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Environmental Sustainability: The role of competition and consumer protection laws and policies

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Abstract:

As the climate change problem worsens, the private sector is increasingly seen as a vital lever for environmental sustainability. In this respect, competition law is often seen as an obstacle to much needed business collaboration. It need not be. At its normative core, considerable overlap already exists between the aims of competition law and environmental sustainability – both seek to increase dynamic efficiencies, and ensure longevity of businesses. Through the exemption to the prohibition under s. 34 of the Competition Act, environmental sustainability can be incorporated into the competition law framework. Such exemption provides, *inter alia*, that agreements would not be prohibited if they contribute to the promotion of technical or economic progress. In this regard, environmental economics has sufficiently progressed to allow environmental benefits to be translated into the language of economics and competition law. The CCCS is thus encouraged to adopt a more capacious interpretation of "economic progress" to allow the consideration of environmental benefits in its cost-benefit analysis. In setting out a theoretical rubric, the CCCS could act in one of two ways: first, it could act to prevent businesses from agreeing to activities harmful to sustainability. This requires a lighter touch approach. Second, it could take action to support agreements that promote sustainability, which would require a balanced approach. Adopting this framework requires some practical implementation. This includes making climate change a strategic priority and publishing specific guidelines on environmental sustainability agreements. The CCCS could also engage in a dialectic with businesses that could extend to creating a 'sandbox' for businesses to experiment with sustainability-linked collaborations. Importantly, it would need to undertake capacity-building in sustainability and environmental economics expertise to credibly account for benefits under its analyses. While challenging, competition law's role in facilitating desirable business collaboration in environmental sustainability is not only possible but critical.

Humanity is at an existential crossroad. We face catastrophic climate change if average temperature rise exceeds 1.5°C. Yet, if 40% of developed fossil fuel reserves – including coal mines already under development – are not left unextracted, there is a decent chance of that scenario materialising.[1] More must be done to abate carbon emissions to the extent needed to keep our planet habitable, including the turn to seemingly unlikely candidates as levers for change – such as competition law.

In this essay, I discuss the imperative and normative arguments for competition law's harmonisation with environmental sustainability. I then provide a theoretical framework for how the national competition authority, the Competition and Consumer Commission of Singapore ("**CCCS**") could approach sustainability agreements amongst competing undertakings pursuant to the prohibition under s.34 of the Competition Act (Cap 50B) (the "**CA**"). I then examine some ways in which these might be practically implemented. I conclude by noting the challenges faced by CCCS in incorporating an environmental sustainability agenda, but how this is not only possible but critical.

Normative harmonisation

Amidst international regimes and governmental regulation falling short, the private sector has become increasingly vital in the transition to a more climate-conscious economy.[2] However, improving on environmental sustainability often requires cooperation, as noted by the UK's Competition and Markets Authority ("**CMA**").[3] Whether in the area of more energy-efficient products or the use of packaging material that facilitates recycling,[4] tangible environmental benefit may only be achieved if these apply at scale.

[1] Kelly Trout et al, 'Existing fossil fuel extraction would warm the world beyond 1.5°C" (2022) *Environ. Res. Lett.* 17 064010.
[2] Simon Holmes, 'Climate Change and Competition Law' *OECD* (DAF/COMP/WD(2020)94, 3; Julian Nowag, 'Sustainability & Competition Law and Policy' *OECD* (DAF/COMP(2020)3, 11.
[3] CMA, 'Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government' (14 Mar 2022) <https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government accessed on 20 May 2022.
[4] Jurgita Malinauskaite, 'Competition Law and Sustainability: EU and National Perspectives' (2022) *Journal of European Competition Law and Practice*, 1-14.

Competition law, however, is not naturally given to the promotion of environmental sustainability. In fact, the promotion of competition potentially leads to adverse environmental impacts.[5] Conceptually, tensions arise because the benefits of environmental protection are not intuitively compatible with the dominant rhetoric of 'consumer welfare' or 'economic efficiencies' found in competition law.[6] Moreover, the fear of antitrust infringement has created reluctance amongst firms to enter agreements that would achieve sustainable outcomes.[7] Despite those challenges, I argue that competition law can be compatible with the protection with the environment – both in its normative core and principled application.

Lying at the heart of sustainability is the continuation of productive and dynamic efficiencies while ensuring equity,[8] both intra-generationally and inter-generationally. In seeking to maximise consumer benefit and ensuring the longevity of business practices, competition law seeks to advance those same efficiencies. This overlap in objectives provides the normative harmony between competition law and environmental sustainability that gives credence to the former's ability to achieve the latter. Indeed, environmental sustainability is already an important dimension to present notions of social welfare and consumer value – something that competition agencies are inherently tasked to promote.[9]

Mapping the above theoretical underpinnings onto the legislative architecture is, of course, another exercise altogether. In this respect, an exemption to the prohibition under s.34 of the CA applies to agreements which, *inter alia*, contribute to the promotion of "technical or economic progress"[10] – in other words, agreements that have a net economic benefit. The underlying precepts of such economic benefit need not be reformulated (even

[5] As was hypothesised with respect to the liberalisation of the electricity sector in Hong Kong: see Thomas K. Cheng, Jolene Lin, 'Introduction of Competition and Environmental Regulation in the Electricity Sector in Hong Kong' in *World Competition Law and Economics Review* (Kluwer Law International 2014).
[6] Iaonnis Lianos, 'Reorienting competition law' (2022) *Journal of Antitrust Enforcement* 10, 1-31, 6.
[7] Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) *Journal of European Competition Law & Practice*, Vol 11, No.3-4, 124-132, 124; Simon Holmes, 'Climate change, sustainability, and competition law' (2020) *Journal of Antitrust Enforcement* 8, 354-405, 354; and Holmes (n2) in which a survey cited showed "60% of businesses shied away from cooperation with competitors for fear of competition law".
[8] Nowag (n2), 8.
[9] Sungchul Choi and Alex Ng, 'Environmental and Economic Dimensions of Sustainability and Price Effects on Consumer Responses' (2011) *Journal of Business Ethics* Vol 104(2), 269-282; Ioannis Lianos, 'Polycentric Competition Law' (2018) *Current Legal Problems* Vol 71, No. 1, 161-213, 161.
[10] S. 35 and paragraph 9, Third Schedule, Competition Act.

as some argue in favour thereof)[11] in order for environmental benefits to fit into the competition law edifice. As it happens, environmental economics literature is now sufficiently well established to equip competition authorities with the tools to place an economic value on environmental benefits,[12] measuring them in "the traditional language of efficiencies used in competition law and economics".[13] One, albeit simple, example is the use of market-based carbon prices to conduct a cost-benefit analysis of an agreement seeking to reduce carbon emissions.[14]

Such forms of valuations are not unprecedented. The Dutch competition authority, ACM, provides inspiring instruction. Under its approach, the benefits of environmental-damage agreements – being the environmental benefits to society as a whole – are assigned an environmental or 'shadow' price, and then put through the rigour of a standard social-cost-benefit analysis in determining if the collaborative initiative should qualify as efficient.[15] In this way, ACM proffers a more "enlightened" approach that captures the benefits of reduced pollution, and discards that parochial attachment to monetary costs and output.[16] CCCS can therefore adopt a more capacious interpretation of "progress" that allows the consideration of environmental benefits, without needing to depart from the economic paradigm.

The theoretical framework

Despite the harmony that can be achieved between the principles of competition law and sustainability, care must be taken to ensure that such collaboration does not lead to consumer harm (such as cartels), or ultimately undermine the policy goals of competition

[11] See Lianos (n6), 9.
[12] Suzanne Kingston, 'Competition Law in an Environmental Crisis' (2019) *Journal of European Competition Law & Practice*, Vol 10 No. 9, 517-518, 518.
[13] Nowag (n2), 18.
[14] *Ibid*, 20.
[15] ACM Draft Guidelines on 'Sustainability Agreements' <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf> accessed 22 May 2022 ("**ACM Draft Guidelines**).
[16] Lianos (n9), 196.

law. A theoretical rubric providing CCCS with high-level guidance to its approach can be adopted to prevent the above. This is summarised in the table below:

Sustainability-related agreement	Harmful to environmental sustainability	Promoting environmental sustainability
CCCS action	Preventative (sword)	Supportive (shield)
Approach	Light touch	Balancing
Level of intervention	Stricter adherence to traditional competition law principles	Weigh environmental benefits against anti-competitive effects
Example	*Daimler, BMW and Volkswagen* decision ("***Daimler* Decision**")	JAMA and KAMA case

The above is adapted from Nowag's novel framework on how competition provisions may be interpreted when faced with two different collaborative measures – one which has as its object or effect the harm of environmental sustainability, and the other the promotion of the same.[17] It should be acknowledged that Nowag's framework is premised upon the obligation under EU law to integrate environmental protection requirements in the implementation of EU policy[18] – a constitutional backdrop that Singapore's legislative framework lacks. Nevertheless, the framework affords a sensible and principled approach, moreover on the basis of the "European concepts of markets, dominance, and market power" which Singapore drew upon when enacting the CA.[19] Each of the two types of CCCS action is elaborated upon below.

[17] See generally Julian Nowag, *Environmental Integration in Competition and Free-Movement Law* (2016 Oxford Scholarship Online).
[18] Article 11 TFEU obliges the "integration" of such requirements. This explains the "supportive integration" and "preventative integration" nomenclature used by Nowag.
[19] Deborah Healy, 'Application of Competition Laws to Government in Asia: The Singapore Story" (2011) *ASLI Working Paper Series No. 025*.

Preventative action

CCCS could prevent agreements which are harmful from an environmental viewpoint. This could be undertakings agreeing to withhold environmental performance information when advertising, as was the case before the French competition authority in the PVC and linoleum floor covering industry.[20] In the case of preventative action, a competition authority is deemed, somewhat counterintuitively, to have less room to pursue the sustainability agenda.[21] Such hesitation stems from the open-endedness of what ought to be considered as environmentally harmful. Having CCCS prohibit agreements on such a value judgment puts it dangerously close to acting beyond its remit, as it is tantamount to setting environmental standards itself.[22] This area therefore poses the biggest lacuna competition law has in addressing issues of sustainability.[23]

Nonetheless, this does not mean competition authorities are unable to act. What it simply means is that, in cases of agreements that are harmful to environmental sustainability, CCCS should subscribe to more traditional theories of competition law. In the *Daimler* Decision, the European Commission found that automobile companies colluded on nitrogen oxide cleaning in ensuring that each company did no better than what the law required, despite the technology being available to do so.[24] Doing this denied consumers the choice to buy less polluting vehicles.[25] In this way, the agreement was prohibited because the practices antithetical to sustainability aligned with the anti-competitive behaviour.

In cases of preventative action, therefore, CCCS needs to employ a lighter touch, assessing "whether the harm to *competition and sustainability*", as taken together, "outweigh the benefits of the measure".[26]

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[20] Nowag (n2), 13.
[21] Julian Nowag, 'Competition Law's Sustainability Gap? Tools for an Examination and a Brief Overview' (2019) *Lund University Legal Research Paper Series* (LundLawCompWP 3/2019), 9.
[22] *Ibid*, 9.
[23] *Ibid*, 11.
[24] European Commission, 'Antitrust: Commission fines car manufacturer €875 million for restricting competition in emission cleaning for new diesel passenger cars' <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581> accessed 26 May 2020.
[25] Nowag (n2), 13.
[26] Malinauskaite (n4), 5.

Supportive action

With respect to agreements that seek to promote sustainability, CCCS need not entertain the same concerns of legislative incursion as its preventative action. Working as a shield, its supportive action can protect such agreements from being deemed as anti-competitive. In a case factually similar to the *BMW* Decision but that had a different result, i.e., the JAMA and KAMA case, automobile manufacturers in an association committed to reducing CO2 emissions from cars with an average target set for all members collectively.[27] With the car manufacturers at liberty to develop CO2-efficient technologies independently (and in competition with one another) to achieve those carbon reductions, the European Commission did not prohibit the agreement.

The above example does not mean – in fact, it demonstrates – that such agreements are preserved in lieu of the competition principles. Rather, a balancing exercise weighing the benefits of environmental sustainability with the policy objectives of competition law is employed to determine if an exemption under the CA should apply. Moreover, sustainability benefits would ultimately still need to be "translated into the language of competition law" under any analysis.[28] As discussed above, however, this is no longer as insurmountable as before.

The approach is not without challenges. Ascribing a value to sustainability benefits, and weighing them against more traditional metrics of costs, can be complex.[29] Yet, as with administrative courts tasked with balancing social values, so too do competition authorities routinely weigh (often conflicting) economic costs and benefits.[30] Ultimately, the tenets of competition law need not be sacrificed on the altar of environmental sustainability. In the ACM Draft Guidelines, the point is made that the sustainability agreement would still be

[27] JAMA (Case IV/F-2/37.634); KAMA (Case IV/F-2/37.611).
[28] Nowag, (n22), 5.
[29] Lianos (n6), 7-8.
[30] Monti (n7), 132; Holmes (n7), 398.

anticompetitive if it "appreciably affect[s] competition on the basis of key competition parameters such as price, quality, diversity, service, and distribution method".[31] In those premises, CCCS is simply asked to eschew the "isolationist" approach that Kingston argues wrongly forecloses environmental benefits from ever constituting economic efficiencies.[32]

Practical implementation

Practically speaking, how CCCS could implement its support for environmental sustainability is equally important. The following contain some suggestions:

(1) CCCS could make explicit that climate change is a strategic priority. This is not dissimilar to the CMA's statement that the transition to a low carbon economy would be a strategic objective, and that it would ensure "businesses are not deterred from taking part in lawful sustainability initiatives in the mistaken belief that they may breach competition law".[33] Internally, CCCS may also consider having a lexicographic ordering of values (with environmental sustainability being one of them) providing a framework for how conflicting values might interact, i.e., which take priority, and which need to be balanced.[34]

(2) As a preliminary step, CCCS may enter into dialogue with businesses. Undertakings can then surface the problems they face, and provide practical examples of environmental collaboration.[35] An expansion of such a dialectic is the idea of a regulatory 'sandbox' Lianos proposes.[36] CCCS can create a supervised environment where businesses are free to experiment with cooperative initiatives to advance environmental sustainability. CCCS can monitor and evaluate those practices for

[31] ACM Draft Guidelines (n16), [16].
[32] Suzanne Kingston, 'Introduction' in Simon Holmes et al, *Competition Law, Climate Change & Environmental Sustainability* (Concurrences 2021), 13.
[33] CMA, 'Guidance: Environmental sustainability agreements and competition law" <https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law> accessed 24 May 2022.
[34] Lianos (n6), 8.
[35] Holmes (n2), 8.
[36] Lianos (n6), 29-30.

anticompetitive effects as well as the sustainability benefits achieved. Such experimentation within specific sectors could further facilitate CCCS to iteratively develop sector-specific standards that are responsive to emerging challenges.[37]

(3) CCCS can publish specific guidance highlighting its position on sustainability collaborations. This could include illustrations/examples of sustainability agreements that would not infringe the s.34 prohibition – an approach adopted by the EU Commission in its draft guidelines on horizontal cooperation.[38] Given businesses in Singapore are expected to self-assess their collaborations in the first instance,[39] such guidance would provide valuable regulatory certainty.

(4) Finally, a critical measure to support sustainability initiatives credibly is to build robust capacity in environmental expertise. Sustainability is a "broad – maybe all encompassing – field",[40] with environmental economics a study all onto its own. Sustainability experts and environmental economists would be required to legitimatise both the light-touch approach and the balancing exercise conducted by CCCS in taking either preventative or supportive action. Employing the right methodological tools will close the gap between a policy stance that supports environmental sustainability and that ensures sound competition law decisions are reached.

Conclusion

The chilling effect of competition law should be jettisoned in favour of much needed business collaboration to undertake sustainability initiatives. Environmental sustainability already shares a normative overlap with competition law – agreements that incorporate the

[37] *Ibid*, 30.
[38] Jeroen Capiau, 'Sustainability agreements under EU competition law" (JFTC International Symposium, 2022) <https://www.jftc.go.jp/cprc/events/symposium/2021/220325sympo1.pdf> accessed 24 May 2022. See also JFTC, 'Guidelines Concerning Joint Activities for Recycling under the Antimonopoly Act'.
[39] CCCS, 'Business Collaboration Guidance Note', [11.1].
[40] Nowag (n2), 23.

true cost of production by accounting for environmental externalities are, indeed, how businesses can compete on a truly level playing field.[41] While challenges still remain, environmental economics has sufficiently advanced to cohere environmental benefits within a competition analysis. Guided by a theoretical approach for preventative and supportive action, and implementing practical measures to incorporate that approach, CCCS can act to "diminish the dark shadow that competition law currently casts over potential collaboration."[42]

[41] Holmes (n2), 367
[42] *Ibid*.

Bibliography

- ACM Draft Guidelines on 'Sustainability Agreements' <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf> accessed 22 May 2022

- Article 11, Treaty on the Functioning of the European Union (TFEU)

- J. Capiau, 'Sustainability agreements under EU competition law" (JFTC International Symposium, 2022) <https://www.jftc.go.jp/cprc/events/symposium/2021/220325sympo1.pdf> accessed 24 May 2022

- CCCS, 'Business Collaboration Guidance Note', [11.1]

- T.K. Cheng, J. Lin, 'Introduction of Competition and Environmental Regulation in the Electricity Sector in Hong Kong' in *World Competition Law and Economics Review* (Kluwer Law International 2014)

- S. Choi and A. Ng, 'Environmental and Economic Dimensions of Sustainability and Price Effects on Consumer Responses' (2011) *Journal of Business Ethics* Vol 104(2), 269-282

- Competition Act (Cap 50B)

- CMA, 'Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government' (14 Mar 2022) <https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government accessed on 20 May 2022

- European Commission, 'Antitrust: Commission fines car manufacturer €875 million for restricting competition in emission cleaning for new diesel passenger cars' <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581> accessed 26 May 2020

- D. Healy, 'Application of Competition Laws to Government in Asia: The Singapore Story" (2011) *ASLI Working Paper Series No. 025*

- S. Holmes, 'Climate Change and Competition Law' *OECD* (DAF/COMP/WD(2020)94

- S. Holmes, 'Climate change, sustainability, and competition law' (2020) *Journal of Antitrust Enforcement* 8, 354-405

- JAMA (Case IV/F-2/37.634)

- JFTC, 'Guidelines Concerning Joint Activities for Recycling under the Antimonopoly Act'

- KAMA (Case IV/F-2/37.611)

- S. Kingston, 'Competition Law in an Environmental Crisis' (2019) *Journal of European Competition Law & Practice*, Vol 10 No. 9, 517-518

- I. Lianos, 'Polycentric Competition Law' (2018) *Current Legal Problems* Vol 71, No. 1, 161-213

- I. Lianos, 'Reorienting competition law' (2022) *Journal of Antitrust Enforcement* 10, 1-31

- J. Malinauskaite, 'Competition Law and Sustainability: EU and National Perspectives' (2022) *Journal of European Competition Law and Practice*, 1-14

- G. Monti, 'Four Options for a Greener Competition Law' (2020) *Journal of European Competition Law & Practice*, Vol 11, No.3-4, 124-132

- J. Nowag, ‘Competition Law’s Sustainability Gap? Tools for an Examination and a Brief Overview’ (2019) *Lund University Legal Research Paper Series* (LundLawCompWP 3/2019)

- J. Nowag, *Environmental Integration in Competition and Free-Movement Law* (2016 Oxford Scholarship Online)

- J. Nowag, ‘Sustainability & Competition Law and Policy’ *OECD* (DAF/COMP(2020)3

- K. Trout et al, ‘Existing fossil fuel extraction would warm the world beyond 1.5°C” (2022) *Environ. Res. Lett.* 17 064010