

# COMPETITION’S ECO RENAISSANCE: A PARADIGM SHIFT

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*Environmental degradation is a prime example of a market failure resulting from negative externalities of production processes, wherein the negative costs are not directly absorbed by either the producer or consumer. The shift towards economic environmental regulatory instruments or incentive/market-based instruments can help reform the crisis in environmental law and achieve a greener competition. Through this paper, the authors shall examine the relevance of market-based instruments in furthering global sustainable practices and the intricate balance that competition establishes between co-operations to advance genuine sustainable objectives and ‘greenwashing’ cartels in the market. It shall also examine the extent of ‘out-of-market’ efficiencies that can be considered without diluting the effectiveness of the enforcement regime. Particularly, the paper seeks to highlight the deficiencies in Indian Competition policy and offer potential pathways for enhancing its approach, in light of the global antitrust practices.*

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## I. INTRODUCTION

Adam Smith famously penned in his *Wealth of Nations* that ‘people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.’<sup>1</sup> However, in light of the contemporary crisis of climate change, casting its shadow over every nation, one might be inclined towards correcting his assertion — it is cooperation (and not competition) that acts as a driving force behind achieving sustainable targets. The shift towards economic environmental regulatory instruments or incentive/market-based instruments can help reform the crisis in environmental law and achieve a greener competition.<sup>2</sup>

Through this paper, the authors will comprehensively analyse the manner in which competition policy can lend its backing to sustainable economic practice and advance towards climate neutrality, aligning with the Sustainable Development Goals (‘SDGs’) and organisations’ Environmental, Social and Governance (‘ESG’) policies. The paper shall examine the relevance of market-based instruments in furthering global sustainable practices. Furthermore, it shall delve into the intricate balance that competition establishes between co-operations to advance genuine sustainable objectives and ‘greenwashing’ cartels in the market. Particularly, the paper seeks to highlight the deficiencies in Indian Competition policy and offer potential pathways for enhancing its approach, in light of the global antitrust practices.

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<sup>1</sup> Adam Smith, *Wealth of Nations* (1776).

<sup>2</sup> C Halpern, ‘Governing Despite its Instruments? Instrumentation in EU Environmental Policy’ (2010) 33(1) *West European Politics* 39.

In the ensuing discourse, Part II will highlight the dilemma in locating sustainability in competition law. Part III will examine the global antitrust practice with specific emphasis to EU competition law within the context of sustainable policies. Transitioning to Part IV, the focus will shift to the Indian competition landscape, probing its current standing and how we can use our existing legislations to broaden the scope of ESG in the nation. In Part V, recommendations will be put forth for the integration of ESG practices and sustainable policies within the Indian context, drawing inspiration from the established international norms. Concluding the discourse, the paper will culminate in Part VI.

## II. LOCATING SUSTAINABLE AGREEMENTS WITHIN ESGS

ESG considerations have become increasingly important in modern business operations with companies facing mounting pressure from multiple stakeholders to demonstrate their ESG compliances. This pressure stems from evolving regulatory frameworks that mandate ESG reporting, growing consumer demand for sustainable products, and heightened regulatory scrutiny of achieving ESG targets.<sup>3</sup>

It is to be noted that companies pursuing ESG initiatives, such as transitioning to environmentally friendly facilities to reduce carbon emission, often face significant capital expenditures affecting their financial performance. This is termed as 'first-mover disadvantage' in competition parlance. Coupled with this is the uncertainty regarding consumers' willingness to pay ('WTP') premium prices for ESG-compliant products, thereby potentially reducing the companies' ability to recover their sustainability investments.<sup>4</sup>

In order to mitigate the negative impacts associated with first-mover disadvantages, some businesses have explored collaborative approaches such as joint ventures to sustainability investments. While such coordinated approaches have significantly beneficial environmental outcomes, it raises competitive law concerns that could facilitate collusions and anti-competitive behaviours, including cartelisation.

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<sup>3</sup> MP Schinkel & Y Spiegel, 'Can Collusion Promote Sustainable Consumption and Production?' (2017) 53 *International Journal of Industrial Organization* 371.

<sup>4</sup> M Kitzmueller & J Shimshack, 'Economic Perspectives on Corporate Social Responsibility' (2012) 50 *Journal of Economic Literature* 51.

In order to address the issues regarding the intersection of sustainability initiatives and competition law, competition authorities around the globe have taken significant steps. The European Commission ('EC') has demonstrated leadership in this area by incorporating dedicated provisions on sustainability agreements in its revised horizontal guidelines.<sup>5</sup> Similarly, the UK Competition and Markets Authority ('CMA') has published directions on how businesses can structure such sustainable co-operations while upholding principles of competition.<sup>6</sup> Additionally, in Europe, both the Netherlands Authority for Consumers and Markets ('ACM')<sup>7</sup> and the Hellenic Competition Commission<sup>8</sup> have issued comprehensive frameworks for addressing the conundrum of locating sustainable agreements within the competition framework.

In light of the European Green Deal, the discourse surrounding 'sustainability and competition law' has ascended to the forefront of debates within the European Union ('EU'). The EC is inclined towards adopting competition practices that align with sustainability objectives and has explicitly underlined through the incorporation of a distinct chapter dedicated to horizontal co-operation agreements with sustainability objectives ('Sustainable Agreements') within the updated Guidelines on the applicability of Article 101 Treaty of Functioning of European Union ('TFEU') to horizontal cooperation agreements ('Revised Horizontal Guidelines'), unveiled on 1 June 2023.<sup>9</sup>

Climate neutrality and sustainability as a concept was championed by the United Nations General Assembly in 2015 with its 2030 Agenda. This framework of 17 SDGs provides a comprehensive blueprint and strategy for the 'betterment of humanity, environment, and prosperity.'<sup>10</sup> On the similar vein, the Paris Agreement endeavours to fortify the global response to climate change through

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<sup>5</sup> European Commission, 'Draft Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements' (2022) OJ C259/1.

<sup>6</sup> Competition and Markets Authority, 'Environmental Sustainability Agreements and Competition Law' (2021).

<sup>7</sup> Autoreiteit Consument & Markt, 'Guidelines on Sustainability Agreements' (2021).

<sup>8</sup> Hellenic Competition Commission, 'Staff Discussion Paper on Sustainability Issues and Competition Law' (2021).

<sup>9</sup> Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C11/1 ('Revised Horizontal Guidelines').

<sup>10</sup> UNGA, 'United Nations Sustainable Development Goals (SDGs)' (2015).

financial mechanisms, technological framework and an amplified capacity-building approach.<sup>11</sup>

Currently, sustainability is a gripping issue, driven by a growing number of companies striving to conduct their operations without jeopardising the capacity of future generations to fulfil their needs. In a comprehensive sense, it encompasses actions that promote economic, environmental, and social progress, including aspects like labour and human rights.<sup>12</sup> Co-operation agreements, irrespective of their form, which pursue sustainable objectives are referred to as 'sustainability agreements'.<sup>13</sup>

From an economic standpoint, environmental harm is conventionally perceived as a 'negative externality', meaning that the choices made by one participant regarding production or consumption inadvertently adversely affect the utility or profit of the other, without any corresponding compensation.<sup>14</sup> In the absence of corrective policies, the market's operation often leads to excessive pollution generation compared to what is economically efficient, thereby signifying market failure. Environmental economic instruments are crafted to address this predicament by incorporating the adverse environmental effects into the decision-making processes of market participants. This approach, as often stated, brings the environment 'into the boardroom'.<sup>15</sup> By leveraging market instruments to incentivise sustainable and optimal allocation of resources, economic instruments become a logical choice for advocates of sustainable development.

The question of whether the environment should indeed be brought into the boardroom is heavily contested. The proponents of integration of sustainability into competition suggest that the tension between the market and the environment could potentially be alleviated by the accumulation of market influence, ultimately promoting sustainability practices as a form of economic

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<sup>11</sup> UN, 'Key Aspects of the Paris Agreement' (UNFCCC 2015) <<https://unfccc.int/most-requested/key-aspects-of-the-paris-agreement>> accessed 9 January 2025.

<sup>12</sup> Revised Horizontal Guidelines, para 517.

<sup>13</sup> *ibid* para 521.

<sup>14</sup> Robert H Frank, *Microeconomics and Behaviour* (6th edn, New York, McGraw-Hill Irwin 2006) 607.

<sup>15</sup> Suzanne Kingston, 'Why Environmental Protection Goals Should Play a Role in EU Competition Policy: A Legal Systematic Argument' in *Greening Competition Law and Policy* (CUP 2012).

progress which contributes a 'fair-share' of benefits to consumers.<sup>16</sup> Conversely, another viewpoint contends that implementing green antitrust measures could potentially harm both competition and the environment. It might stifle the natural market forces driving businesses to adopt more sustainable practices, manifest in deceptive greenwashing cartels and provide government entities, which should be promoting sustainability, with additional reasons to avoid their responsibility for crafting effective regulations.<sup>17</sup>

To determine whether market-based instruments are the appropriate avenue for tackling public policy objectives, it is crucial to understand the significance of consumers' WTP as the economic foundation of numerous sustainability agreements.<sup>18</sup> This is because WTP is inherently linked to whether or not industries would face a 'first-mover-disadvantage,' or potential setbacks that a company might face when it unilaterally intends to adopt a new strategy or technology, particularly in cases where high investments or uncertainty is involved. If there is a desire for sustainable products and a substantial willingness among consumers to pay for them, undertakings can unilaterally embark on a sustainable consumption and production model ('SCP'). SCP, aimed at optimal allocation of resources while mitigating pollution and waste, is regarded as a viable approach to addressing environmental complexities.<sup>19</sup> In such cases, any additional costs can be passed onto the consumers and this will actually benefit the first mover. However, it is not always the case that WTP and SCP are in tandem with each other.

#### A. RELEVANCE OF CO-OPERATION BETWEEN COMPETITORS TO ACHIEVE ESG GOALS

Encouraging sustainable practices have become progressively more vital for enterprises across various industries. This shift is propelled by regulations and varied expectations of stakeholders including customers, investors, and

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<sup>16</sup> Gianni De Stefano, 'EU Competition Law & the Green Deal: The Consistency Road' (*Competition Policy International*, 28 July 2020) <[https://www.pymnts.com/cpi\\_posts/eu-competition-law-the-green-deal-the-consistency-road/](https://www.pymnts.com/cpi_posts/eu-competition-law-the-green-deal-the-consistency-road/)> accessed 02 August 2023.

<sup>17</sup> Maarten Pieter Schinkel and Leonard Treuren, 'Green Antitrust: (More) Friendly Fire in the Fight against Climate Change', (2020) Amsterdam Law School Research Paper No. 2020-72 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3749147](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3749147)> accessed 01 August 2023.

<sup>18</sup> Dr Nicole Rosenboom, 'Ticking the Boxes on green self-assessment, and the risk of greenwashing' (*Oxera*, 31 August 2022) <[https://www.oxera.com/insights/agenda/articles/ticking-the-boxes-on-a-green-self-assessment-and-the-risk-of-greenwashing/#up\\_ftn11](https://www.oxera.com/insights/agenda/articles/ticking-the-boxes-on-a-green-self-assessment-and-the-risk-of-greenwashing/#up_ftn11)> accessed 02 August 2023.

<sup>19</sup> MP Schinkel (n 11).

employees, encompassing ESG considerations.<sup>20</sup> Commissioner Vestager opines that businesses play a vital role in helping to create a sustainable market and sometimes respond better, if they get together.<sup>21</sup>

When an individual company endeavours to absorb externalities (such as pollution cost), it is plausible that an additional cost may arise and this could result in a first mover disadvantage.<sup>22</sup> Unfortunately, the overly formalistic approach of competition law undermines such initiatives. A splendid example in this regard is of the Fair Wear Foundation ('FWF'), a leading law firm which intended to implement a 'living wage',<sup>23</sup> guaranteeing that employees in their garment factories were given a living wage which met their basic necessities.<sup>24</sup> However, this policy never saw the light of the day because of the rational fear that it would be perceived as a buyer's cartel amounting to an object restriction under Art 101 of TFEU.

With the escalating urgency of environmental issues, there is a growing call for a comprehensive collective effort, or an 'all-hands-on-deck' approach<sup>25</sup>. At this juncture, it is relevant to consider the sustainable framework in competition policy across the globe to safeguard consumer welfare and balance it against public policy.

### III. SUSTAINABILITY FRAMEWORKS IN ANTITRUST ACROSS THE GLOBE

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<sup>20</sup> Jay Mondrall, 'Climate Change and Sustainability Disputes: Antitrust considerations' (*Norton Rose Fullbright*, July 2021) <<https://www.nortonrosefulbright.com/en/knowledge/publications/3633ff51/climate-change-and-sustainability-disputes-anti-trust-and-competition-perspective>> accessed 21 August 2023.

<sup>21</sup>OFT - OECD, OFT Contribution to the OECD Policy Roundtable on Horizontal Agreements in the Environmental Context 2010 (24 November 2011) <<http://www.oecd.org/competition/cartels/49139867.pdf>> accessed 13 August 2023.

<sup>22</sup>Suzanne Kingston, (n 15) 97. See also, S Kingston, 'Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special' (2010) 16(6) *European Law Journal* 780.

<sup>23</sup> Simon Holmes, 'Climate Change, Sustainability and Competition Law' (2020) 8 *Journal of Antitrust Enforcement* 354, 364 <[https://events.concurrences.com/IMG/pdf/simon\\_holmes\\_article.pdf](https://events.concurrences.com/IMG/pdf/simon_holmes_article.pdf)> accessed 20 August 2023 ('Simon Holmes') 357.

<sup>24</sup> Arnold and Porter LLP, 'The Application of EU Competition Law to the Adoption of the Living Wage Standard (Legal Opinion for the Fair Wear Foundation)' <<https://api.fairwear.org/wp-content/uploads/2016/06/Opinion-to-FWF-The-Application-of-EU-Competition-Law-to-FWF-Living-Wage-Standardfinal1.pdf>> accessed 13 August 2023

<sup>25</sup> Executive Vice-President M. Vestager, 'Speech: A New Era of Cartel Enforcement' (Italian Antitrust Association Annual Conference, 22 October 2021) <[https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en)> accessed 27 August 2023.

Collaborative efforts among competitors serve as a mechanism to 'equalise the level playing field' by incorporating expenses that mirror true production costs. When these costs are effectively internalised, it amplifies the motivation for companies to curtail these expenditures—resulting in a symbiotic enhancement of both the environment and the competitive landscape.<sup>26</sup> To ensure that competition does not impede these efforts of private voluntary measures, antitrust authorities across the globe such as Australia<sup>27</sup> and the Member States of the EU have implemented measures.

#### A. LEARNINGS FROM THE EU

Sustainable development is a core principle of EU law and has been explicitly referred in Article 3(3) of the Treaty of European Union ('TEU'),<sup>28</sup> Article 11 of the TFEU and Article 37 of the EU's Charter of Fundamental Rights ('CFREU').<sup>29</sup> A conjoint reading of Article 7 and Article 11 TFEU creates a mandatory legal obligation for sustainability goals to be incorporated into the framework of competition law.<sup>30</sup> Union laws and policies should be consistent with environmental protection requirements, ensuring the *ex-ante* detection and resolution of any conflicts between different policies, rather than dealing with restriction and harm after they have occurred, thereby increasing efficiency.<sup>31</sup>

The Revised Horizontal Guidelines provide a non-exhaustive list of agreements that are unlikely to cause competition concerns, such as those aimed at complying with international treaties, or conventions, agreements relating to internal corporate conduct, and agreements to establish a database containing general information about suppliers with (un)sustainable value chains or production processes.<sup>32</sup> Additionally, the Dutch ACM has also enumerated a list of practices which are unlikely to raise competition law concerns including private voluntary non-binding initiatives and agreements to phase out lesser

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<sup>26</sup> Simon Holmes (n 23) 367

<sup>27</sup> *ibid.*

<sup>28</sup> Art 3(3) TEU states 'The Union [...] shall work for the sustainable development of Europe [...] and a high level of protection and improvement of the quality of the environment.'

<sup>29</sup> See also Arts 3(5) and 21(2) TEU.

<sup>30</sup> Donald McGillivray and Jane Holder, 'Locating EC Environmental Law' [2001] 20 YEL 139, 152.

<sup>31</sup> Julian Nowag, 'The Sky is the Limit: On the Drafting of Article 11 TFEU's Integration Obligation and Its intended reach' (2014) 45 University of Oslo Faculty of Law.

<sup>32</sup> Revised Horizontal Guidelines, paras 527-531.



sustainable products from the market provided that it does not significantly impact price and/or product diversity.<sup>33</sup>

To illustrate, the EC's *Consumer Detergents* case demonstrated how environmental programmes could potentially serve as vehicles for anticompetitive conduct, specifically price coordination. In this case, an initiative involving laundry detergents led to cartelisation and coordination of prices. However, competition frameworks also acknowledge legitimate sustainability measures, permitting certain actions that advance environmental objectives even when they may have some competitive implications.<sup>34</sup>

B. PURSUING NON-COMPETITION GOALS IN 'EFFICIENCY' DRIVEN MARKETS:  
WHEN SUSTAINABILITY AGREEMENTS RAISE COMPETITION LAW CONCERNS

The European Court of Justice has consistently stated that in order to analyse whether a practice is a restriction of competition, it is necessary to consider the legal and economic context of which it forms part<sup>35</sup> and the 'precise purpose' of the agreement.<sup>36</sup> Legitimate objectives, objective justifications, and doctrine of ancillary restriction are tools of determining the precise purpose of the agreement under the umbrella of the legal and economic context of the agreement.<sup>37</sup> Further, a counterfactual analysis should be conducted to prove whether there were 'real, concrete possibilities'<sup>38</sup> for the competition to exist. Therefore, while the EC indicates that horizontal co-operation agreements which are disguised cartels are restrictive of competition by their very nature and are caught by Article 101(1) of TFEU, it also differentiates by stating that a

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<sup>33</sup>Autoriteit Consument & Markt, 'Vision Document Competition & Sustainability' (2014) [1.3] [https://www.acm.nl/sites/default/files/old\\_publication/publicaties/13077\\_vision-document-competition-and-sustainability-2014-05-09.pdf](https://www.acm.nl/sites/default/files/old_publication/publicaties/13077_vision-document-competition-and-sustainability-2014-05-09.pdf) > ('ACM Vision Document').

<sup>34</sup>Commission Decision of 13 April 2011 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case COMP/39579 – Consumer Detergents) [2011] OJ C193/14.

<sup>35</sup>Case 56/65 *Société Technique Minière*, EU:C:1966:38.

<sup>36</sup>Joined Cases C 403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*, EU:C:2011:631, para 136.

<sup>37</sup>Saskia King, 'Agreements that Restrict Competition by Object under Article 101(1) TFEU: Past, Present and Future' (2015) LSE Theses Online, 170.

<sup>38</sup>Joined cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services Ltd and others v Commission*, EU:T:1998:198, para 137.

coordinated restriction of output is not considered as a price-fixing cartel as it was a joint production agreement.<sup>39</sup>

The EC has taken wider public interest considerations into account in the past in decisions like *CECED* wherein an exemption was granted to a joint cooperation agreement among domestic appliance manufacturers and trade associations to discontinue energy inefficient models, increase consumer awareness, and promote energy saving technology.<sup>40</sup> The Swiss Federal Competition Commission exempted the agreement under Article 101(3) because it contributed to lower cost of pollution (which is an external social cost),<sup>41</sup> fostered economies of scale, and deemed that the environmental advantages resulting from the agreement outweighed any potential negative effects on competition.<sup>42</sup> The Commission balanced individual economic benefits with collective environmental benefits while deciding whether consumers derive a fair share of benefits.

Further, certain associations of manufacturers made a commitment to reduce CO<sub>2</sub> emissions from cars in *ACEA*<sup>43</sup> and *JAMA and KAMA*.<sup>44</sup> These targets were set on behalf of all members and as long as the average targets were met, the members were allowed to apply targets and determine how to achieve such targets.

### C. THE IRRELEVANCE OF AN 'OBJECT-BOX' CLASSIFICATION

Professor Whish terms 'object-box'<sup>45</sup> as a limited class of agreements that have a 'particularly pernicious effect on competition' that is incapable of any redeeming virtue and are considered by law to have as their object to restrict competition.<sup>46</sup> The object-box or restriction of competition by object is akin to the 'per-se restriction' under §1 of the Sherman Act. It forms a part of the 'orthodox

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<sup>39</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C11/1, [160] ('Guidelines on Horizontal Co-operation Agreements').

<sup>40</sup> Case IV.F.1/36.718 *CECED* (2000) OJ L 187/47, paras 53-57.

<sup>41</sup> *ibid.*, paras 52-57.

<sup>42</sup> Ismail Siddiqui, 'Competition Policy and Sustainability: A Difficult Path to Thread?' (2022) SSRN <<http://dx.doi.org/10.2139/ssrn.4056805>> accessed 30 August 2023.

<sup>43</sup> Case COMP/37.231 *ACEA* [1998], Commission Press Release IP/98/865, 16 October 1998.

<sup>44</sup> Case COMP/37.634 *JAMA* and Case COMP/37.612 *KAMA* (1999), Commission Press Release IP/99/922, 1 December 1999.

<sup>45</sup> Richard Whish, *Competition Law* (6th edn, Oxford University Press 2009), 120.

<sup>46</sup> *ibid.*, 115

approach' and results in oversimplification of law.<sup>47</sup> The CJEU has consistently held that once an agreement is shown to restrict competition by object, it is not necessary to examine its negative impact on competition,<sup>48</sup> even if the agreement is not implemented.<sup>49</sup>

If a sustainable horizontal co-operation agreement involves particular restrictions of competition, such as coordination of input cost, then by the object-box classification, it would prima-facie be considered as a hardcore restriction of competition. This is because practices resulting in commonality of variable cost would disincentivise innovation and thereby affect consumer welfare and market structure. However, if such cooperation agreement was designed to keep the output cost constant despite internalising negative externalities, then it can be considered to have an ambivalent effect on competition and by that token, a 'by object' label will be inappropriate.

#### D. CONDITIONS FOR EXEMPTING SUSTAINABLE AGREEMENTS:

##### ARTICLE 101(3) ANALYSIS

Chapter 9 of the Draft Horizontal Guidelines is dedicated to the treatment of sustainability agreements, with Section 9.4 specifically addressing their evaluation under Article 101(3) TFEU. Accordingly, claimed efficiency gains must meet rigorous standards vis concrete, verifiable, and supported by objective evidence.<sup>50</sup>

A sustainability standardisation agreement that does not fulfil the 'soft safe harbour' requirements<sup>51</sup> will require an individual analysis of whether it fulfils the four cumulative criteria mentioned in Article 101(3) including (i) agreement contributes to 'objective, concrete and verifiable' efficiency gains ('efficiency gains'); (ii) restriction of competition is indispensable for attaining the benefits

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<sup>47</sup> Whish remarks that O Odudu, 'Interpreting Article 81(1): the Object Requirement Revisited' (2001) 26 *European Law Review* 379.

<sup>48</sup> Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:343, [29]

<sup>49</sup> Case C-199/92 *P Hüls AG v Commission*, EU:C:1999:358, [160]

<sup>50</sup> María Campo Comba, 'EU Competition Law and Sustainability: The Need for an Approach Focused on the Objectives of Sustainability Agreements' [2022] *Erasmus Law Rev.* 5.

<sup>51</sup> This includes (i) transparency and all interested competitors must be able to participate, (ii) voluntary participation, (iii) freedom to adopt a higher standard (although minimum standard can be imposed), (iv) no exchange of commercially sensitive information (v) open and non-discriminatory access; (vi) the sustainability standard must not lead to a "significant" increase in price or "significant" reduction in quality of the products, or the combined market share of the participants must not exceed 20% on any relevant market affected by the standard.

(‘indispensability’); (iii) consumers receive fair share of benefits (‘fair share of benefits to consumers’); and (iv) parties compete on at least one parameter of competition (‘no elimination of competition’).<sup>52</sup> Considerations connected with the pursuit of public interest<sup>53</sup> are verified within Article 101(3) framework by balancing pro-competitive and restrictive practices.<sup>54</sup>

The first assessment under Article 101(3) is the nature of benefits that can be considered. Non-economic benefits may be included in the condition of ‘contribution to improving the production or distribution of goods or advance technological and economic progress’<sup>55</sup> and such benefits must be taken into consideration according to the cross-sectional clauses of the TFEU.<sup>56</sup> The Revised Horizontal Guidelines explicitly recognise utilising cleaner production or distribution technologies, enhancing production and distribution conditions, reinforcing infrastructure resilience, and achieving superior product quality,<sup>57</sup> indicating the acceptance of non-economic considerations as ‘efficiencies.’

Indispensability represents another aspect of the cumulative requirements outlined in Article 101(3) TFEU. In essence, the limitations imposed by the agreement are reasonably necessary for fulfilling the efficiencies and objectives of the agreement. Sustainable initiatives entail high costs, and businesses express willingness to invest only when free-rider and first-mover disadvantages are addressed.<sup>58</sup> The revised horizontal guidelines recognise these problems<sup>59</sup> and allows restrictions on competition provided that it is not beyond what is necessary for achieving the objectives of the agreement.<sup>60</sup>

Thirdly, the Revised Horizontal Guidelines recognise three types of consumer benefits that could arise from sustainability agreements vis

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<sup>52</sup>Slaughter and May, ‘European Commission clarifies sustainability rules in revised horizontal guidelines’ (*Lexology*, 14 June 2023) <<https://www.lexology.com/library/detail.aspx?g=eea60a9c-5de4-4fb3-9df5-f21112b8c92f>> accessed 1 August 2023.

<sup>53</sup> Joined cases T-185/00, T-216/00, T-299/00 and T-300/00 *Métropole Télévision SA (M6) and others v. Commission of the European Communities* ECLI:EU:T:2002:242, para 118.

<sup>54</sup> T-328/03 *O2(Germany)* EU:T:2006:116, para 69.

<sup>55</sup> Case T-451/08 *Stim* ECLI:EU:T:2013:189, para 103.

<sup>56</sup> For instance, in *CECED*, the Commission considered the cost of pollution, which is an external social cost as an efficiency while exempting the agreement under Article 101(3). See *CECED* (Case IV.F.1/36.718) Commission Decision 2000/475/EC [2000] OJ L187/47, paras 55-56.

<sup>57</sup> Revised Horizontal Guidelines, para 558.

<sup>58</sup>Giorgio Monti, ‘Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives’ [2017] 42 E.L. Rev 636.

<sup>59</sup> *ibid* para 566.

<sup>60</sup> *ibid* para 568.

(i) Individual use value benefits;<sup>61</sup> (ii) Individual non-use value benefits;<sup>62</sup> and (iii) Collective benefits.<sup>63</sup> While the first indicator is associated with the direct use of products of sustainability agreements by consumers including traditional advantages like improved price or quality which generate positive externalities, the second and third criteria make an attempt at considering non-economic benefits and 'out-of-market' efficiencies, despite requiring a significant overlap of consumers with beneficiaries outside the relevant market. Individual non-use value benefits refer to indirect advantages stemming from consumers' valuation of how their sustainable consumption impacts others through WTP methodologies. The guidelines illustrate this through example 4 involving furniture producers creating a 'green tree label' for sustainably sourced wood products.

The Revised Horizontal Guidelines will be factored into the evaluation of efficiencies, including those arising from collaborative production agreements under Article 101(3). This allows for the potential inclusion of 'off-market efficiencies,' which are efficiencies not immediately benefiting only the consumers impacted by the cooperation's restrictive consequences.

E. DUTCH COMPETITION AUTHORITY EMPHASIZING SUSTAINABILITY  
IN COMPETITION LAW

Of particular relevance is the analysis of the decisions of the Dutch Authority for Consumers and Markets ('ACM') regarding cooperation between undertakings which uphold public policy considerations. On 6 May 2014, the Dutch Government released a series of policy guidelines to the ACM regarding the application of Article 101(3) TFEU to sustainability initiatives. Simultaneously, the ACM issued a Vision Document outlining its implementation.<sup>64</sup>

The Guidelines and the Vision Document emphasise that while evaluating the efficiency requirement (under the first limb of Article 101(3)) of sustainable agreement, a broad welfare outlook would be embraced.<sup>65</sup> For instance, when conducting cost-benefit analysis for proposed public interest projects, the

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<sup>61</sup> *ibid* para 9.4.3.1.

<sup>62</sup> *ibid* para 9.4.3.2.

<sup>63</sup> *ibid* para 9.4.3.3.

<sup>64</sup> Jan Peter van der Veer, 'Article 101(3) and Sustainability- new developments in the Netherlands' (*Kluwer Competition*, 15 May 2014) <<https://competitionlawblog.kluwercompetitionlaw.com/2014/05/15/art-1013-and-sustainability-new-developments-in-the-netherlands/>> accessed 23 August 2023.

<sup>65</sup> *Ibid*.

positive and negative impacts on the environment are measured using standard valuation methods. Furthermore, the evaluation includes the consideration of both present and future consumers.<sup>66</sup>

In 'Energy Agreement for Sustainable Growth', a nationwide initiative led by the Dutch government to transition to green energy, certain energy companies committed to shutting down five coal power plants, constituting about 10% of the Netherlands' generating capacity. The ACM refused to uphold the public interest defence because closing down of power plants would result in higher energy prices, potentially harming consumers.

In the *Chickens of Tomorrow* case, the Dutch supermarkets, broiler farmers, and broiler meat processors reacted to public concerns about poor living conditions of chickens in industrial farms and made arrangements to sell chicken meat that adhered to improved animal welfare standards. While the ACM noted the legitimate objective and the precise purpose of the agreement, it nonetheless did not exempt the agreement under Article 101(3) because although the consumers' WTP was high, the environmental benefits of the agreement didn't sufficiently outweigh the drawbacks.

#### F. SUSTAINABLE COOPERATION OR GREENWASHING CARTEL?

In a market when the players discreetly 'conspire against the public', problems concerning the veracity and fairness of the representation of product and service are bound to arise.<sup>67</sup> (Lord Denning remarked, 'People who combine to keep prices up do not shout it from the rooftops. They keep it secret; they set up shop in cellars where no one can see them. They refuse to put anything in writing, not even words. A simple nod or wink will suffice.'<sup>68</sup>)

According to a study conducted by Schinkel and Spiegel in 2017,<sup>69</sup> *ceteris paribus*, where the production costs are not high and consumers have shown a degree of interest in the form of WTP, when undertakings collude, it actually

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<sup>66</sup> ACM Vision Document, para 3.5.1.

<sup>67</sup> B.S. Chauhan, 'Indian Competition Law: Global Context' (2012) 54 JILI 315 <<https://www.sconline.com/Members/BrowseResult.aspx#FN0011>> accessed 14 August 2023.

<sup>68</sup> *RRTA v. W.H. Smith and Sons Ltd.*, L.R. 3 R.P. 122.

<sup>69</sup> Maarten Pieter Schinkel and Yossi Spiegel, 'Can Collusion Promote Sustainable Consumption and Production?' (2017) 53 *International Journal of Industrial Organization* 371 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2704259](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2704259)> accessed 30 August 2023.

results in reduced sustainability levels as compared to unilateral conduct.<sup>70</sup> This is commonly termed as a greenwashing collusion or a sustainability product purchasing buyers' cartel. However, if there is little to no WTP, then firms will encounter first-mover disadvantage and cooperation between undertakings can actually increase SCP.

The Revised Horizontal Guidelines attempt to tackle this conundrum by stating that sustainability standards employed as a cover for activities such as price fixing, market or client allocation, output restrictions, and curbing quality or innovation amounts to restriction of competition by object under Article 101(1) TFEU.<sup>71</sup> Such disguised cartels can manifest in many ways, such as market barriers to new entrants due to abuse of dominant position by existing market players or spillover of elevated production costs of sustainable products on the output costs.

In order to distinguish between greenwashing cartels and sustainable co-operations, it is important to consider the economic reasoning behind the coordination that arises from the spillover effects or externalities among the undertakings involved. Secondly, the NCA or individual companies conducting self-assessments should evaluate whether the agreement effectively elevates sustainability to socially optimal levels or not.<sup>72</sup>

In *Chickens of Tomorrow*, the ACM determined that the sustainability benefits and the WTP analysis did not significantly outweigh the anticompetitive harm. It conducted a 'conjoint consumer survey'<sup>73</sup> which revealed that the cost would rise by €1.46 per kilogram of chicken meat, whereas Dutch consumers assessed the improved chicken living conditions at just €0.82 per kilogram.<sup>74</sup>

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<sup>70</sup> 'Ticking the boxes on a green self-assessment, and the risk of greenwashing' (Oxera, 31 August 2022) <<https://www.oxera.com/insights/agenda/articles/ticking-the-boxes-on-a-green-self-assessment-and-the-risk-of-greenwashing/>> accessed 31 August 2023.

<sup>71</sup> Revised Horizontal Guidelines, para 547.

<sup>72</sup> 'Ticking the Boxes on a Green Self-assessment, and the Risk of Greenwashing' (n 70).

<sup>73</sup> 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) <<https://competitionlawblog.kluwercompetitionlaw.com/2015/02/18/valuing-sustainability-the-acms-analysis-of-chicken-for-tomorrow-under-art-1013/>> accessed 2 August 2023.

<sup>74</sup> ACM, 'Analysis of the Sustainability Arrangements Concerning the 'Chicken of Tomorrow' (ACM, 26 January 2015) <[https://www.acm.nl/sites/default/files/old\\_publication/publicaties/13789\\_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf](https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf)> accessed 2 August 2023.

#### IV. SETTING SAIL TOWARDS SUSTAINABLE COMPETITION: INDIA'S IMPERATIVE

This growing emphasis on aligning competition law with sustainability in jurisdictions like the EU and the Netherlands provides valuable lessons for countries like India, where the discourse around integrating environmental objectives into competition enforcement remains largely unexplored. ESG in India, especially pertaining to the competition arena, is at its latent stage. Here, the question of how we can distinguish greenwashing cartels from sustainability agreements does not arise or whether sustainability should be the end goal of competition does not arise, when the discourse surrounding the compatibility of competition law with sustainable development has not yet seen the participation of the Competition Commission of India ('CCI').<sup>75</sup> The fundamental aspect to be scrutinised at its core pertains to the primary integration of sustainability within the framework of competition law in India.

Until recently, instances of enforcing competition regulations pertaining to collusion in sustainable/innovative competitive practices within the global spectrum of competition authorities, including the CCI had been notably rare. However, a significant shift occurred in July 2021 when the EC deliberated upon the *Car Emissions* case<sup>76</sup> involving collaborative actions in technical evolution and rivalry within innovation, specifically within the domain of emission cleansing technologies for passenger vehicles. The proceedings were framed under Article 101 TFEU r/w Article 53 of the EEA. The ruling made by the European Commission in the case showcases how both competition and innovation can play pivotal roles in combating environmental deterioration, thereby aiding the realisation of the objectives outlined in the European Green Deal.<sup>77</sup>

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<sup>75</sup> Aileen Aditi Sundardas, 'Sustainability and Competition: Recognizing Potential in Competition Law to Promote Green Future' (*Indian Review of Corporate and Commercial Law*, 02 November 2021) <<https://www.ircl.in/post/sustainability-and-competition-recognizing-potential-in-competition-law-to-promote-green-future>> accessed 2 August 2023.

<sup>76</sup> European Commission, 'Case AT.40178 – Car Emissions' (08 July 2021) <<https://competition-cases.ec.europa.eu/cases/AT.40178>> accessed 20 August 2023.

<sup>77</sup> Marco Plankensteiner, 'European Union: Car Emissions Case: First Sanction Of An Anti-competitive Agreement On Technical Development By The European Commission' (*Mondaq*, 07 December 2021) <<https://www.mondaq.com/france/cartels-monopolies/1139020/car-emissions-case-first-sanction-of-an-anti-competitive-agreement-on-technical-development-by-the-european-commission>> accessed 20 August 2023.



Furthermore, casting a glance at the initiation of antitrust implementation efforts in 2010, the CCI has scrutinised a total of 1,187 antitrust cases up until 30 September 2022. Strikingly, no final verdicts have been issued thus far in any instance against any entity for engaging in horizontal non-price collusion aimed at restricting and directing innovation-driven competition. Such actions are in violation of the guidelines outlined in Section 3(3)(b) of the Act.<sup>78</sup>

Hence, this specific domain stands out as the least explored territory and had not drawn the focused attention of competition authorities until the aforementioned landmark pronouncement by the EC. This indicates that the ruling by the EC could serve as a revelation for regulators in the competition realm of India, potentially kindling their interest in delving into this uncharted arena of competition law enforcement.

#### A. WHY THE SUSTAINABILITY DEFICIT IN THE INDIAN COMPETITION REGIME?

On 4 July 2023, SEBI enacted significant changes to the SEBI (Credit Rating Agencies) Regulations, 1999, introducing a thorough regulatory framework for entities engaged in ESG-based assessments.<sup>79</sup> This mandates ESG rating entities to secure SEBI's approval before commencing operations. India leads by regulating ESG Rating Providers ('ERPs') earlier than jurisdictions like the EU, the US, the UK, and Singapore. This development aligns with SEBI's consultation papers released on 24 January 2022<sup>80</sup> and 22 February 2023.<sup>81</sup>

The SEBI also instituted an obligation in 2012 for the foremost 100 enlisted enterprises to furnish business responsibility requirements, which subsequently expanded to encompass the 500 premier listed firms in 2016, explicit confirmation of initiatives aligning with the Task Force on Climate-related Financial Disclosures ('TCFD') framework remains elusive.<sup>82</sup>

While European regulatory bodies are making significant strides in global sustainability initiatives, and entities such as SEBI in India are fostering an

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<sup>78</sup> Competition Commission of India, *Annual report 2020–21 (2021)*.

<sup>79</sup> Securities and Exchange Board of India (Credit Rating Agencies) Regulations 1999 [Last amended on July 4, 2023].

<sup>80</sup> Securities and Exchange Board of India, Consultation Paper (1) on Environmental, Social and Governance (ESG) Rating Providers for Securities Markets (2022).

<sup>81</sup> Securities and Exchange Board of India, Consultation Paper (2) on Regulatory Framework for ESG Rating Providers (ERPs) in Securities Market.

<sup>82</sup> TCFD, *2018 Status Report 2018 (2018)*.

environment conducive to ESG considerations, the question arises as to why the competition realm in India appears to be trailing behind in this endeavour.

India in reality does not fall behind when it comes to the battle against climate change as a whole. The nation has committed to reduce greenhouse gas emissions by 33-35%. Efforts are underway to enhance the proportion of electricity derived from non-fossil fuel sources to 40% and to augment the expanse of forested areas for the absorption of approximately 2.5 to 3 billion tonnes of carbon dioxide by the year 2030.<sup>83</sup> These initiatives mirror the commitments outlined within the ambit of the Indian government's Indicated Nationally Determined Contributions ('INDCs') as part of their engagement with the United Nations Framework Convention on Climate Change ('UNFCCC') in Conference of Parties ('COP 21') in Paris in the year 2015.<sup>84</sup> To attain these objectives, acknowledging the indispensable role of private enterprise is paramount. The nation lags in mandating corporations to reveal their susceptibility to climate change.

It is the juncture where Indian antitrust legislation and the cooperative pursuit of ESG objectives converge which has predominantly remained an area of limited investigation, primarily owing to the prevailing dearth of explicit directives on this subject matter.

Noticeably absent are any official instructions or mandates issued by the CCI that directly cater to the prerequisites of enterprises aiming to collaborate harmoniously in attaining ESG milestones. Nevertheless, discernible within the confines of the Competition Act, 2002 are several constructive stipulations that offer room for interpretation, potentially paving the way for facilitating collaborative ESG endeavours amidst competitors.<sup>85</sup>

The horizon of consumer welfare possesses the potential for augmentation beyond the confines of consumer surplus, encompassing areas such as societal wellness and sustainability, particularly amidst the imminent situation of

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<sup>83</sup> Press Information Bureau Delhi, 'Cabinet approves India's Updated Nationally Determined Contribution to be communicated to the United Nations Framework Convention on Climate Change' (Press Information Bureau, 03 August 2022) <<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1847812>> accessed 20 August 2023.

<sup>84</sup> Prerna Jain and Pragati Jain, Are the Sustainable Development Goals really sustainable? A policy perspective, (2020) PL 1642.

<sup>85</sup> Rohan Arora, 'Is Indian Competition Law ESG-ready?' (*Bar and Bench*, 13 March 2023) <<https://www.barandbench.com/columns/is-indian-competition-law-esg-ready>> accessed 12 August 2023.

climatic upheaval. Nascent tools in assessing and numerically gauging national prosperity, such as Gross National Happiness and Carbon Footprints, need to be complemented with conventional economic metrics like Gross National Product, considering the evolving landscape of multifaceted aspirations.<sup>86</sup>

#### B. INTERPRETATION OF EXISTING LEGISLATIONS AS THE KEY TO THE TREASURE

As we have seen from other jurisdictions, competition law can be a part of the solution for the climate crisis in the Indian regime too. The answer to how it can be implemented in the nation is widening our interpretation of our already existing legislations to cater to the nexus between sustainability and 'anti-competitive practice'.

The Supreme Court of India has construed Article 21 of the Indian Constitution as encompassing the entitlement to an unpolluted ecological milieu, thus elevating it to an fundamental prerogative of the populace.<sup>87</sup> The verdict rendered in the legal matter denoted as *Ivory Traders and Manufacturers Association v Union of India*<sup>88</sup> pronounced that a trade detrimental to the natural milieu holds the potential to be constrained or proscribed without invoking the purview of Article 19(1)(g) of the Constitution, which stands as an inherent entitlement. Hence, it becomes apparent that certain bedrock rights can be delimited considering the comprehensive purview of environmental and communal prosperity. The essence of safeguarding the environment, as echoed across assorted adjudications and enshrined within the Directive Principles of State Policy,<sup>89</sup> harmoniously aligns with the third objective of 'Good Health and Well-Being' stipulated in the United Nations' roster of 17 SDGs,<sup>90</sup> and converges seamlessly with the aspiration of the CCI to uphold consumer welfare. The congruence among these facets is unmistakable.

As a case in point, the preamble encapsulated within the Competition Act distinctly contextualises its provisions within the broader tapestry of 'economic

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<sup>86</sup> Robert Costanza, 'Beyond GDP: The Need for New Measures of Progress' (2009) No. 4 THE PARDEE PAPERS, Boston University <<https://www.bu.edu/pardee/files/documents/PP-004-GDP.pdf>> accessed 12 August 2023.

<sup>87</sup> Daksheeja Sharma, 'Right to a Healthy and Sustainable Environment under Article 21 of the Constitution of India' (*Amikus Qriae*) <<https://theamikusqriae.com/right-to-a-healthy-and-sustainable-environment-under-article-21-of-the-constitution-of-india/>> accessed 25 August 2023.

<sup>88</sup> *Ivory Traders and Manufacturers Association v Union of India* AIR 1997 DEL 267.

<sup>89</sup> The Constitution of India, Part IV.

<sup>90</sup> UN DESA, 'The Sustainable Development Goals Report 2022' (UN DESA, 7 July 2022) <<https://unstats.un.org/sdgs/report/2022/>> accessed 12 August 2023.

development of the country, at the same time recognizing the ascendancy of 'consumer interests' as an integral objective.

Likewise, cast under the ambit of Section 19(3) within the same legislation, the CCI is endowed with the authority to scrutinise agreements designed to expedite ESG goals, discerning their potential anti-competitive attributes through the lenses of consumer welfare, enhancements in the production and distribution of commodities, and the advancement of scientific and economic progress.

Similarly, in consonance with the parameters delineated within Section 20(4) of the Competition Act, the CCI retains the right to assess the plausible anti-competitive repercussions of mergers aimed at fostering ESG endeavours, with a lens directed at factors such as innovation, economic growth, and the comprehensive advantages accruing to consumers or the societal fabric at large.<sup>91</sup>

Within the Indian context, the evaluation of competitive dynamics can incorporate a heightened emphasis on sustainability considerations, by harnessing the potential inherent in Section 54 of the Competition Act, 2002. This particular Section empowers the central administration of India to wield the authority to 'suspend the application of this [Competition] Act, or any of its stipulations, for a designated time frame.'<sup>92</sup> Emanating from the backdrop where environmental safeguarding and sustainability have emerged as pivotal facets of the national policy, Section 54's subsection (a) imparts the Indian government with the latitude to suspend certain segments of the Competition Act, 2002, in circumstances where it is demonstrably established that an anti-competitive stratagem yields substantial advantages in the realm of public interest, bolstering the broader ethos of environment protection.<sup>93</sup>

In a parallel vein, the corresponding clause (b) inherent within this very Section stands poised to furnish the Indian government with the mechanisms to honor its commitments voiced during the Paris Summit of 2015. In precise terms, this clause delineates a provision wherein the Central government is vested with the capacity to suspend the applicability of the Competition Act's tenets, an action executed in fulfilment of 'any practice or agreement arising out

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<sup>91</sup> King Stubb & Kasiva, 'The Intersection of Indian Competition Law and ESG Collaborations: Challenges and Opportunities,' (King Stubb and Kasiva, 16 May 2023) <<https://ksandk.com/competition/indian-competition-law-esg-collaborations/>> accessed 12 August 2023.

<sup>92</sup> The Competition Act 2002, s 54.

<sup>93</sup> *ibid* s 54 (a).

of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries.<sup>94</sup> Remarkably, this very Section has been enlisted by the Indian government to champion broader communal well-being objectives, as evidenced by the exclusion of Regional Rural Banks from the ambit of Sections 5 and 6 of the Competition Act in the year 2017.<sup>95</sup>

Thus, it becomes patently evident that, within the Indian landscape, the Competition Act, 2002 stands as a cogent instrument not necessitating wholesale amendments; rather, a judicious re-interpretation suffices. One that is attuned to the compulsion of curbing climate change and embarking upon a trajectory of comprehensive sustainability across all dimensions of the human populace.

## V. SUGGESTIONS FOR GREENING THE INDIAN COMPETITION LANDSCAPE

The deficiency in enforcing environmental legislation is the Achilles heel within contemporary environmental legal systems across the globe. To satiate this deficiency, economic environmental regulatory instruments can be utilised in the form of direct regulation and 'administrative rationalism'<sup>96</sup> and in the alternative, proceduralisation of direct regulation that involves establishing procedures and not substantive standards for evaluating the efficiency of administrative action are some ways to ensure that market-based instruments are instrumental in upholding social objectives. These procedures could pertain exclusively to CCI's requirement to carry out an Impact Assessment, appraising their alignment with the sustainable development paradigm, or external aspects such as providing for the participation of third parties (like industries or general public) within the regulatory framework.<sup>97</sup>

It is not practical for competition authorities to consider out-of-market efficiencies for all cooperations between undertakings pursuing sustainable

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<sup>94</sup> *ibid* s 54 (b).

<sup>95</sup> Telegraph Bureau, 'Centre Keeps Regional Rural Banks Out of Ambit of Competition Commission of India' *The Telegraph Online* (Kolkata, 21 July 2017) <<https://www.telegraphindia.com/business/centre-keeps-regional-rural-banks-out-of-ambit-of-competition-commission-of-india/cid/1953525>> accessed 25 August 2023.

<sup>96</sup> J Dryzek, *The Politics of the Earth: Environmental Discourses* (2nd edn, OUP 2005).

<sup>97</sup> Farber, 'Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law' (1999) 23 *Harvard Environmental Law Review* 297.

objectives. A practical solution to this conundrum would be to encourage negative externalities by introducing carbon taxes. Economists often endorse such measures because they help internalize the negative externalities, bringing all consequences back within the purview of the market. This ensures competition policy interventions to ensure optimal allocation of resources.<sup>98</sup>

Furthermore, our analysis in this field has revealed insights that could be valuable to regulatory bodies overseeing competition on a global scale:

- *Firstly*, the formulation of explicit business guidelines, elucidating permissible (green) collaborative endeavours, contingent upon their capacity to yield environmental advantages such as innovation, quality enhancement, and sustainable processes, can empower firms to assume more responsible roles in this arena.
- *Secondly*, as competition and antitrust authorities brace for a surge in such eco-centric initiatives within the market's landscape, they must adeptly discern the economic incentives underpinning them. This entails making judicious use of all available information, including internal corporate documents, comprehensive market analysis, and meticulously conducted surveys.
- *Thirdly*, we underscore the adaptability of conventional legal and economic frameworks to accommodate sustainability considerations within the ambit of consumer welfare, public interest, and operational efficiencies. In practical terms, expanding the purview of competition and consumer welfare emerges as an imperative approach for attaining these objectives. This expansion, however, must be underpinned by a commitment to the unwavering pursuit of independent, evidence-based enforcement of competition regulations.

## VI. CONCLUSION

Competition policy, when thoughtfully crafted and efficiently executed in alignment with a nation's economic, social, and environmental conditions, is anticipated to synergise with other governmental strategies to foster sustainable and inclusive economic growth and development. By addressing market

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<sup>98</sup> Luc Peepkorn, 'Competition Policy is not a Stopgap!' (2021) 12(6) Journal of European Competition Law & Practice 416.

imperfections, well-executed competition policies have the potential to drive firms towards greater efficiency, stimulate innovation, and expand consumer options while enhancing product quality.

Competition policy can foster sustainable development by spurring innovation, increasing the diversity of products, facilitating an optimal distribution of resources, minimising production expenses, and consequently bolstering consumer welfare.<sup>99</sup> Nonetheless, it is crucial to emphasise that sustainability agreements formed in response to a first-mover disadvantage will only effectively enhance sustainability if the agreement results in an increased WTP to pay for more sustainable products.<sup>100</sup>

In an Indian context, existing frameworks such as the National Voluntary Guidelines ('NVGs'), the National Action Plan on Climate Change ('NAPCC'), and public procurement policies under the General Financial Rules ('GFR'), 2017, provide viable pathways.

The NVGs emphasize responsible business conduct, enabling the CCI to incorporate sustainability metrics into merger reviews and market assessments. This ensures that transactions in sectors like renewable energy, support innovation and efficiency.<sup>101</sup> The NAPCC, with its sectoral missions like the National Solar Mission, offers a roadmap for prioritizing green technology collaborations, exempting such initiatives from anti-competitive scrutiny, and mandating compliance with sustainability targets in merger approvals.<sup>102</sup>

Public procurement, governed by the GFR, further supports sustainability by factoring in environmental standards. The CCI could curb anti-competitive practices in green procurement, ensuring open, efficient markets for eco-friendly suppliers.<sup>103</sup> The CCI possesses the potential to significantly bolster market competitiveness while concurrently championing environmental

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<sup>99</sup> Revised Horizontal guidelines, para 518.

<sup>100</sup> Maarten Pieter Schinkel (n 3).

<sup>101</sup> Versha Vahini, 'Scope of Beneficial ESG Collaboration under Competition Law in India' (2023) 5(1) CMR University Journal for Contemporary Legal Affairs 249.

<sup>102</sup> Ministry of New & Renewable energy, 'Jawaharlal Nehru National Solar Mission: Phase II – Policy Document' (December 2012) <[https://prod-qt-images.s3.amazonaws.com/indiawaterportal/import/sites/default/files/iwp2/Jawaharlal\\_nehru\\_National\\_Solar\\_Mission\\_Phase\\_II\\_MNRE\\_2012\\_.pdf](https://prod-qt-images.s3.amazonaws.com/indiawaterportal/import/sites/default/files/iwp2/Jawaharlal_nehru_National_Solar_Mission_Phase_II_MNRE_2012_.pdf)> accessed 01 January 2024.

<sup>103</sup> Ishita Srivastava, 'Green Public Procurement for Advancing Sustainable Development in India,' (SDG Charter, 2024) <[https://www.teriin.org/sites/default/files/2024-08/GPP\\_SDG\\_Charter\\_ISBN.pdf](https://www.teriin.org/sites/default/files/2024-08/GPP_SDG_Charter_ISBN.pdf)> accessed 01 January 2024.

sustainability and innovation. The legal framework provided by the Competition Act offers ample latitude to accommodate the concerns of sustainability and align with the environmental objectives set forth by the Indian government. Drawing inspiration from the proactive stance adopted by European competition authorities, this fresh perspective could potentially catalyse a paradigm shift towards eco-consciousness within the Indian marketplace.