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# Green Anti-Trust: A New Way Forward

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## ABSTRACT

*The global COVID-19 pandemic came up with its second wave which has been deadlier and much more horrifying globally, especially in India. The count of positive cases has elevated to record peaks exceeding 3 lakh per day and the number of deaths per day over 3000. Hospitals are running out of beds and low on oxygen. There is significant shortage of essential drugs. There is increased pressure on all fronts to minimize the effects of second wave by accelerating vaccination. In this context, the court took suo motu cognizance of the situation to curb the effect of the deadly wave and save the population from the ongoing pandemic. The order inculcates the directions to the Central and State/UT governments regarding the management of vaccination drives, supply of essential drugs and identifying vulnerable age groups in accordance with the changing nature of pandemic.*

## I. INTRODUCTION

We understand that India is a developing country which is actively involved in taking mitigating measure to tackle climate change and environmental threats. India is a party to the various international treaties and summit engaging in the protection of environment and tackling climatic changes owing to global warming. We recognise that the sustainability is a collective effort of the countries at international level, states at national level and corporates at the economic level. This being said, it will be correct to include that there is a point of intersection where the economics plays a crucial role in the environmental sustainability. The study of economics includes production, supply, distribution and consumption of goods and services. The increase in growth of economic activities has led to critical effects on the environment such as waste management, hazardous industries, increased use of non-degradable substances etc. Therefore, economics combined with the sustainability creates negative as well as positive impact. With the growing economic corporate activities, it is the need of the hour to shift the attention to protect the environment and move towards sustainability. The regulators and law enforcement should become active and promote activities favouring sustainability and restricting activities causing environmental damage. There is a need for the regulators to go

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beyond the mere economic objective and undertake advocacy towards sustainability.

The Competition Commission of India (CCI) set up under the Competition Act, 2002 is one such organisation, empowered to regulate healthy competition in the market, protect the interest of consumers and ensure freedom of trade with a view of the economic development of the country. The act prohibits agreements certain anti-competitive agreements such as cartels at horizontal level and tie-in, exclusive distribution etc at vertical level of production, supply, distribution etc. Till now, the CCI has only acted to protect or restrict the body corporates having economic impacts without making any assessments or observation regarding the environmental impacts. They have been sensitive and considerate to recognize the workings of the MSME's and the current pandemic effects on the companies as an exception to the Competition Act, 2002 by restraining itself from taking punitive actions. The Commission has shown its flexibility and execution of its wide powers to be considerate and critical towards the need of the hour.

Since sustainability and environment protection also subsists in the manufacturing, production, supply and distribution which itself becomes part of the economic scenario regulated by bodies such as CCI, the intersections of both the worlds can help move a step towards environmental issues.

Therefore, the paper attempts to introduce a new dimension to competition law in addition to the existing statutes and tribunals to actively protect the environment and promote sustainability while balancing its function to regulate the market conditions.

## **II. THE EXTANT COMPETITION REGIME VIS-À-VIS SUSTAINABILITY: A COMPARATIVE STUDY**

The provisions of the Competition Act, 2002 enlists certain agreements as anti-competitive and certain conduct as abuse of dominance which are prohibited by the Act. The act defines various factor for assessing dominance, abuse, and appreciable adverse effect on competition. These factors are economic factors such as barriers for new entrants, foreclosure of market, denial of market access etc. The act does not recognise expressly non-economic factors to make assessments regarding the contravention of the Competition Act. It is however observed the Competition Commission of India has wide powers under the given Act to include and act on the economic contravention having non-economic effect i.e., deterioration of environment. There has been various cases and initiative across different Competition Authorities across the globe wherein the Competition authorities have taken up active role in enacting measures to protect the environment. The concept of Green Anti-trust can be a defined as term coined to

merge Competition laws with the aim of improving environmental conditions and reaching sustainability.

## **EUROPEAN UNION**

The European Commission in its priorities for the year 2019-2024 implemented an action plan called the “European Green Deal<sup>2</sup>” to make EUs economy sustainable by efficient use of resources and restoring biodiversity. The plan also included action by various sectors of the economy which included supporting innovation by industries. In furtherance to its plan the European Commission recognized EU Competition rules as source of contribution in implementing green policies effectively. The EC invited experts and academicians to contribute to collect ideas and proposals on the probability of competition policy becoming a complementing regulation to protect the environment.

Another initiative towards the same goal was undertaken by the Organisation for Economic Co-operation and Development (OECD)<sup>3</sup> in December 2020 during the meeting held between the Competition authorities and OECD Competition Committee on sustainability and competition law. The discussion revolved around the potential conflict between the competition and sustainable goals and use of tools to consider sustainability concerns.

The efforts of the authorities are to mindfully enforce competition law to reach sustainable goals. However, in EU there have been various cases where the Competition authorities have acted in ways which have seen and assessed positive impact on the environment. In the case of BMW, Daimler, and VW, where it was held that the companies were engaging in anti-competitive practices by restricting innovation in two emission-cleaning system used in cars. It was observed that restricting innovation in these technologies denies consumers the opportunity to buy less- polluting cars.<sup>4</sup>

Similarly in Philips/Osram<sup>5</sup>, the EU Competition Commission observed that the use of cleaner facilities would “... result in less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities.”

Therefore, the EC is also working on evolving and focussing on enforcing sustainability issues through Competition Authority.

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<sup>2</sup> *Priorities 2019-2024, A European Green Deal*, European Commission

<sup>3</sup> *Sustainability and Competition, OECD Competition Committee Discussion Paper*, OECD (2020), <http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf>

<sup>4</sup> *Case AT.40178-Car Emissions*, (EC, 2019), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_2008](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008)

<sup>5</sup> OJ [1992] L037/16 (para 27).

## INDIA

In India, the Competition Act 2002 was enforced in 2009 and prohibits anti-competitive practices like cartels, vertical restraints, and abuse of dominance. Sustainability or environment protection are non-economic and non-price effect. The Competition Commission of India recently in the WhatsApp/Facebook<sup>6</sup> case of alleged abuse of dominance, recognised Data as non-price factor wherein lower data protection by a dominant player was observed to be abuse of dominance as it leads to deterioration of quality. Therefore, the Commission has widened its jurisdiction by assessing a non-price factor or non-economic factors as ground for abuse of dominance under Section 4 of the Competition Act.

Moreover, the Commission also recognised the difficulties faced by companies in the pandemic of COVID-19 and safeguarded the businesses from sanctions for certain coordinated conduct resulting in increased efficiency.<sup>7</sup>

These are the wide powers of the Competition Commission of India; however the commission has not yet expressly acted in favour of sustainability or environmental harm yet.

## UNITED KINGDOM

The Competition and market authority (CMA) is competition authority of the United Kingdom. Recently in its annual plan for 2020/21<sup>8</sup>, the authorities have submitted that they shall support businesses to adapt to climate change and engaged in sustainability initiatives in line with competition law. Moreover, they have submitted that the competition authority shall improve its understanding on 'green claims' made by the sellers regarding the misleading and false statements affecting the consumers. During the OECD Roundtable on Horizontal Agreements in the environmental context, 2010<sup>9</sup>, UK submitted that they are looking towards exempting agreements between firms which may appeal to the policy makers having potential of securing environmental benefits by reducing the amount of legislation and regulations. It submitted that in regard to horizontal agreements, the agreements that gives rise to direct cost efficiencies or direct economic benefits in an environmental context are included under Article 101(3) of TFEU.

It was also submitted that the Office of Fair Trading, UK reviewed the specific block exemption

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<sup>6</sup> In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, *Suo Moto* Case no.1 of 2021.

<sup>7</sup> *Advisory dated 19 April 2020*, Competition Commission of India, [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Advisory.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf).

<sup>8</sup> *Competition and Markets Authority Annual Plan 2020/21, March 2020, CMA112*, Competition and Markets Authority.

<sup>9</sup> *Policy Roundtables, Horizontal Agreements in the Environmental Context, 2010, DAF/COMP (2010)39*, OECD

for certain public transport ticketing scheme. The ticketing agreements had economic benefits for the passengers and the transport operators and also indirect economic benefit like increased efficiency of service resulting in reduced congestion, noise and air pollution. Therefore, such agreements were included within the ambit of Article 101(3) or equivalent Section 9(1) of the UK Competition Act 1998.

## FRANCE

Similarly, the French Competition Authority i.e., *Autorité* in its announcement for priorities for 2020 declared that sustainable development at the core of its action and that it shall take part in collective discussion on climate issues with other regulators. Moreover, in the case 17-D-20 regarding the floor coverings sector, *Autorité* on 18 October 2017 *fined* members of a cartel for refraining to promote environmental performance beyond the average industry standards. It was held that this practise harmed the interest of consumers.

Therefore, the above observations across different jurisdictions around the globe reflects the conduct and insights of the competition authorities towards a larger goal of sustainability. Whereas, India has also pulled up to include non-economic factors within its ambit, yet it has not expressly focussed upon sustainability and greener issues.

## III. THE ECONOMICS OF SUSTAINABILITY AND COMPETITION

Sustainability focuses on meeting the requirements of the present generation without compromising the needs of the future generations. Remotely sustainability is made up three factors: - Environmental, economic, and social. The economics of sustainability also includes issues like innovation, resource efficiency, and role and contribution of the private corporates towards sustainability. The role of body corporates is also very critical in attaining these goals as recently, these corporates have started committing to sustainable issues like waste disposals, controlling emissions, lowering energy use, using alternate eco-friendly products etc. there is a need to support such initiatives and commitments. Therefore, economics is an indispensable part of sustainability. As sustainability can be attained with the economic rationale of innovations and efficient use of resources by companies and individuals. For achieving and promoting such innovations there is a need for healthy market and freedom of flow of trade which results in consumer benefit.

While analysing the objective of Competition law which is economic in its objective, it will be correct to state that the competition authorities also play a role of regulator to promote innovations having direct economic benefits. However, there may be cases where non-economic benefits such as resource efficiency and eco-friendly alternates may also be

considered along with economic benefits. There are two methods for the application of competition law to achieve and include sustainability in its working i.e., preventive, and supportive. If the Competition law is interpreted to promote and support sustainability such as giving limited exemptions from competition law to enterprises working for sustainability is called supportive mechanism. While preventive mechanism may be interpreting competition law to prohibit measures which are harmful to sustainability such as not approving certain mergers or determination of abuse of dominance for non-economic effect such as sustainability. Therefore, competition law can definitely be used as an additional mechanism to achieve sustainability. However, it can either be executed by interpreting the extant competition regime or by amending the competition regime to allow integration of sustainability and non-economic assessments.

#### **IV. COMPETITION ACT 2002: IS IT A POLICY SUPPORTING GREEN?**

The websters dictionary defines 'Green' as 'concerned with or supporting environmentalism' while sustainability is a specifically defined word falling under the ambit of green. Sustainability is one of the ways to achieve green. While the Competition Act 2002 prohibits cartels, vertical restraints, and abuse of dominance by enterprises and individuals to maintain healthy competition and consumer benefit.

In regard to the supportive mechanism of the Competition law to achieve the goals of sustainability, Section 3(3) and section 4 of the Competition Act plays a pivotal role. Section 3 of the Act prohibits any agreement between enterprises engaged in the similar trade of goods or service which determines sale or purchase price, limits technical development, restricts production/supply or market including cartel. However, the proviso to the section allows Joint ventures between enterprises which increases the efficiency in production, supply etc.

##### **(A) Supportive mechanism**

Therefore, the interpretation of section 3(3) of the Competition Act in regard to supportive mechanism may be construed as exempting Joint ventures for the purpose of achieving sustainability in terms of increasing efficiency such as an innovation of an alternate eco-friendly product or efficient use of resources. The CCI may actively or passively use the proviso to support joint ventures with the objective of innovations, productions or distribution for the alternative environmentally friendly products and services.

Moreover, the CCI can also assess the conduct of enterprises or body corporate as not having appreciable adverse effect on competition by interpreting eco-friendly innovations, use of

biodegradable alternates under Section 19(3)(e) as an improvement in production or distribution and also under Section 19(3)(f) as technical, scientific, and economic development.

### **(B) Preventive Mechanism**

The preventive mechanism can be undertaken by the CCI under section 3(3)(b) which prohibits agreements between enterprises limiting technical development. Therefore, if an agreement is entered between enterprises causing restriction to innovation such as supporting sustainability, it must be prohibited by the CCI. Therefore, no agreements can be entered into by the enterprises which results in restriction of innovation including steps towards sustainability.

Similarly, section 4 can be interpreted as another preventive mechanism. Section 4 prohibits a dominant enterprise from abusing its dominant position such as if it directly or indirectly imposes unfair condition, restricts technical or scientific development prejudicing the consumers. While interpreting the section, the words ‘unfair condition’ can be construed to have a wide ambit. Recently the Competition Commission of India in the Whatsapp/Facebook case<sup>10</sup> interpreted unfair condition to include non-economic factors like low data protection. It can be observed that Competition Commission of India has moved past the price factors and considered non-price factors in assessing the competition in market. Therefore, there is a scope to include any condition which may harm the environment or the scarce resources as an unfair condition by a dominant enterprise. These conditions can have direct or indirect economic benefits in the market.

Be that as it may, considering that the Competition Commission of India is still at infancy stage in comparison to other jurisdictions, it may not assess environmental issues as an unfair condition entirely, however it can still measure the harm of the condition in the light of green effect along with the economic effect. For example: - if a condition is imposed by a dominant player which may restrict the user/consumer to avail an eco-friendly alternative, or to invent an eco-friendly alternate, or ends up consuming scarce resources of earth as part of its business plan may be assessed as abuse of dominance by the Competition Commission. These may be assessed as non-economic benefits to a consumer i.e. qualitative efficiencies benefit in quality of the product to the consumer. These may be defined as benefits arising out the non-price effect of the product or service such as quality, biodegradability, characteristics etc.

The most important aspect where the Commission comes into play under section 4 is in regard to Greenwashing. Greenwashing is the “*act of misleading consumers regarding the environmental practices of an organization (firm-level) or the environmental benefits of a*

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<sup>10</sup> In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, *Suo Motu* Case no. 01 of 2021



product or service (product/service-level). An example of firm-level greenwashing is the “Ecomagination” campaign from General Electric which advertised the organization’s environmental practices while at the same time lobbied to fight new clean air EPA requirements.”<sup>11</sup> The practice of Greenwashing by a dominant player is a deceptive marketing and unfair upon the consumers. Under the provisions of the Competition Act, the Commission places a special responsibility upon a dominant player.<sup>12</sup> When a dominant player directly or indirectly imposes unfair condition upon the consumers may be assessed as contravention of section 4. The act of greenwashing by a dominant player can also be assessed by the Competition Commission as anti-competitive as the consumer is misled in terms of quality and characteristic of the product or service by a dominant player. For example: - In Italy the Competition authorities fined a company Eni with \$ 5.6 million for a misleading marketing campaign wherein the advertisement by calling its diesel as green diesel on the pretext that it has a renewable component which was not backed by any evidence or conclusion. Therefore, it was classified as unfair commercial practise.<sup>13</sup> Therefore, India may also consider such greenwashing acts by dominant players as abuse of dominant resulting in consumer harm.

Therefore, the preventive mechanism that may be undertaken by the CCI will be adjoin to the existing regulators such as National Green Tribunal, Central Ground water Board, Environment Pollution (Prevention and control) Authority, Central Pollution Control Board etc., and may prove to be an excellent step to regulate environmental education and preventive execution.

## V. SUGGESTIONS AND CONCLUSION

As observed above the extant law of competition in India is related to the assessment of the economic efficiencies which are directly or indirectly passed on to the consumers. The Competition Act, 2002 in its age of 11 years has regulated the competition in the market by assessing economic factors and efficiencies which also includes the assessment of consumer benefits. The statute though provides scope and ambit for interpretation to include non-economic factors for assessment and benefits to consumer.

There is a need for the competition law to evolve and include non-economic assessments such as related to the environmental benefits to its ambit while regulating and assessing the competition in the market. The issues like global warming, sustainability, green effects including resources such as water, oil, coal etc., should also be considered by regulator such as

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<sup>11</sup> de Freitas Netto, S.V., Sobral, M.F.F., Ribeiro, A.R.B. *et al.* Concepts and forms of greenwashing: a systematic review. *Environ Sci Eur* 32, 19 (2020).

<sup>12</sup> Sh. Neeraj Malhotra v. North Delhi Power Limited, Case no. 06 of 2009

<sup>13</sup> Proceedings No. PS11400

Competition Commissions to prevent environmental hazards and support environment protection. The question that arises is whether the Competition Commission is the correct regulator to enforce environmental issues?

The answer lies in the fact that Competition Commission has wide powers to regulate free flow of trade and healthy competition alongwith the consumer benefits. It is the duty of the Commission to balance these factors which means a healthy competition alongwith consumer benefits. If a certain conduct of an enterprise results in healthy competition, however, also cause consumer harm, it becomes a competition domain. Therefore, the answer lies in the balance of the economic and non-economic factors and benefits resulting in having adverse effect on the competition.

The statute itself has empowered the Competition Commission to assess direct and indirect imposition of condition which is unfair as abuse of dominance. The meaning of unfair itself is wide and non-exhaustive. The effect of increased pollution, use of non-biodegradable products, use of scare resources may be construed as unfair towards the consumers *in rem*. Similarly, restriction in scientific or technical development which is assessed as an abuse of dominance may include the non-economic factors. Therefore, any act or conduct of a dominant enterprise which restricts or limits any development towards environmental protection may also be deemed as anti-competitive.

Summarily the suggestions are highlighted as follows:

1. The Competition Commission of India like other jurisdictions should consider to widen its scope to also include non-economic benefits and become supportive of the green deals.
2. The first step of the Commission towards including the non-price factors such as Data privacy should further expand and include environmental efficient while assessing anti-competitive conducts.
3. The Competition Commission may in execution of its power under section 64 should consider exempting certain associations and agreements between traders formed with main objectives towards sustainability and environmental protection.

To conclude the submissions, it is hereby quoted that Jerry Greenfield, Co-founder of Ben & Jerry's Ice Cream once said that "*Recycling, packaging, businesses are changing all of those things because that's what consumers want.*" This very beautifully illustrates the intersection of consumerism and sustainability. The need of the hour is to collaborate and sync the working of the regulators to attain sustainability while balancing the act with economy. Therefore, the

activism of regulator such as Competition Commission plays a critical role towards attaining the balance between ecology and economy. It is suggested that the Competition Commission of India like other jurisdictions also widen its scope to achieve dual objectives.

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