainability agreements and competition law in the UK.The CMA also held public consultations to gather views on competition law enforcement, merger control, consumer protection, and market investigations [8]. Although the CMA's approach is consistent with global trends, it offers some unique perspectives. For example, the CMA defines asustainability agreement as “Collaborative arrangements between businesses (including industry-wide projects and trade association decisions) designed to achieve sustainability objectives, such as mitigating climate change. This could involve, for instance, businesses working together to enhance product energy efficiency or agreeing to use packaging materials that meet specific recycling standards to reduce waste” [9].

The CMA has developed a 'framework for assessment' flowchart to guide businesses in structuringtheir agreements to comply with competition regulations while furthering sustainability goals. According to the UK's Competition Act 1998 (CA98), there are provisions for block and individual exemptions that may apply to sustainability agreements, potentially exempting them from being classified as anti-competitive. If these exemptions are not applicable, CA98 also allows for agreements that deliver substantial benefits to consumers to be exempted. Moreover, UK courts have supported agreements that might restrict competition but are justified by legitimate purposes.

Regarding merger control, the CMA has noted that mergers aimed at advancing sustainability objectives could lead to 'rivalry-enhancing efficiencies' or 'significant customer benefits.' Consequently, such mergers might be viewed favorably, despite potential anti-competitive effects. This presents its challenges, as balancing these factors requires detailed, case-by-case evaluation. The CMA’s request for public input has resulted in a detailed list of questions coveringnearly every aspect of sustainability and competition law. The final evaluation of these inputs is still pending, so it remains to be seen how the CMA will incorporate sustainability goals into its guidelines.

Similarly in Austria, The Austrian Federal Competition Authority (AFCA) is leading the way in integrating sustainability into competition law reforms. In September 2021, Austria amended its Cartel Act of 2005 to reflect a significant international legislative change. This update came aboutbecause the Austrian legislature asked the AFCA to consider sustainability in its enforcement practices [10][20][21]. Previously, agreements were exempt from cartel prohibitions if they contributed to better production or distribution of goods, or promoted technical and economic progress while ensuring that consumers benefited fairly.

The new amendment refines this by specifying that agreements must also significantly support an ecologically sustainable and climate-neutral economy to qualify for the exemption.

The amendment was supplemented by a three-page document outlining the criteria that could warrant an exception to the cartel prohibition based on sustainability considerations. These criteriaare:

- Efforts towards climate protection, sustainable management of water resources, transitioning to a circular economy, and the conservation and restoration of biodiversity and ecosystems.
- These environmental gains can benefit society as a whole and do not have to be confined to the market where the measures are applied.
- The benefits of these actions can also impact future generations.

On the contrary, the European Commission has carried out public consultations and hosted a conference to examine how EU competition regulations can support the environmental and climate objectives, of the European Green Deal [11]. This Green Deal is a strategic plan aimed at making the EU's economy sustainable by converting climate and environmental challenges into opportunities throughout all policy areas.

The European Commission has recently released a competition policy brief to support Europe's environmental ambitions ('EC Policy Brief'). This brief clarifies several major issues that authorities face when integrating sustainability goals, such as:

- The brief points out that policies will only be effective if markets respond correctly to thesignals and incentives provided, without causing distortions in competition.
- The Commission must also account for the diverse conditions across member states to ensure a successful transition to a green economy while maintaining social and political acceptance.
- Based on feedback from various stakeholders, the Commission noted that a lack of clear guidelines on how sustainability goals are assessed under antitrust laws could discourage businesses from investing in sustainable products or processes due to concerns about breaching competition rules.
- In terms of merger control, the Commission took into consideration stakeholders' views on continuing to apply theories of harm related to innovation to prevent the loss of "green"innovations.

On the other hand, The Bundeskartellamt, Germany's antitrust authority, has explored whether environmental factors can be taken into account in evaluating anti-competitive agreements. In 1999, the German Competition Act was updated to include a specific exemption rule for collaborations related to environmental take-back obligations. This rule pertains to agreements anddecisions that enhance the collection and disposal of goods while ensuring that consumers benefit fairly from these improvements [12][22][23]. Such agreements were exempted from the competition prohibition under the German Competition Act, provided they could not be achieved through othermeans, were sufficiently significant compared to the associated competition restrictions, and did not result in creating or strengthening a dominant market position.

D. Pending Concerns in Market Competition

It has been observed that Western authorities have begun emphasizing sustainability and demonstrated a readiness to revise their assessment methods. As stakeholders anticipate the releaseof official guidelines, it is crucial to address certain concerns at the initial stages. Amongst it, someof the relevant concerns are demonstrated below:

Killer Green Acquisition: Killer acquisitions have been a persistent issue for competition regulators, particularly in the context of harm theories. Such acquisitions occur when powerful firms acquire promising competitors to shut down their innovation efforts, thereby preventing future competition. This problem becomes even more critical in the context of green acquisitions,which require careful attention from authorities [13]. Although the European Commission has acknowledged the importance of preventing these harmful practices in its Policy Brief, it has not yet established a remedy for the issue. It is still uncertain how authorities will tackle killer acquisitions, especially those that influence sustainability targets.

Innovation Incentives: Authorities have noted that the current system fails to provide adequate incentives for businesses to innovate and pursue sustainability. As guidelines from various jurisdictions remain unpublished, businesses are likely to proceed with caution, and noticeable shifts in practices may be slow to materialize. Given that assessing sustainability claims—whether related to sustainability agreements or green mergers—demands a detailed, case-by-case evaluation of efficiencies, the lack of practical implementation of new guidelines in the early stages may even dissuade businesses from actively pursuing innovation and engagement.

Authenticity of Sustainability Claims: Another crucial area requiring detailed examination by authorities is how sustainability defenses will be evaluated regarding anti-competitive practices. There is no universal standard for determining what is right or wrong in this context. However, quantitative measures, such as those attempted by the ACM, could assist businesses in self-assessing and developing robust sustainability defenses. The effectiveness of these defenses will ultimately be determined as jurisprudence evolves.

Jurisdictional Issues: Sustainability defenses will create particular jurisdictional hurdles. For example, how will criteria for assessment be established when the claimed sustainability benefitsdo not have a direct impact on the jurisdiction where the evaluation occurs? Additionally, as sustainability agreements often cover multiple jurisdictions, the risk of non-compliance increases.The international scope of supply chains further complicates the practical enforcement of sustainability claims. Overcoming these challenges will require stronger international coordination among regulators and greater openness from businesses.

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The practice of companies making deceptive claims about the sustainability of their products, services, or business practices is known as greenwashing. Companies frequently exaggerate their commitment to sustainability, even when their actual contributions are minimal.

E. Implications of Non-Compliance with Claims

Companies often fail to meet their sustainability claims, resulting in legal actions and penalties under consumer protection and antitrust regulations. The investigations conducted by multiple authorities not only consume significant time and resources but also tarnish the reputation of other market participants. Moreover, companies face reputational harm from fines and penalties, and misleading sustainability claims can disrupt their supply chain relationships.

F. Future Directions for Policy Development

The case for adopting sustainable competition practices is often vague and lacks clear evidence and direction. According to the European Commission's Policy Brief, stakeholders are finding it challenging to present real-world examples of sustainability problems and effective solutions. Historically, companies have sometimes used the pretext of cooperative sustainability agreements as a cover for cartel behavior, which has attracted regulatory scrutiny. Until recently, regulators primarily targeted hardcore cartels involving price-fixing and competition distortion, often overlooking cooperation agreements aimed at sustainability, even when these agreements were deceptive or misleading [14].

Antitrust concerns related to social and environmental benefits may necessitate competition authorities in different jurisdictions to balance various objectives, which could lead to less aggressive enforcement [15]. Policymakers and businesses will likely face uncertainties with these developments, including how authorities exercise discretion, conduct cost-benefit analyses, and apply a case-by-case approach, which might be more practical in navigating these complex issues.

However, in recent years, authorities have become more aware of environmental impacts and havebegun investigating legitimate technical cooperation that has been misused. For instance, in 2021,the European Commission fined BMW, Daimler, and the Volkswagen Group for conspiring to restrict the development and deployment of emissions-cleaning technology for new diesel and petrol vehicles, thereby limiting consumer access to less polluting cars [16]. The EC had also previously prosecuted cartels in 2012 and 2017 that manipulated markets for environmental services such as water management and car battery recycling [17]. However, their focus at the time was more limited. A common argument in these cases is that competition does not always drive greater sustainability due to the ‘first mover disadvantage.’ Investing in sustainable products often involves higher costs, and companies may be deterred by the prospect of competitors continuing to offer cheaper, less sustainable alternatives.

Concerns about social and environmental benefits under antitrust laws may lead competition authorities in different regions to balance various goals with less aggressive enforcement. Policymakers and businesses often face uncertainty with these issues, as the discretion of authorities, cost-benefit analysis, and a case-by-case approach might be more practical solutions.

II. CONCLUSION

During the COP26 Summit in Glasgow, the Indian government outlined its climate goals, which include achieving net zero emissions by 2070 and sourcing 50% of its energy from renewables by 2030 [18]. The Sustainable Development Goals (SDGs) are being pursued by the Indian government through the potential revamping of existing environmental laws.[21] In the corporate sector, the National Guidelines on Responsible Business Conduct (NGRBC) were introduced in 2018 by theMinistry of Corporate Affairs in collaboration with the Indian Institute of Corporate Affairs [19]. TheNGRBC was developed as an update to the earlier National Voluntary Guidelines on Social, Environmental, and Economic Responsibilities of Business (NVG) from 2011, and is intended to guide businesses in the implementation of SDGs within their organizations. Businesses are encouraged by the NGRBC to operate responsibly and sustainably, and these practicesare expected to be extended to their suppliers, vendors, distributors, partners, and other stakeholders.

Additionally, proactive steps have been taken by the Securities and Exchange Board of India (SEBI) since 2012 to ensure that necessary disclosures regarding environmental, social, and governance (ESG) impacts are made by businesses. Under the Listing Regulations, the top 100 listed entities by market capitalization were required by SEBI to file Business Responsibility Reports (BRRs) addressing these aspects. This requirement was extended to the top 500 companies in the fiscal year 2015-16. Voluntary sustainability reporting was thus introduced among companies in India, fostering engagement with stakeholders beyond mere regulatory financial compliance.

A circular on business responsibility and sustainability reporting (BRSR) was recently issued by SEBI for the top 1000 listed companies by market capitalization, to integrate sustainability reporting with financial reporting. Although BRSR reporting is voluntary for the fiscal year 2021-22, it will become mandatory starting from the fiscal year 2022-23. The BRSR will require extensive disclosures on topics such as resource usage, pollutant emissions, the transition to a circular economy, waste management practices, and information related to the workforce, supply chains, communities, and consumers.

III. SUGGESTIONS

When competition law is used to promote sustainability, the objectives and priorities of the regulator are crucial. The influence of an active competition regulator on sustainability can be significant, particularly in cases where false or misleading sustainability claims are made by companies. Under its current framework, the Competition Commission of India (CCI) could be encouraged to highlight sustainability goals when reviewing transactions.

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Emphasis could be placed on the pro-competitive benefits of a transaction, such as advancements in green innovation, sustainable technologies, and vertical arrangements. The CCI's position on the relationship between competition law and sustainable development goals has not yet been established, but international developments should be closely monitored. The debate over the interaction between sustainability and competition laws is expected to gain momentum in the coming years. Formal guidelines or assessment reports from authorities are anticipated in the first half of the next year. With substantial stakeholder involvement, the transformation of competition law under sustainability goals will be of considerable interest. Policies, regulations, taxes, standard setting, green financing, and investment are recognized as essential for achieving India's sustainability commitments. Given the climate change emergency, it is suggested that the CCI could play a pivotal role in driving this agenda from a market perspective. This transformation is anticipatedto lead to a more sustainable, competitive, and resilient economy in India.

DECLARATION STATEMENT

After aggregating input from all authors, I must verify the accuracy of the following information as the article's author.

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