COMPETITION LAW AND SUSTAINABILITY AGREEMENTS: SHOULD ANTITRUST LAWS EVOLVE TO ALLOW COLLABORATION FOR CLIMATE GOALS?

Bhavika Mehta, Lawyer, BNCS Partners

Kanika Mehta, Research Scholar, Department of Commerce, Punjabi University, Patiala, Punjab, India

ABSTRACT

The climate change crisis has made both policymakers and businesses to rethink the trade-off between environmental objectives and market regulations. In India, the Competition Act, 2002 aims to prevent collusion and protect consumer welfare, yet this framework faces a tension when competitors collaborate for sustainability. Such joint measures, like industry-wide carbon footprint, cleaner technologies, or decarbonisation of the supply-chain, can seem counter-competitive in current provisions, despite their establishment of long-term consumer and societal welfare. This paper discusses the question of whether the competition law in India ought to be modified progressively to accommodate the sustainability agreements without compromising on its fundamental aims. Through law and economics approach, the work determines the extent to which consumer welfare can be construed in a broader sense to cover environmental welfare and inter-generational equity. It suggests, through a comparative approach based on EU and US experience, the use of targeted reforms, including safe harbours, pre-clearance systems, and comfort letters, that would promote bona fide sustainability alliances without increasing the chance of greenwashing cartels.

Keywords: Competition Law, Sustainability Agreements, Consumer Welfare, Incremental Reform, Climate Change

1. Introduction

1.1 Climate Change and the Business Competition Law Interface

Climate change is one of the most acute international issues of the twenty first century. Their consequences are already being felt in terms of rising temperatures, unpredictable monsoons, distress in farming sectors and growing occurrences of natural calamities.[1] In the case of developing economies such as India, they are especially acute considering the twin demands of maintaining economic growth and environmental safety. Increasing demands on businesses by regulators, investors, and consumers are mounting pressure on them to make their footprints smaller, greener, and to reorient production processes to achieve sustainability objectives.[2]

This kind of systemic change, however, frequently necessitates industry scale actions as opposed to individual actions by a single firm. Indicatively, in industries like cement, aviation and fast-moving consumer goods, the drop in emissions and funding green infrastructure can only be agreeable when competitors join up, technology is shared or minimum sustainability is agreed. These partnerships are pro-environment, but under the antitrust statute can be seen as anti-competitive agreements, limiting production or terms of trade, to this end. [3]And so, lies the inherent contradiction: how can competition law, in place to discourage collusion and safeguard consumer welfare, accommodate such cooperation in favour of climate action?

1.2 Indian Competition Law Framework

The Indian legal framework is provided in the Competition Act, 2002, which prohibits anti-competitive agreements under Section 3 and the formation of combinations that adversely affects competition under Section 5 and 6. Section 19(3) identifies factors to ascertain appreciable adverse effects on competition (AAEC) and these factors include consumer benefits and enhancement of production or distribution. However, the issue of environmental sustainability is not specifically identified under this system.[4] Agreements meant to lead to the minimisation of emissions or to positively influence the ecological results might therefore be

[1] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY* (Cambridge Univ. Press 2022).
[2] ORG. FOR ECON. CO-OPERATION & DEV., *SUSTAINABILITY AND COMPETITION* (OECD 2020).
[3] RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* (10th ed. Oxford Univ. Press 2021).
[4] U.S. Mehta & R. Agarwal, Competition Law and Public Interest: The Indian Experience, 5 INDIAN J.L. & ECON. 45 (2019).

examined under the prism of limiting competition, irrespective of whether they produce long-term gains to the consumer and the society.

Competition Commission of India (CCI) has long been known to focus on price, output and the consumer choice in its evaluation. Although the element of the interest of the population is sometimes taken into account, the explicit consideration of climate or sustainability issues is in its infancy.[5] This lacuna leaves the companies with the unwarranted fear of falling under the antitrust liability even when engaging in pro-environmental cooperation.

1.3 Law and Economics Approach to Sustainability Agreements

Classical law-and-economics approach to competition law places more emphasis on consumer welfare, which is considered synonymous with short-term price and output effects.[6] Climate objectives, however, beg the question of whether welfare also encompasses long-term environmental benefits accruing to consumers and future generations. An example of this would be an agreement between automobile makers to eliminate fossil-fuel cars by a deadline, which would raise short-term prices, but would provide long-lasting consumer benefits of cleaner air, thus, lowering health expenses, and reducing climate change.[7]

Therefore, it is difficult to expand the definition of consumer welfare without leaving the orthodox tradition. A broader strategy would still need to put a strict test on the efficiencies, proportionality and necessity of the accord, hence only true sustainability partnerships would be granted safeguarding.[8]

1.4 Comparative Lessons: EU and US

The European Union has made efforts in the world to incorporate sustainability in competition law. Certain sustainability agreements are expressly carve-out under the European Commission Horizontal Cooperation Guidelines (2023) and guidance has been issued by national agencies like the Dutch Authority for Consumers and Markets (ACM) to offer safe harbours of pro-

[5] R. Narayan, Public Interest and the Competition Act, 2002: Scope for Sustainability Considerations, 32 NAT'L L. SCH. REV. 89 (2020).
[6] ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (Basic Books 1978).
[7] OECD, *supra* note 2.
[8] European Commission, *Guidelines on the Applicability of Article 101 TFEU to Horizontal Co-operation Agreements* (2023).

environment contracts.[9] However, the United States on the other hand, is more conservative and the Federal Trade Commission (FTC) and Department of Justice (DOJ) follow a very strict consumer welfare test, though there is a growing policy debate.[10]

These experiences have important lessons to impart to India: direct transplantation is not a fund to transplant, but incremental changes like pre-clearance processes, comfort letters or guidance notes can create a more legal certainty.[11]

1.5 Research Question and Objectives.

The focus of this paper is to respond to the main question as follows: Should Indian competition law be liberalised to enable collaboration on climate objectives, and, in that case, how can this liberalisation be done in a gradual manner without compromising fundamental antitrust principles?

The objectives of the study are as follows:

1. To analyse the conceptual contradiction between competition law and sustainability partnerships in India.

2. To analyse the scope for incremental reform within the existing statutory framework of the Competition Act, 2002.

3. To bring down comparative lessons of the EU and the US and suggest the procedural and doctrinal innovations appropriate to the Indian setting.

1.6 Structure of the Paper

The article is separated into six sections. Part 2, which follows this introduction, establishes the conceptual framework and the current legal landscape (with special interest in India), and subsidiarily compares it (to the EU and the US). Part 3 continues the incrementalism argument, emphasising law-and-economics arguments of broader consumer welfare. Part 4 includes counterarguments, highlighting the dangers of greenwashing and the problems of enforcing it.

[9] Authority for Consumers & Markets, *Guidelines on Sustainability Agreements: Opportunities Within Competition Law* (2021) (Neth.) [hereinafter ACM Guidelines].
[10] Fed. Trade Comm'n & U.S. Department of Justice, *Draft Merger Guidelines* (2023).
[11] Narayan, *supra* note 5.

Part 5 then gives some proposed reforms of India, such as safe harbours and procedural innovations, and Part 6 concludes the paper.

2. Conceptual Framework and Current Legal Landscape

2.1 Competition Law: Objectives and Doctrines

Competition law (or antitrust law) is traditionally aimed at ensuring market efficiency, consumer welfare protection, and collusion or abuse of dominance. These aims are reflected in the Indian Competition Act, 2002 which includes three main pillars, which are anti competitive agreement, prevention of abuse of dominant position, and combinations (merger and acquisition) under Section 5 and 6.[12]

On a global scale, competition law has ping-ponged between two paradigms, the structuralist paradigm, emphasising market structure and concentration requirements, and the law-and-economics paradigm, epitomised by the consumer welfare standard proposed by Bork which focuses on efficiencies and output effects.[13] In India, the Competition Act of 2002 reflects a hybrid approach, while the preamble of the act emphasises on consumer welfare, the provisions under the act incorporates various considerations, such as innovation and economic growth, and thus, providing some flexibility.[14]

2.2 Sustainability Agreements: Scope and Examples.

Sustainability agreements Sustainability agreements are cooperative agreements between a group of companies that are aimed at achieving either an environmental or social goal, typically in line with the UN Sustainable Development Goals (SDGs).[15] These include:

- Joint initiatives of research and development for clean technologies (e.g., cells made of hydrogen fuel).

- Industry-wide standards for carbon-neutral supply chains.

[12] Competition Act, No. 12 of 2002, Acts of Parliament, 2003 (India).
[13] BORK, *supra* note 6.
[14] Mehta & Agarwal, *supra* note 4.
[15] G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development* (Sept. 25, 2015).

- Agreements to phase out harmful inputs, such as single-use plastics.

Such agreements have the potential to generate positive externalities, benefits which are not only enjoyed by the firms involved, but also by consumers, communities, and future generations. They, however, also have the danger of producing adverse effects of competition as well: price coordination, restricting production, or sidelining the smaller competitors.[16]

2.3 The Indian Position

Under Section 3(1) of the **Competition Act, 2002**, "no enterprise or association of enterprises shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or services, which causes or is likely to cause an appreciable adverse effect on competition within India."[17] Further, Section 3(3) deems horizontal agreements such as price fixing or bid rigging as **per se anti-competitive**.

This poses a sustainability partnership quandary: a horizontal accord to cut down emissions could unwittingly appear like a cartel in case it has an impact on production or prices. Although Section 19(3) states that the CCI should take into account pro-competitive grounds, i.e., efficiency gain, distribution improvement, or consumer benefits, these aspects are not explicitly linked to sustainability.[18]

An analysis of CCI case law provides an interesting illustration of the overwhelming emphasis on price and output effects, and little to no consideration of environmental efficiencies. As an illustration, in In ***Re: Alleged Cartelisation in the Cement Industry (2012)***,[19] the Commission criticised industry-wide coordination as restricting output and raising prices, without considering whether any collaborative efficiencies (such as environmental benefits) existed.[20] Although the issue in that case was not sustainability, the rationale shows the inflexibility of the Indian framework.

Such absence of recognition leads to uncertainty in the regulation: it may make companies afraid to enter into green deals because they risk antitrust liability. Stakeholders in the industry

[16] WHISH & BAILEY, *supra* note 3.
[17] Competition Act, No. 12 of 2002, § 3(1) (India).
[18] Id. § 19(3).
[19] Builders Association of India v. Cement Manufacturing Association, (2012) CCI 42 (India).
[20] Builders Association of India v. Cement Manufacturing Association, (2012) CCI 42 (India).

have called on the CCI to release guidelines on acceptable sustainability contracts yet little has been done.[21]

2.4 The European Union

The EU has gone a long way to accommodate sustainability in the competition law. The European Commission 2023 Horizontal Cooperation Guidelines provide certain space to sustainability agreements.[22] The Guidelines identify that the benefits of sustainability, including reduced carbon emission, biodiversity protection, long-term consumer health, may be regarded as efficiencies under Article 101(3) of the Treaty on the Functioning of the European Union (TFEU).

On a national level, the Dutch Authority for Consumers and Markets (ACM) has provided specific guidance to permit sustainability agreements where their overall benefits to society are greater than competition issues.[23] An example of this is that the reduction of CO2 emissions can be approved even when they raise prices, but so long as the environmental benefits can be demonstrated and shared with consumers.

2.5 The United States

The US remains cautious. The FTC and the DOJ still apply the consumer welfare standard in a very narrow manner whereby focus is laid on price, output, and innovation.[24] Despite some policymakers advocating the inclusion of environmental benefits, there are no binding guidelines to allow sustainability partnership exemptions. Such agreements must therefore be justified under the rule of reason, which is a strenuous criterion that requires demonstrating that pro-competitive advantages outweigh potential harms.[25]

Key Insights for India

The comparative picture suggests three lessons to India:

[21] Narayan, *supra* note 5.
[22] European Commission, *supra* note 8.
[23] ACM Guidelines, *supra* note 9.
[24] FTC & DOJ, *supra* note 10.
[25] William E. Kovacic & Carl Shapiro, Antitrust Policy: A Century of Economic and Legal Thinking, 14 J. ECON. PERSP. 43 (2000).

- EU shows that sustainability can be implemented in a gradual way by way of rules and broadened definitions of efficiencies.

- The Netherlands (ACM) explains how useful it is to issue so-called comfort letters and instructions to particular agreements.

- The US demonstrates the danger of stasis: unless the reform is conducted, companies are unlikely to take the initiative to establish socially beneficial but legally dangerous partnerships.

These lessons mean that India needs to reform its framework, both through the further development of the concept of consumer welfare and through procedural innovations, without necessarily rewriting the statute.

3. The Case for Reform

3.1 Economic Justifications for Reform

Climate change is a textbook example of a market failure: market transactions do not take into account any negative externalities of greenhouse gas emissions.[26] Left unattended, firms have little incentive to internalise such costs. Competition law, however, tends to punish the collaborative solutions to such failures by considering them cartel-like behaviour.

Reform is favoured under a law-and-economics approach since the traditional emphasis on the short-term prices overlooks the long-term welfare benefits of a sustainability agreement. As an example, the short-term impact of a consortium of cement manufacturers switching to carbon capture technology could be higher prices, but it will lead to less environmental damage. When applied in a narrow way, the consumer welfare standard underestimates such gains.[27]

Indian competition law might embrace an expanded version of consumer welfare and apply intergenerational benefits, including less expensive healthcare, less environmental degradation, and better living standards, as pertinent efficiencies. Such change would bring competition

[26] A.C. PIGOU, *THE ECONOMICS OF WELFARE* (Macmillan 1920).
[27] WHISH & BAILEY, *supra* note 3.

analysis in line with the larger economic realities without abandoning the orthodox framework.[28]

3.2 Legal Doctrinal Flexibility

The Competition Act, 2002 already incorporates flexibility in that the Section 19(3) directs the CCI to take into account aspects such as efficiency gains and consumer benefits to determine appreciable adverse effect on competition (AAEC).[29], although sustainability has not been listed expressly, the section can be purposely read to include the concept. Purposive interpretation has frequently been applied by India courts and regulators as an interpretation of statutes with reference to constitutional and public policy objectives.[30]

Therefore, until the statute is changed, the CCI can use guidance that acknowledges the environmental efficiencies as consumer benefit. That would reflect the progress in the EU where sustainability has been understood as a subset of consumer welfare through Article 101(3) TFEU.[31] That interpretation would maintain consistency in doctrine, but broaden its scope.

3.3 Procedural Innovations

Procedural reforms are also needed to minimize regulatory uncertainty in incremental reform. Companies will not enter into sustainability partnerships when they are afraid of punishment. Procedural innovations may include:

- Comfort letters: The CCI may also provide non-binding so-called comfort letters as in the case of the European Commission, and thus, explains whether a proposed agreement would be likely to violate competition law.[32]

- Mechanisms of pre-clearance: It is a system, in which companies can inform the CCI about their planned collaborations and receive expedited evaluation, which minimizes

[28] OECD, *supra* note 2.
[29] Competition Act, 2002, § 19(3).
[30] H.M. SEERVAI, *CONSTITUTIONAL LAW OF INDIA* (4th ed., Universal Law Publishing 2013).
[31] European Commission, *supra* note 8.
[32] European Commission, *Comfort Letter to Medicines for Europe on COVID-19 Cooperation* (2020).

compliance risks.[33]

- Safe harbours: Statement of principles defining types of sustainability agreements (e.g., joint R&D of green technologies) based on presumptions of being allowed based on transparency and verification.[34]

The mechanisms need not be changed through legislation but can operate under the enabling power of the CCI through uniformity of regulations, guidance notes or a policy paper that the CCI may issue.[35]

3.4 Alignment with Broader Policy Goals

India has taken big climate goals in the Paris Agreement such as reaching net-zero by the year 2070.[36] and not an impediment to this but must work in support of these targets. This can be accomplished through incremental reform through which actual green partnerships are possible, but without collusion under the guise of sustainability.

In addition, in its interpretation of the competition law, the Indian judiciary has always identified the right to clean environment as a subset of the right to life as enshrined in Article 21 of the Constitution.[37] It would therefore be in line with constitutional jurisprudence to interpret the competition law in such a manner that it facilitates the incorporation of sustainability.

3.5 Comparative Validation

The step-by-step course is confirmed by the comparative experience. The examples of the Horizontal Cooperation Guidelines (2023) of the EU and the sustainability guidance of the Dutch ACM show that targeted and guidance-focused reforms can find the golden mean between market integrity and climate action.[38]

---

[33] Ariel Ezrachi, Competition and Sustainability: The Role of Competition Law, 9 J. ANTITRUST ENFORCEMENT 1 (2021).
[34] ACM Guidelines, *supra* note 9.
[35] Competition Act, 2002, § 64.
[36] Ministry of Environment, Forest & Climate Change, *India's Long-Term Low Emissions Development Strategy* (Government of India 2022).
[37] Subhash Kumar v. State of Bihar, A.I.R. 1991 S.C. 420 (India).
[38] ACM Guidelines, *supra* note 9.

India can follow these models carefully and make reforms context-dependent and sensitive to the capacity to enforce the same. Drastic changes-like amending the Competition Act to add to it the new objective of protecting the environment- can be viewed as a dangerous step of watering the nest with a launder. Incremental reform has the advantage of eliminating these risks and produces concrete gains.

3.6 The Case for Reform In a Nutshell.

The case for incremental reform is therefore based on four pillars:

- **Economic rationale**: Sustainability agreements internalise externalities and provide long-run consumer benefits.
- **Flexibility in doctrine**: Efficiency-based analysis, which may include sustainability, is already permitted in section 19(3) of the Competition Act.
- **Procedural certainty**: The chilling effects on businesses are lessened through the use of the comfort letters, safe harbours and pre-clearance systems.
- **Policy coherence**: The alignment of competition law with climate commitments and constitutional values in India enhances legitimacy.

These pro-cyclical interventions maintain the orthodox consumer welfare framework, but extend its cover, thus enabling the competition law to participate constructively in the effort to tackle climate change.

4. The Case Against Reform

4.1 Risk of Greenwashing Cartels

Greenwashing cartels are one of the most powerful reasons why the competition rules should not be relaxed to ensure sustainability. Companies can also present the old forms of anti-competitive cooperation as sustainability partnerships in order to avoid the attention of appropriate authorities.[39] For example, competitors might sign a contract to produce less, but

[39] Giorgio Monti, Sustainability Agreements and Antitrust Law: The Case for Caution, 17 EUR. COMPETITION J. 371 (2021).

in fact, they aim at maximising their profits at the expense of consumers. This negates faith in the competition law and environmental policy.

The Dutch ACM itself has cautioned that sustainability exemptions must not become a loophole for collusion.[40] Without robust monitoring and verification, incremental reforms risk legitimising anti-competitive practices under the banner of climate goals.

4.2 Difficulty of Measuring Benefits

The other difficulty is the difficulty of measuring benefits of sustainability. Although price effects and output effects are relatively easy to quantify, environmental benefits are diffuse, long-term, and speculative.[41] For instance, in the case of consumer welfare impact of reduced carbon emissions one would have to use complex modelling to include health and ecological impacts as well as intergenerational impacts. The CCI might not have the necessary institutional capacity and expertise to accomplish such assessments in a reliable manner.

This issue is amplified by asymmetry of information: the firms are in better position to obtain data regarding the purported advantages of their accords, which can encourage overstating or manipulation.[42] This not only increases the risks of enforcement, but also puts excessive technical demands on the regulator that are not within its usual area of expertise.

4.3 Conflict with Core Antitrust Principles

The basis of competition law is that the results of the market should be made through free competition rather than through collusion.[43] Any introduction of sustainability exemptions would tend to blur this line, enabling co-ordination in markets that would otherwise provide innovation and efficiency through competitive rivalry. Critics find that direct regulation, such as carbon taxes or emission regulations, is a better way to pursue environmental policy, than to twist antitrust regulations.[44]

[40] ACM Guidelines, *supra* note 9.
[41] Ezrachi, *supra* note 33.
[42] Damien Geradin & Nicolas Petit, Sustainability and Competition Law: Bridging Two Worlds, CONCURRENCES 22 (2020).
[43] WHISH & BAILEY, *supra* note 3.
[44] Joseph E. Stiglitz, Addressing Climate Change Through Price and Non-Price Instruments, 129 ENERGY POLICY 449 (2019).

Furthermore, the introduction of the non-price elements of consumer welfare (sustainability) may blur the competitiveness analysis. The experience in the US reveals that a limited popular interest on price, output, and innovation offer predictability in enforcement.[45] Extending this standard poses a risk of confusion in doctrines and inconsistency in decision-making.

4.4 Potential Risk of Regulatory Capture

There is also a potential threat of regulatory capture whereby, industrial groups may lobby to attain sustainability exemptions that would, however, serve their own commercial interests.[46] For example, green standards can be advanced by the incumbents in a way that would disadvantage smaller competitors or new entrants hence throttling new innovation. Reforms of the competition law, in such instances, may rather enshrine the market power instead of promoting sustainability.

4.5 Slippery Slope Concerns

Critics of reform fear the slippery slope, with competition law trying to achieve climate objectives, pressure will then be put to extend competition law to other political actions like employment protection or regional development.[47] This poses a threat of turning competition law into a wide-ranging industrial policy tool that compromises its vision and purpose.

4.6 Gaps in Indian Institutional Capacity

In India, institutional capacity constraints enhance the risks. The CCI continues to cement its position as a good competition regulator. It is challenged by the lack of resources, heavy caseload, and continuous reforms due to the Competition (Amendment) Act, 2023.[48] The need to assess complex sustainability benefits may overwhelm the institution and issue inconsistent results.

Moreover, India does not have a well-developed culture of ex-ante advice and consultation to stakeholders in competition law as the EU. In the absence of such infrastructure, reforms such

[45] FTC & DOJ, *supra* note 10.
[46] Ioannis Lianos, Polycentric Competition Law, 71 CURRENT LEGAL PROBS. 161 (2018).
[47] Massimo Motta & Martin Peitz, Intervention Triggers and Competition Policy: Beyond Price Effects, 16 J. COMPETITION L. & ECON. 175 (2020).
[48] Competition (Amendment) Act, No. 13 of 2023, Acts of Parliament, 2023 (India).

as comfort letters or safe harbours might not work as intended.[49]

4.7 The Case Against Reforms in a Nutshell

To conclude, there are five main arguments by the opponents of incremental reform:

- **Greenwashing risks**: Companies can use the sustainability exemptions to mask cartels.
- **Measurement challenges:** The benefits ascribed to the environment are difficult to quantify.
- **Watering down of doctrine:** The broadening of the consumer welfare raises the possibility of a dilution of law.
- **Regulatory capture**: Regulators can use the reforms to entrench the market power of the incumbents.
- **Institutional constraints**: The CCI might not be able to implement subtle sustainability systems.

The above-mentioned concerns imply that, though incremental reform is a noble idea in theory, it should be implemented in a way that mitigates the risk of the occurrence of unaccountable and unwanted consequences.

5. Way Forward

5.1 Doctrinal Reform: Expanding Consumer Welfare

The best incremental reform is the expansion of the meaning of consumer welfare as provided by Section 19(3) of the Competition Act, 2002. Although the provision now enumerates efficiency gains, technical progress and benefits to consumers, the CCI may specify that these terms extend to cover environmental efficiencies.[50] As an example, efficiency gains in production or distribution may involve reduced carbon intensity or consumption of resources.

[49] Mehta & Agarwal, *supra* note 4.
[50] Competition Act, 2002, § 19(3).

This would interpret competition law in a way that its utility is consistent with Article 21.[51] of the Indian Constitution, a pledge to protect the environment.

The orthodoxy is maintained in this expansion of doctrines: consumer welfare continues to be the driving force, only this time of the twenty-first century.

5.2 Procedural Innovation: Creating Legal Certainty

Procedural innovation must encourage the change of doctrines in order to give businesses clarity. The measures that India can take are:

- **Guidance Notes**: The CCI has the ability to provide industry specific guidance, which explains what sustainability partnerships are acceptable, based on its authority under Section 64 of the Act.[52]

- **Comfort Letters**: The CCI came up with Comfort Letters, which are based on the European Commission, the ability to issue non-binding letters in which the CCI grants a comfortable assurance that a proposed agreement is not likely to breach the law.[53]

- **Safe Harbours**: The CCI would consider safe harbours with low-risk deals including joint research and development in clean technologies, joint setting standards on recyclable packaging, or joint buying of green inputs.[54]

- **Ex-ante Consultation Mechanisms**: A mechanism where businesses seek early feedback by way of a notification procedure would mitigate the chilling effects and encourage compliance.[55]

Such tools reduce the levels of uncertainty, promote true green partnerships, and curb abuse by promoting transparency.

[51] Subhash Kumar v. State of Bihar, A.I.R. 1991 S.C. 420 (India).
[52] Competition Act, 2002 § 64.
[53] European Commission, *supra* note 32.
[54] ACM Guidelines, *supra* note 9.
[55] Ezrachi, *supra* note 33.

5.3 Checks and Balances

In order to ensure that the risks above-mentioned are mitigated, the following reforms should have a safeguard:

- **Transparency Requirements**: Firms should provide information to back the stated environmental advantages.
- **Independent Verification**: Greenwashing should be eliminated by having third-party audit of sustainability claims.[56]
- **Time-Bound Exemptions**: All sustainability exemptions must be reviewed after a certain time to make sure that benefits are realised.
- **Proportionality Principle**: There should be no agreements that exceed the necessary to attain the stated environmental goal.[57]

These controls lessen the risks of regulatory capture, measurement challenges and cartelisation.

5.4 Policy Coherence

The reform of the competition law must not replace direct climate regulation. Tools such as carbon pricing, emissions standards, renewable energy requirements and so on are still central to the attainment of sustainability.[58] Competition law should not provide unnecessary stifling of pro-environment collaboration, but should also guard against anti-competitive abuse.

The CCI can bring about coherence between competition enforcement and national climate commitments by aligning itself with other larger policy instruments, including the Long-Term Low Emissions Development Strategy of India.[59]

6. Conclusion

This paper has discussed the conflict between competition law and sustainability accords in the Indian situation. Although the Competition Act, 2002 is not currently structured to

[56] Geradin & Petit, *supra* note 42.
[57] European Commission, *supra* note 8.
[58] Stiglitz, *supra* note 44.
[59] Ministry of Environment, Forest & Climate Change, *supra* note 36.

accommodate environmental objectives, its open-mindedness, together with the gradual reforms, is a way forward. India can facilitate climate-oriented cooperation without leaving the orthodoxy of antitrust through expanding the consumer welfare standard to encompass environmental efficiencies and procedural innovations such as guidance notes, comfort letters, and safe harbours.

The argument against reform--based on the greenwashing concerns, the difficulty in its measurement, and institutional constraints--is convincing. However, these difficulties are not impossible to overcome in case the reforms are properly planned with protection. Finally, the competition law should also adapt in unison with the constitutional values in India and the global climate commitments. The most viable frontier of contemporary business regulation is not radical change, but incremental reform: a path that balances competition with accountability, efficiency with fairness, and competition with environmental protection.

References

A.C. PIGOU, *THE ECONOMICS OF WELFARE* (Macmillan 1920).

Ariel Ezrachi, Competition and Sustainability: The Role of Competition Law, 9 J. ANTITRUST ENFORCEMENT 1 (2021).

Authority for Consumers and Markets, *Guidelines on Sustainability Agreements: Opportunities Within Competition Law* (2021) (Neth.).

Builders Association of India v. Cement Manufacturing Association, (2012) CCI 42 (India). [In Re Alleged Cartelisation in the Cement Industry, Case No. 29 of 2010 (CCI 2012).]

Competition (Amendment) Act, No. 13 of 2023, Acts of Parliament, 2023 (India).

Competition Act, No. 12 of 2002, Acts of Parliament, 2003 (India).

Damien Geradin & Nicolas Petit, Sustainability and Competition Law: Bridging Two Worlds, CONCURRENCES 22 (2020).

European Commission, *Comfort Letter to Medicines for Europe on COVID-19 Cooperation* (2020).

European Commission, *Guidelines on the Applicability of Article 101 TFEU to Horizontal Co-operation Agreements* (2023).

Fed. Trade Comm'n & U.S. Dep't of Justice, *Draft Merger Guidelines* (2023).

Giorgio Monti, Sustainability Agreements and Antitrust Law: The Case for Caution, 17 EUR. COMPETITION J. 371 (2021).

H.M. SEERVAI, *CONSTITUTIONAL LAW OF INDIA* (4th ed., Universal Law Publ'g 2013).

Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (Cambridge Univ. Press 2022).

Ioannis Lianos, Polycentric Competition Law, 71 CURRENT LEGAL PROBS. 161 (2018).

Joseph E. Stiglitz, Addressing Climate Change Through Price and Non-Price Instruments, 129 ENERGY POL'Y 449 (2019).

Massimo Motta & Martin Peitz, Intervention Triggers and Competition Policy: Beyond Price Effects, 16 J. COMPETITION L. & ECON. 175 (2020).

Ministry of Environment, Forest & Climate Change, *India's Long-Term Low Emissions Development Strategy* (Gov't of India 2022).

Organisation for Economic Co-operation & Development, *Sustainability and Competition* (OECD 2020).

R. Narayan, Public Interest and the Competition Act, 2002: Scope for Sustainability Considerations, 32 NAT'L L. SCH. REV. 89 (2020).

RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* (10th ed., Oxford Univ. Press 2021).

ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (Basic Books 1978).

Subhash Kumar v. State of Bihar, A.I.R. 1991 S.C. 420 (India).

U.S. Mehta & R. Agarwal, Competition Law and Public Interest: The Indian Experience, 5 INDIAN J.L. & ECON. 45 (2019).

United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, G.A. Res. 70/1, U.N. Doc. A/RES/70/1 (Sept. 25, 2015).

William E. Kovacic & Carl Shapiro, Antitrust Policy: A Century of Economic and Legal Thinking, 14 J. ECON. PERSPS. 43 (2000).