

# **COMPETITION LAW AS A SOLUTION TO SUSTAINABILITY: AN INDIAN PERSPECTIVE**

- *Kaushiki Nayak\**

## **CHAPTER - I**

### **INTRODUCTION**

In the times of facing climate change and depletion of natural resources, nations worldwide have become more conscious of sustainable development. While nations are formulating policies in order to achieve sustainable development, the duty also lies upon the private sector to develop and adopt sustainable production techniques. Business corporations often try to achieve sustainable goals by collaborating with other competitor corporations which leads to a breach of anti-trust laws.

To deal with the situation, many countries have already formulated regulations and policies to make competition law more eco-friendly without affecting the market competition adversely. India is yet to formulate regulations on the same front but the Competition Act of 2002 might contain some scope to deal with environmental sustainability and this will be dealt with in the further chapters.

The World Commission on Environment and Development published 'Our Common Future' in 1987, also known as the Brundtland Report, which stated that 'sustainable development' means "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"<sup>1</sup>. The report also stated that "three main interdependent

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\* Student of Law (BA.LLB.) at Vivekananda Institute of Professional Studies, Guru Gobind Singh Indraprastha University.

<sup>1</sup> The Commission was established in accordance with resolution 38/161 of 19 December 1983 of the General Assembly. See <https://sustainabledevelopment.un.org/milestones/wced>.

domains of action that are necessary to guarantee sustainable development translated into economic growth, social development and environmental protection”.<sup>2</sup>

Environment Social Governance (ESG) has transformed the business models of corporations in order to achieve the same. Corporations have become increasingly active in ESG initiatives to gain the trust of their stakeholders which at times may also serve the interests of the consumers or the government.<sup>3</sup>

Ensuring compliance with ESG standards is not an easy task, as it often entails significant costs to implement new processes and technologies. In some cases, it may even require a complete revamp of a business line. When businesses fail to comply with ESG standards, it not only affects the economy but also livelihoods. Therefore, it is the responsibility of governments to create rules that facilitate the transition to ESG compliance with minimal damage to businesses and job opportunities.<sup>4</sup> Full implementation of ESG standards requires a multi-dimensional approach that includes technology transfer, collaboration among industry partners, and regulatory changes. To achieve this, competition laws must become more cooperative.<sup>5</sup>

According to the Secretary of the Competition Commission of India (CCI), “Innovation and competition are two of the most important pillars which support and foster economic growth, and there is nothing better than having these pillars supported by sustainable development for a safe, secure and liveable future.”<sup>6</sup>

The purpose of ESG collaborations ranges from establishing net zero carbon emissions to waste management etc. These collaborations involve competitive firms coming together which might

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<sup>2</sup> LO Vreja, S Balan and C Mavrodin, 2016, Sustainability and the tragedy of the commons: A new perspective, International Conference on Competitiveness of Agro-food and Environmental Economy Proceedings, The Bucharest University of Economic Studies, (5)176–187, United Nations Conference on Trade and Development, Competition And Consumer Protection Policies For Sustainability (September 28, 2022).

<sup>3</sup>India: The Crossroads of ESG Collaboration And Competition Law, available at: <https://www.mondaq.com/india/antitrust-eu-competition-/1305206/the-crossroads-of-esg-collaboration-and-competition-law> (last visited on December 2, 2023).

<sup>4</sup> Competition Laws must adapt to support the ESG mandate, available at: <https://www.teriin.org/blog/competition-laws-must-adapt-support-esg-mandate> (last visited on December 4, 2023).

<sup>5</sup> Ibid.

<sup>6</sup> KR SRIVATS, “Competition law fit to assess sustainability, climate action”, The Hindu, Businessline., December 06, 2022, available at <<https://www.thehindubusinessline.com/economy/competition-law-fit-to-assess-sustainability-climate-action/article66229745.ece>> (last visited on December 9, 2023).

violate the anti-trust regulations. Thus, regardless if the collaboration is environment-friendly, it may be considered as an anti-competitive behaviour of the firms.<sup>7</sup>

In the arena of competition law, the author seeks to delineate a path for environmental sustainability and to what extent can competition law serve the goals of sustainability in the Indian perspective in the absence of explicit law while stretching the ambit of existing Indian competition law. The advancements across other jurisdictions with explicit regulations concerning the same shall also be analysed for potential developments in the Indian landscape.

## **CHAPTER II**

### **INTERSECTION OF SUSTAINABILITY AND COMPETITION LAW**

#### **2.1 THE POINT OF INTERSECTION – COHERENCE OR CONFLICT**

Numerous initiatives and measures have been undertaken to prioritize environmental protection through laws, regulations, and schemes. The primary focus of these efforts is to achieve sustainable development<sup>8</sup>.

According to renowned economist Sir Nicholas Stern “Climate change is a result of the greatest market failure the world has seen”. Stern believed that the market price does not account for the environmental and climate cost resulting from greenhouse gas emissions and pollution. This implies that the actual cost of a product is not accurately reflected in its price. These "negative externalities" are not included in the price and are borne by society. Although the consumers pay for these costs later which are the penalties not monetary in nature. Therefore,

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<sup>7</sup> Antitrust and Climate Change: How Competition Enforcement Prevents Sustainability Collaboration, available at: <https://www.cbfinludelhi.in/post/antitrust-and-climate-change-how-competition-enforcement-prevents-sustainability-collaboration> (last visited on December 9, 2023).

<sup>8</sup> World Commission on Environment and Development, Our Common Future (1987) (‘Brundtland Report’).

the market has a direct impact on our environment and it becomes crucial to bring both of these factors under the same regulatory framework.<sup>9</sup>

In the new era, sustainability has become a new norm of business life and companies are becoming more and more active to incorporate sustainable business practices like net zero carbon emissions<sup>10</sup>, reducing plastic waste, proper disposal management, etc. Corporations take up these ESG initiatives for multiple reasons, like responding to shareholder preferences, customer choices or statutory or governmental obligations<sup>11</sup>.

Environmental, Social Governance (ESG) is not specially defined in any statute but it can be understood as a framework that helps stakeholders to understand the way in which a company manages its risks and opportunities with respect to environmental, social and governance criteria.<sup>12</sup> In India ESG can be inferred from Section 166(2) of the Companies Act, 2013 which imposes a duty on the director to act in good faith to protect the environment. The provision states that “A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.”<sup>13</sup>

The public as well as the private entities have the responsibility to act in compliance with the United National Sustainable Development Goals of which Goal 12.6 encourages the private entities for adoption of sustainable business practices.<sup>14</sup> Corporate actions and strategic market choices can have a greater impact on the environment than state interventions. For instance,

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<sup>9</sup> Lord Stern, The Economics of Climate Change: The Stern Review (Cabinet Office, HM Treasury 2006), Pallavi Mishra, “Locating the Contours of Sustainability and Environmental Protection within Competition Law in India: Swinging in Tandem or Isolation?”, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4461327](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4461327) (last visited on December 10, 2023).

<sup>10</sup> A journey towards ESG: Key competition law issues examined, available at: [https://insightplus.bakermckenzie.com/bm/attachment\\_dw.action?attkey=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQJsWJiCH2WAVfnLVn2g hRGMMNwb7ciSht&nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQbuwypnpZjc4%3D&attdocparam=pB7HEsg%2FZ312Bk8OIuOIH1c%2BY4beLEAexnX7BXM2M9g%3D&fromContentView=1](https://insightplus.bakermckenzie.com/bm/attachment_dw.action?attkey=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQJsWJiCH2WAVfnLVn2g hRGMMNwb7ciSht&nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQbuwypnpZjc4%3D&attdocparam=pB7HEsg%2FZ312Bk8OIuOIH1c%2BY4beLEAexnX7BXM2M9g%3D&fromContentView=1) (last visited on December 10, 2023).

<sup>11</sup> Antitrust and sustainability: globally warming up to be a hot topic?, available at: <https://competitionlawblog.kluwercompetitionlaw.com/2019/10/18/antitrust-and-sustainability-globally-warming-up-to-be-a-hot-topic/> (last visited on December 10, 2023).

<sup>12</sup> ESG (Environmental, Social, & Governance), available at: <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/> (last visited on December 10, 2023).

<sup>13</sup> The Companies Act, 2013.

<sup>14</sup> MR. VIKRAM SOBTI & RIDDHIKA Dumane, “LESSONS FOR INDIA IN SUSTAINABILITY AND ANTITRUST: SUSTAINABLE AGREEMENTS (PART I)”, 7(2) Indian Competition Law Review.

the environmental benefit derived from Amazon.com becoming CO<sub>2</sub>-neutral would be slightly larger than if the entire country of Sweden became CO<sub>2</sub>-neutral<sup>15</sup>. This is the reason due to which the UN Sustainable Development Goals have focused on the contribution of the private sector.<sup>16</sup>

Pursuing such non-economic targets independently is possible but it often leads to the ‘first-mover disadvantage’ to the company<sup>17</sup>. The first-mover disadvantage is faced by a company while taking the first move towards sustainability by changing its production technique, making the product more expensive than other competitors.

Due to the first-mover disadvantage or the free-rider concerns, corporations believe in taking such initiatives in collaboration to prevent this effect. Such collaborations often lead to an increase in the price of the goods which is usually taken up with the objective of public interest rather than monetary profits, and such initiatives are supported by the state as well.<sup>18</sup>

Sometimes ESG initiatives are needed to be collaborated by different corporations to achieve larger goals like curbing down the expenses of the change in technique of production, and this leads to the price of the good spreading out evenly in the market.<sup>19</sup>

An example of the same could be in a case where corporations would want to switch to cleaner jet fuels but individually would lead to an increase in the airfare but if collaborated upon, then would distribute the airfare evenly across the market beating the first-mover disadvantage.<sup>20</sup>

Since these collaboration involve alliance of different competitors, it often leads to a breach of competition laws. Despite the moral motives of the companies, they are not exempted from the compliance of anti-trust laws.<sup>21</sup> Such collaboration might invite allegations of cartelization

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<sup>15</sup> Amazon emitted 2020 around 60.64 million tons of CO<sub>2</sub> in 2020 see, <https://fortune.com/2021/06/30/amazon-carbon-footprint-pollution-grew/> (accessed 15 Feb. 2022), Sweden emitted around 45.5 million tons of CO<sub>2</sub> in 2020, see [www.statista.com/statistics/449823/co2-emissions-sweden/](http://www.statista.com/statistics/449823/co2-emissions-sweden/) (accessed 15 Feb. 2022), Marco Corradi and Julian Nowag, “ESG Policies at the Intersection between Competition and Corporate Law”, Cambridge: Cambridge University Press, Cambridge: Cambridge University Press 32 (2023).

<sup>16</sup> Marco Corradi and Julian Nowag, “ESG Policies at the Intersection between Competition and Corporate Law”, Cambridge: Cambridge University Press, Cambridge: Cambridge University Press 32 (2023).

<sup>17</sup> Supra note 11.

<sup>18</sup> Ibid.

<sup>19</sup> Is Indian Competition Law ESG-ready?, available at: <https://www.mondaq.com/india/antitrust-eu-competition-1295434/is-indian-competition-law-esg-ready> (last visited on December 5, 2023).

<sup>20</sup> Ibid.

<sup>21</sup> Supra note 10.

from competition authorities like CCI (Competition Commission of India). The CCI might infer that the activities are anti-competitive in nature because such collaborations often require key management of competitors to regularly communicate and exchange commercial information.<sup>22</sup>

Cartels are defined in the Competition Act, 2002 under Section 2(c) as “*“cartel” includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.*”<sup>23</sup>

These circumstances bring out the interconnection of sustainability with competition law. Both domains focus on public welfare, where sustainability is centred around environmental protection, competition law focuses on controlling the domination of a single player in the market and protecting the rights of the consumers<sup>24</sup>. However, competition law often becomes an impediment to sustainable initiatives by imposing restrictions on collaborative ESG initiatives.

The Indian competition law has remained unexplored in terms of ESG initiatives due to lack of formal regulations on the same and it becomes crucial to assess whether India is equipped with appropriate laws to support the same. However, there are certain provisions of the Competition Act of 2002 which can be given a broader interpretation in order facilitate sustainable collaborative initiatives.<sup>25</sup>

## **2.2 SUSTAINABILITY AGREEMENTS**

Sustainability agreements are not officially defined by any authority or statute. It can be understood as partnerships between businesses to achieve sustainability goals and address climate change. These agreements can involve working together to reduce environmentally

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<sup>22</sup> Supra note 19.

<sup>23</sup> The Competition Act, 2002.

<sup>24</sup> United Nations Conference on Trade and Development, Competition and Consumer Protection Policies For Sustainability.

<sup>25</sup> Supra note 19.

harmful substances or determining how to handle the costs of environmental protection measures.<sup>26</sup>

It has been argued that certain collaborative sustainable agreements among market players cannot be considered anti-competitive because they have authentic, non-economic benefits that align with public policy.<sup>27</sup>

To understand this concept, it is essential to understand anti-competitive agreements. These are the agreements among competitors that reduce the competition in the market. These agreements can also be understood from Section 3(1) of the Competition Act, 2002 as “*No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.*”

These agreements aim at the identification, prevention, restriction or mitigation of the negative impact of economic activities on the people, animals, environment, or nature. Sustainability agreements among competitors may have a negligible impact on competition, and should not normally create an antitrust risk. However, many companies are still reluctant to engage in any cooperation with competitors because they fear that any collaboration with competitors may carry antitrust risks.<sup>28</sup>

Sustainable Agreements can be agreements that firstly, aim at contributing to mitigate the harm to the environment, secondly are non-binding on the individuals/undertakings giving them a leeway to determine their contributions, thirdly aim at removing less-sustainable products from the market without adversely affecting the price or product diversity and fourthly to not restrict competition in the efforts to promote sustainability.<sup>29</sup>

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<sup>26</sup> Supra note 7.

<sup>27</sup> Sustainability and Competition: Recognizing Potential in Competition Law to Promote Green Future, available at: <https://www.ircl.in/post/sustainability-and-competition-recognizing-potential-in-competition-law-to-promote-green-future> (last visited on December 6, 2023).

<sup>28</sup> Antitrust Risk in ESG, What is it and how to mitigate it?, available at: <https://excellenceenablers.com/antitrust-risk-in-esg-what-is-it-and-how-to-mitigate/> (last visited on December 10, 2023).

<sup>29</sup> Supra note 14.

Competition law stands as a major barrier to such type of agreements. These collaborations may violate the competition laws leading to investigations by the authorities to assess if such collaboration agreements restrict competition to a significant degree.<sup>30</sup>

Thus, the agreements should be scrutinised keeping in view any impact on prices, increased coordination, and reduction in the range of available options or affecting the markets in the favour of the parties without any corresponding procompetitive effects.<sup>31</sup>

### **CHAPTER III**

## **THE INTERNATIONAL SCENARIO**

### **3.1 WORLD'S APPROACH**

On an international level, UN Agenda 2030 has laid down 17 Sustainable Development Goals and in addition to that, the OECD's Competition Committee found that many sustainability agreements are in harmony with the competition law in its special hearing on sustainability and competition law in its 134th Meeting.<sup>32</sup>

Where most of the nations have complied with the UN Sustainable Development Goals ('SDGs'), the success of these goals would only depend on the native policies and regulations of the nations. Many nations and blocs have taken the lead by formulating policies which can become references for India to plan its next step towards incorporating sustainability through competition law. Authorities such as the European Commission ('EC'), Austrian Federal

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<sup>30</sup> 'Guidance on Environmental sustainability agreements and competition law' (Competition and Market Authority, 27 January 2021) accessed 3 January 2022, Vijay Pratap Singh Chauhan, Aakriti Thakur, assisted by Shruti Khaitan, "Competition Law Tackling Sustainability Goals: An Analysis of International Practices and the Challenges Ahead", National Law School Business Law Review.

<sup>31</sup> Vijay Pratap Singh Chauhan, Aakriti Thakur, assisted by Shruti Khaitan, "Competition Law Tackling Sustainability Goals: An Analysis of International Practices and the Challenges Ahead", National Law School Business Law Review.

<sup>32</sup> Competition law aspects of ESG initiatives in the Life Sciences & Healthcare Sector, available at: <https://cms-lawnow.com/en/ealerts/2023/06/competition-law-aspects-of-esg-initiatives-in-the-life-sciences-healthcare-sector> (last visited on December 10, 2023).



Competition Authority ('AFCA'), and the Dutch ACM have taken active measures to assess whether sustainability should be imbibed in the competition arena.<sup>33</sup>

Netherlands, Greece and the United Kingdom are one of the first few countries to formulate regulations and have issued guidelines<sup>34</sup> on the interplay between competition law and sustainability agreements.<sup>35</sup> There are no separate guidelines in the United States about the same.<sup>36</sup>

Other countries such as Japan, Australia, New Zealand, and Germany have also addressed anti-competitive agreements with green dimensions by creating guidelines.<sup>37</sup>

On a detailed observation it can be seen that the approach adopted by most competition authorities is to position sustainability agreements within the existing framework of the law while providing guidance on how to assess them.<sup>38</sup>

### **3.2 EUROPEAN UNION (EU)**

The European Commission has recently published guidance on assessing sustainability agreements in line with the European Green Deal of 2020. This guidance is a part of the revised Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union (TFEU) to horizontal cooperation agreements.<sup>39</sup> The European Competition Regime, which consists Article 101(3) of The Treaty on the Functioning of the European Union (TFEU), is a well-developed system. It outlines the circumstances under which "horizontal agreements" can be exempted from competition laws. The agreements under these regulations

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<sup>33</sup> Supra note 31.

<sup>34</sup> Whilst the competition authorities of Netherlands and United Kingdom have issued guidelines on sustainability and competition law, Greece's competition authority has issued a discussion paper in this regard. The competition authorities of Netherlands and Greece have also published a 'technical report on sustainability and competition' that they had jointly commissioned to facilitate the competitive assessment of sustainability agreements.

<sup>35</sup> Supra note 3.

<sup>36</sup> Ibid.

<sup>37</sup> Green Competition: Adopting a Flexible Regulatory Framework, available at: <https://cbcl.nliu.ac.in/competition-law/green-competition-adopting-a-flexible-regulatory-framework/> (last visited on December 6, 2023)

<sup>38</sup> Supra note 3.

<sup>39</sup> Ibid.

can be exempted if they help to increase production, distribution, or technical advancements, thereby improving overall efficiency.<sup>40</sup>

In July 2021, the EC observed that certain car manufacturers (Daimler, BMW and Volkswagen group) colluded on limiting technical development in the area of nitrogen oxide cleaning for new passenger diesel cars. The manufacturers held regular meetings to develop emissions control systems which were required to meet the regulatory requirements on emission cleaning. They agreed on the tank sizes and estimated consumption of the diesel exhaust fluid (known as 'AdBlue') which was injected into the exhaust gas stream as part of the emission control system and exchanged commercially sensitive information on these elements. According to the EC, this amounted to restricting competition on product characteristics relevant to consumers and constituted an infringement in the form of a limitation of technical development. The car manufacturers were consequently penalised (except for Daimler which received 100% leniency for disclosing the cartel).<sup>41</sup>

The European Commission (EC) has taken steps to promote sustainable cooperation among businesses, but their approach has left many companies confused. An efficient way of encouraging sustainable collaboration is to ensure that agreements aimed at promoting environmental, social, and governance (ESG) goals, and whose overall benefits in the larger environmental context outweigh the competition concerns, are not restricted by antitrust authorities. This can be achieved by instilling confidence among businesses through changes in guidelines. However, the ambiguous approach of EC antitrust authorities towards ESG agreements may deter companies as they will be cautious about attracting antitrust liabilities.<sup>42</sup>

### **3.2 NETHERLANDS**

The Dutch guidelines state that agreements promoting sustainability must consist of benefits that outweigh the disadvantages caused by competition restrictions, also the parties would have

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<sup>40</sup> Supra note 7.

<sup>41</sup> Supra note 3.

<sup>42</sup> Drive Towards A Sustainable Competition: Lessons From Other Regulators, available at: <https://www.cbflnludelhi.in/post/drive-towards-a-sustainable-competition-lessons-from-other-regulators> (last visited on December 9, 2023)

to give justifications for the benefits incurred.<sup>43</sup> The agreements would be allowed even if they restrain competition in the market.<sup>44</sup>

The Dutch regulators introduced the fair share criteria which focuses on offsetting environmental damages rather than other sustainability norms. This does not necessarily mean that immediate consumers will be fully compensated for the effects of competition. It would be adequate if prime objective that is the environmental goals get fulfilled. The Dutch authorities are leading the way for the antitrust regulators to endorse sustainability-conscious agreements. These agreements not only defeat the "first mover's disadvantage" but also promote competition in tandem with sustainability.<sup>45</sup>



## CHAPTER IV

### THE AMBIT IN INDIA

The sustainability movement has not been able to come into effect in India with respect to competition law. The Competition Act, 2002 does not consist of any explicit provisions with regard to sustainable agreements between companies<sup>46</sup>, even the Competition Amendment Act, 2023 did not introduce any provisions supporting ESG collaborations among the companies.

But the CCI does seem to have sustainability as a pro-competitive idea which will be discussed ahead. According to some researchers, the provisions of the Competition Act, 2002 seem to have provisions broad enough to interpret sustainable agreements.<sup>47</sup>

A satisfactory competition policy for sustainability should address three pillars primarily, viz., environmental protection, economic growth, and social inclusion. Both the public and private sector aims to achieve these three pillars.<sup>48</sup>

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<sup>43</sup> Supra note 37.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Supra note 3.

<sup>47</sup> Ibid.

<sup>48</sup> Supra note 31.

## **4.1 THE COMPETITION ACT, 2002**

There are no special provisions for the sustainable agreements in the Competition Act, 2002 and neither there was any new amendment in the Competition Amendment Act, 2023 for the same. However, certain provisions of the Act can be interpreted broadly to incorporate sustainable agreements.

### **4.1.1 SECTION 3**

The proviso of Section 3(3)<sup>49</sup> provides that “*Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.*”

It can be inferred from the provision that cooperation agreements in the form of joint ventures can be exempted under the proviso to Section 3(3) of the Act<sup>50</sup>.

In *Association of Third-Party Administrators v. General Insurers’ (Public Sector) Association of India* it was held that joint ventures set up to combat in the market, not affecting competition in an adverse manner may not be seen as adversarial to the competition laws.

### **4.1.2 SECTION 19 AND 20**

As per Section 19(3) of the Competition Act, the Competition Commission of India (CCI) has the authority to evaluate whether agreements that promote ESG practices have any adverse effects on consumers, enhance the production and distribution of goods, and encourage economic and technological development.<sup>51</sup> There also exists a framework of assessment of agreements having A.A.E.C (Appreciable Adverse Effect on Competition) under Section 19(3)(d) and 19(3)(f), which are equipped to smoothly accommodate ESG assessments in sustainable collaborations, which promote technical, scientific and economic developments and benefits to consumers.<sup>52</sup>

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<sup>49</sup> The Competition Act, 2002.

<sup>50</sup> Association of Third-Party Administrators v. General Insurers’ (Public Sector) Association of India, 2011 SCC OnLine CCI 55, Supra note 14.

<sup>51</sup> Supra note 19.

<sup>52</sup> Supra note 42.

Section 19(3) of the Act provides that “*The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:- ... (e) improvements in production or distribution of goods or provision of services; or (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.*”<sup>53</sup>

Additionally, the CCI can also examine the potential negative impact of ESG-related acquisitions on innovation, economic growth, and benefits to consumers or society under Section 20(4) of the Act.<sup>54</sup>

#### **4.1.3 SECTION 54**

Section 54 of the Act provides the power to Central Government to grant exemption in the interest of security of the State or in public interest. Here, security does not only refer to territorial security but also ‘Social, Economic and Environmental (SEE)’ security of present as well as the future generations.<sup>55</sup>

#### **4.1.4 A LOOK AT JUDICIAL PRONOUNCEMENTS**

In *Andhra Pradesh Gas Distribution Corporation Limited, Shell Gas B.V & Ors.*<sup>56</sup> the CCI had the opinion that there was a deficiency in the supply of natural gas supply and the proposed JV consisted of efficiencies in terms of creating a new source of natural gas for the consumers, thus allowing the JV.<sup>57</sup>

The CCI has no development on environmental governance yet, but has shown sensitivity to social goals in the following judgments. In *Vipul Shah v. AIFEC and Ors.*, the CCI refrained from imposing penalties on film associations for alleged cartelisation since they were formed by daily-wage earners and craftsmen. In *FCI v. SAPPL & Ors.*, the CCI did not impose the

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<sup>53</sup> The Competition Act, 2002.

<sup>54</sup> The Intersection of Indian Competition Law and ESG Collaborations: Challenges and Opportunities, available at: <https://ksandk.com/competition/indian-competition-law-esg-collaborations/> (last visited on December 9, 2023)

<sup>55</sup> Supra note 4.

<sup>56</sup> 2016 SCC ONLINE CCI 105.

<sup>57</sup> Supra note 7.

penalty on small/medium offending enterprises, taking note of the fact that the micro, small and medium enterprises (MSME) sector in India was under stress due to the economic situation caused by COVID-19.<sup>58</sup>

#### **4.2 INDIA'S PLAN AHEAD AND THE CCI**

During the COP26 Summit held in Glasgow, the Indian government announced its goals to combat climate change. India aims to achieve net-zero emissions by 2070 and generate 50% of its energy from renewable sources by 2030. The Indian government is also considering amending existing environmental laws to support the SDGs.<sup>59</sup>

According to the Secretary of CCI, Jyoti J. Bhanot, the competition law framework has in-built flexibility to account for sustainable development and climate change, and 'environmental friendliness' may be considered a 'quality' dimension in competition assessment.<sup>60</sup>

The Ministry of Corporate Affairs collaborated with the Indian Institute of Corporate Affairs to create the National Guidelines on Responsible Business Conduct in 2018 (NGRBC).<sup>61</sup> In the Principle 6 of these guidelines it is stated that businesses should respect and make efforts to protect and restore the environment. Further it emphasises that *"environmental issues are interconnected at the local, regional and global levels, which makes it imperative for businesses to address issues like pollution, biodiversity conservation, sustainable use of natural resources and climate change (mitigation, adaptation and resilience) in a just, comprehensive and systematic manner. These are aligned with SDGs 11, 13, 14 and 15."*<sup>62</sup>

The Securities and Exchange Board of India (SEBI) has been taking proactive steps since 2012 to ensure that businesses disclose the necessary information related to environmental, social, and governance implications. Under the Listing Regulations of 2012, SEBI instructed the top 100 listed entities by market capitalization to submit Business Responsibility Reports (BRRs) from an environmental, social, and governance perspective. These BRRs help businesses to

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<sup>58</sup> Supra note 19.

<sup>59</sup> Supra note 31.

<sup>60</sup> Supra note 6.

<sup>61</sup> Supra note 31.

<sup>62</sup> National Guidelines on Responsible Business Conduct.

demonstrate the adoption of NVG principles and the attendant core elements, with the aim of engaging them more meaningfully with their stakeholders.<sup>63</sup> SEBI has recently released a circular regarding business responsibility and sustainability reporting (BRSR) for the top 1000 listed entities (by market capitalization).<sup>64</sup> The objective of this circular is to bring sustainability reporting at par with financial reporting. While it was voluntary till FY 2021-22, it was later made mandatory from FY 2022-23. The extensive disclosures will cover aspects such as resource usage, pollutant emissions, transitioning to a circular economy, waste generated, and waste management practices. It will also include disclosures related to the workforce, value chains, communities, and consumers.<sup>65</sup>

During the BRICS Competition Conference, the chairperson of the Competition Commission of India (CCI) announced that they are exploring ways to incorporate sustainability into the competition law framework. India has set a goal to achieve carbon neutrality and reduce emissions intensity by 2030. This requires a society that balances economic growth with environmental sustainability<sup>66</sup> which further emphasizes on introduction of new policies supporting environmentally sustainable competition law.

### **4.3 ROADBLOCKS**

#### **4.3.1 NO EXPRESS REGULATION**

Firstly, there are no express regulations with regard to ESG-related collaborations in India. Secondly, it does not account for assessing the benefits that could arise from collaborations among competitors for future consumers. It only focuses on the benefits for current consumers. Thirdly, as per the Competition Act, parties have to self-assess whether their collaboration can lead to any anti-competitive effects and there is no provision for communication channels with CCI for seeking guidance on such collaborations. Due to the absence of any previous experience and guidance on this issue, companies are compelled to

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<sup>63</sup> Supra note 31.

<sup>64</sup> SEBI, 'SEBI Circular on Business Responsibility and Sustainability Reporting by listed entities' (PR No.: 18/2021, 10 May 2021) accessed 30 November 2022.

<sup>65</sup> Supra note 31.

<sup>66</sup> Supra note 37.

adopt conservative strategies that may potentially harm ESG interests.<sup>67</sup> In light of the increasing number of businesses aiming to improve their environmental, social and governance (ESG) scores, and the government's commitment to achieving net-zero carbon emissions and promoting corporate social responsibility, it is imperative that the CCI and the government align India's competition regulations with the best global practices. This alignment will help create opportunities for ESG partnerships and initiatives.<sup>68</sup>

#### **4.3.2 CONTRARY OBJECTIVE**

The main objective of the Competition Act, 2002 is to keep a check on the mergers of competitor companies and other anti-competition activities which might lead to domination of one producer and a monopolistic market for the consumers. Competition law remains disincentive to cooperation between firms which is an essential requirement for the enforcement of sustainable agreements.<sup>69</sup> Green competition law is an intricate and relatively unexplored territory. The absence of guidance by policymakers on how competition law can advance sustainability initiatives may end up worsening the problem instead of being a solution.<sup>70</sup>

#### **4.3.3 GREENWASHING**

Greenwashing is the practice of making false environmental claims to present a company or product as environmentally friendly, and it is a widespread problem in India.<sup>71</sup> The greenwashing cartel is an example of a situation where anti-competitive practice and environmental damage are caused at the same time, it refers to corporations collectively overcharging consumers under the guise of environmental protection. It can also refer to corporations intentionally and jointly reducing competition in the market for sustainable

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<sup>67</sup> Supra note 19.

<sup>68</sup> Supra note 54.

<sup>69</sup> Supra note 37.

<sup>70</sup> 'Green' competition law – a changing enforcement climate?, available at: <https://sustainability.freshfields.com/post/102g6wo/green-competition-law-a-changing-enforcement-climate> (last visited on December 11, 2023).

<sup>71</sup> Greenwashing In India: Deceptive Marketing Or Genuine Sustainability?, available at: <https://www.mondaq.com/india/waste-management/1390564/greenwashing-in-india-deceptive-marketing-or-genuine-sustainability> (last visited on December 10, 2023).



products.<sup>72</sup> Companies masquerade their agreements as sustainable and energy-efficient to attract investors and customers and deceive antitrust regulators.<sup>73</sup> These practices are a threat to the genuine environmental-friendly initiatives by many other corporations.

The Ministry of Environment, Forest and Climate Change in 2018, released draft guidelines called "Guidelines for Environmentally Sustainable Practices" to prevent Greenwashing and promote genuine sustainability efforts. The guidelines outline a set of criteria that companies should follow when making environmental claims. The criteria consist of being transparent about the environmental impact, using credible and verifiable information, and avoiding vague or ambiguous claims.<sup>74</sup>

According to the Secretary of CCI, anti-competitive practices can occur when corporations engage in collusion to delay the market introduction of green technologies or agree not to promote the environmental performance of their products.<sup>75</sup>

## CHAPTER V

### POTENTIAL DEVELOPMENTS IN INDIA

#### 5.1 A REGULATORY FRAMEWORK

CCI needs to create a competition regime that is sufficiently flexible to look beyond a consumer welfare standard to consider broader wider economic and social impacts. In doing so, it could observe the EU's approach.<sup>76</sup>

India is fortunate to have a wide range of regulations from around the world to refer to for making a beneficial statute or regulation that is well-suited to the Indian landscape.

The formulation of new regulations is essential and can be done by either amendment to the existing Act of 2002 or by enforcing new regulations. The regulations formed should be

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<sup>72</sup> Supra note 6.

<sup>73</sup> Supra note 42.

<sup>74</sup> Manoj Sonawala, "Green Washing and Green Blushing", available at: <https://www.icsi.edu/media/webmodules/CSJ/April/11ArticleManojSonawala.pdf> (last visited on December 10, 2023).

<sup>75</sup> Supra note 6.

<sup>76</sup> Supra note 37.

flexible in nature to have scope for wider interpretation in times of dynamic technological changes.

## **5.2 'RULE OF REASON'**

The CCI has the option to apply the "Rule of Reason" by following the UK Competition Authorities' four-pointer test. This test includes the following criteria: Firstly, the agreement should generate efficiencies (i.e., improve the quality of products), secondly these efficiencies cannot be achieved with less restrictive means, thirdly they should benefit consumers, and fourthly the agreement should not lead to the elimination of competition in the market. The term "efficiencies" should be based on objective parameters. Both quantitative data (such as the reduction rate of carbon footprints) and qualitative data (such as measures related to animal welfare) can be considered.<sup>77</sup>

## **5.3 CHANNEL FOR COMMUNICATION WITH FIRMS**

The CCI should consider the option to provide businesses with clear and constructive formal guidance on how to address this issue of ESG-collaborative agreements.<sup>78</sup> Alternatively, the CCI can also establish channels of communication that allow businesses to present their collaborative proposals to the organization. To effectively promote collaborative ESG initiatives, these efforts will need to be complemented with legislative support that explicitly incorporates provisions to this effect.<sup>79</sup> There is a need for guidance by CCI so that businesses shying away from sustainability activities due to the fear of allegations of anti-competitive behaviour gain some fundamental guidance.<sup>80</sup> Such guidance will enable the stakeholders to approach the CCI with inquiries that might aid in elucidating the issues.<sup>81</sup> The regulators may guide the individual sector or provide case-related guidance. This approach has been used by the Japan Fair Trade Commission.<sup>82</sup>

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<sup>77</sup> Supra note 7.

<sup>78</sup> Supra note 19.

<sup>79</sup> Ibid.

<sup>80</sup> Supra note 31.

<sup>81</sup> Ibid.

<sup>82</sup> 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.

Given the increasing interest of companies in improving their ESG (Environmental, Social, and Governance) scores, as well as the government's commitment to corporate social responsibility (CSR) and net-zero carbon emissions, it is crucial for the government and the CCI to facilitate ESG collaborations and bring India's competition regulations in line with global practices.<sup>83</sup>

#### **5.4 INCENTIVIZE INNOVATION**

Authorities have acknowledged that the current regulations do not provide enough incentives to businesses to encourage them to innovate and become sustainable. As most jurisdictions are yet to publish their guidelines, businesses may be cautious and not make any substantial changes to their practices immediately. The assessment of sustainability claims, whether it's in the form of a sustainability agreement or a green merger, requires authorities to evaluate efficiencies on a case-by-case basis. The lack of practical application of any upcoming guidelines in the preliminary stages may even discourage businesses from actively participating and innovating.<sup>84</sup>

#### **5.5 EDUCATE CONSUMERS**

When consumers are empowered to value sustainable products and make informed decisions, businesses may feel encouraged to compete with sustainability and can innovate their production, distribution, and sales processes to gain sustainability advantages. Statistically, 68% of highly empowered consumers plan to increase their efforts to identify brands that reduce their environmental impact, while 61% actively seek out energy-efficient labels when making purchases.<sup>85</sup>

If consumers value sustainability and are well-informed about its attributes in products, businesses can innovate their production, distribution, and sales processes to gain

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<sup>83</sup> Supra note 19.

<sup>84</sup> Supra note 31.

<sup>85</sup> United Nations Conference on Trade and Development, Competition and Consumer Protection Policies For Sustainability.

sustainability advantages. Empowered consumers can therefore act as a driving force, encouraging business innovation, investment, and competition in the area of sustainability.<sup>86</sup>

## **5.6 SANDBOXING**

The OECD has suggested the use of sandboxing as a potential strategy for antitrust regulators. Sandbox testing would allow companies to experiment with new ideas, products or services under the guidance and supervision of the competition authority. This means that companies would not be penalized for any potential violations of the law that may occur during the sandbox testing period.<sup>87</sup> While sandboxing is being studied, proposed and considered in various jurisdictions such as the Netherlands, Greece, and the EU, it has not yet been implemented.<sup>88</sup>



## **CHAPTER VI**

## **CONCLUSION AND SUGGESTIONS**

After having a view of the international position of sustainability in competition law and analysing the current position of India, it would not be incorrect to conclude that the scope of competition law in India can be easily extended to sustainability by stretching the ambit of the current provisions and by introducing certain specific regulations for the same to bring guidance to the companies aiming for ESG-collaborations.

The competition law can be seen through a green lens and can also act as an effective solution to sustainability by encouraging companies to collaborate on ESG initiatives if incapable of doing the same individually which would lead to sustainable production and distribution of goods along

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<sup>86</sup> Ibid.

<sup>87</sup> Supra note 82.

<sup>88</sup> Supra note 31.

with protection of the rights of the consumer. This would also make the companies along with the consumers more environmental-conscious.

By viewing other jurisdictions and their regulations, India can formulate ideal guidelines for their market. Also, the provisions of the Competition Act, 2002 and the current approach of CCI reflect a positive approach of India towards competition law as a solution to sustainability.

The author would suggest that the CCI should take reference from other jurisdictions discussed above and formulate fresh regulations for ESG-collaborations. Also, while the interpretation of the Competition Act, 2002 is broadened, the definition of anti-competitive agreements in Section 3(1) should be narrowed down to give more clarity as to which agreement would fall under the category of anti-competitive agreements and which would not.

It is also submitted that Section 54 of the Competition Act, 2002 be given a wider interpretation. The clause (a) in the said section states “*in the interest of security of the State or public interest*”<sup>89</sup> which can be read for including the acts undertaken for environmental security. Clause (b) of the said section which states exemption to “*any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries*”<sup>90</sup> can be read for ESG-collaborative agreements as it is the duty of the state to protect the environment and India is obligatory under UN Sustainable Development Goals, Paris Agreement, 2015, etc. for the same. Lastly, clause (c)<sup>91</sup> of the said section which provides an exemption from the rules of competition if the act performed is a sovereign function or is related to a sovereign function, can also be read in a manner wherein protection of the environment, promotion of sustainable development and innovation of technology for greener production are the sovereign functions of the state which the private entities perform.

Lastly, it is proposed that the guidance from the CCI whether formal or informal is the need of the hour for companies to implement their ESG initiatives.

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<sup>89</sup> Section 54, The Competition Act, 2002.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

Nature is an indispensable part of human life and protection of the same would lead to the protection of humankind, and this requires a nation to be environmentally conscious. This brings a pressing need for the interpretation of laws like anti-trust laws through a green lens.



# vakalatnaama