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Balancing environmental sustainability and market competition

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Overview

Environmental, Social and Governance (ESG) concerns are on the rise globally. As ESG enforcement evolves and stakeholders become more attuned to sustainability, businesses and regulators must realign their strategies to be inclusive of the ESG principles. This shift is crucial to ensure long-term viability and foster a positive societal impact. However, it also presents a challenge as business conduct and/or policies, which prioritise competition and market efficiencies, may conflict with environmental priorities.

For instance, policies promoting competition in certain resource-intensive industries (such as the smartphone industry) enhance market efficiency by optimising resource allocation, boosting productivity and providing consumer benefits through reduced costs and more choices. Studies indicate that such stimulus may also push companies to overproduce to achieve efficiency, which in turn may accelerate resource depletion and adversely affect the environment[1].

Navigating this dichotomy between competition-driven market efficiency and environmental impact is, therefore, crucial and requires balancing economic imperatives with environmental considerations to achieve sustainable outcomes.

Revisiting antitrust assessments

Conventional antitrust assessments focus on market share analysis and often overlook broader societal issues. This happens because of challenges associated with measuring these concerns and the focus on short-term competitive effects rather than the potential social benefits in efficiency that come from a transaction. As more businesses incorporate environmental sustainability into their strategies, regulators may need to re-evaluate their criteria to measure business conduct. These sustainability initiatives can manifest in various forms, ranging from non-merger collaborations between businesses to combine their respective R&D strengths to mergers aimed at strengthening sustainability across the value chain.

To ensure that businesses continue to pursue environmental sustainability as a part of their intrinsic strategy, certain regulators are incorporating environmental sustainability principles in competition law. For instance, the UK's Green Agreements Guidance provides businesses with a direction on when they can legitimately engage in environmental cooperation[2], and the EU's Sustainability Guidelines mention how agreements between competitors for sustainability objectives should be assessed[3].

The proactive stance around legislative changes has led to certain antitrust regulators allowing collaborations between businesses to promote eco-friendly practices. For instance, the Netherlands Authority for Consumers and Markets (ACM) approved a collaboration between competitors – TotalEnergies, Shell Netherlands, Energie Beheer Nederland (EBN) and Gasunie – to build a high-capacity trunkline to capture and store carbon, which in turn will reduce CO_2 emissions. It approved the collaboration with the understanding that the benefits to society outweighed the costs of restricting competition[4]. Furthermore, the ACM approved the arrangement between soft drink suppliers, including Coca-Cola and Vrumona, and supermarket chains Albert Heijn and Jumbo to discontinue the use of plastic handles on all soft drink and water multipacks in a move towards recycling and reducing plastic use[5].

While these are small steps taken by businesses and regulators to meet larger sustainability goals, there are challenges that stakeholders face on either end of the spectrum.

[1]Sources: https://documents1.worldbank.org/curated/en/350851612561873572/pdf/An-International-Framework-for-Eco-Industrial-Parks-Version-2-0.pdf ; https://www.journals.uchicago.edu/doi/10.1093/reep/rex013 ; https://doi.org/10.1787/9789264190504-en.
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[4]Source: https://www.acm.nl/en/publications/acm-shell-and-totalenergies-can-collaborate-storage-co2-empty-north-sea-gas-fields
[5]Source: https://www.acm.nl/en/publications/acm-favorable-joint-agreement-between-soft-drink-suppliers-about-discontinuation-plastic-handles

Where do the challenges lie?

Businesses often hesitate in leading collaborative sustainability initiatives (to enhance sustainability efforts) in the fear of being perceived as anticompetitive. Meanwhile, antitrust regulators are facing challenges in the application of traditional competitive assessment frameworks.

The first challenge is to distinguish between genuine motivation and greenwashing, a practice where false or exaggerated environmental claims are made to appeal to consumers or enhance a company's public perception.

The next challenge is deciding if it is feasible to consider environmental efficiencies that benefit consumers other than those directly affected the anticompetitive conduct or transaction. Regulators also face the dilemma of choosing the right timeframe for considering environmental effects and efficiencies. This entails quantifying and balancing environmental effects with other types of effects and efficiencies.

Navigating ESG integration

In our experience, a sustainability-incorporated competition framework should ideally integrate environmental sustainability into each phase of the competition assessment. Across the pre-assessment, assessment and post-assessment stages, organisations should keep the following points in mind:

Pre-assessment stage

- Introduce an augmented checklist encompassing environmental metrics of the proposed merger or collaborative conduct
- Metrics could include Key Performance Indicators (KPIs) used to measure achievement of environmental goals

Assessment stage

- Identify the relevant market and competition level
- Analyse information-sharing protocols for non-merger collaborations
- Assess the purpose of the merger or collaborative conduct using time value-adjusted social cost-benefit analysis and/or Life Cycle Assessment (LCA)

Post-assesment stage

- Ensure compliance by setting targeted environmental goals and deadlines
- Consistent monitoring at pre-decided time intervals to ensure achievement of goals

Bringing the framework to life

Highlighting the proposed framework using an illustrative example, let us consider a hypothetical collaboration between two car companies to reduce CO_2 emissions through improved diesel technology.

Pre-assessment stage

The pre-assessment stage would entail both companies providing information on their current CO_2 emissions levels, details on the technology that will be used to reduce emissions, related costs and the proposed reduction in CO_2 emissions.

Assessment stage

This stage would involve defining the relevant product and geographic market of the low-emission cars while integrating sustainability aspects into the definition of the relevant market.

Once the relevant market is identified, concentration in the identified markets could be evaluated using metrics such as the Herfindahl-Hirschman Index (HHI). This would be followed by analysing the information-sharing protocol between two companies and ensuring that only data regarding the improved diesel technology is shared between the parties.

Once this is done, the purpose of the collaborative conduct should be assessed to ensure the collaboration is not an act of greenwashing. This can be done using the time value-adjusted social cost-benefit analysis. This analysis identifies the direct, indirect costs and benefits, including environmental costs and benefits, and the timeframe for the realisation of the impact. In this case, the major costs would include the increased R&D efforts, capital expenditures and re-training of the workforce, while the benefits would include reduced emissions.

While quantifying costs is typically straightforward, the challenges lie in measuring environmental benefits, often intangible or non-monetary. A proposed way of quantifying CO_2 emissions is the use of the social cost of carbon for India, which currently stands at ~US$ 90 per tonne of CO_2, meaning each extra tonne of CO_2 emission costs the Indian economy USS 90[6]. After quantifying all the costs and benefits, an appropriate rate of return is identified to discount all the projected costs and benefits to their present value.

The last step would involve calculating the Benefit-Cost Ratio (BCR) – the sum of the present value benefits divided by the sum of the present value costs. A BCR of more than 1 indicates that benefits outweigh costs, suggesting the merger or collaboration is environmentally beneficial despite the additional costs and the collaboration is approved, bringing an end to the assessment stage.

Post-assessment stage

The post-assessment stage would involve discussions with regulators to set measurable environmental goals and timeframes, such as a 50 percent reduction in CO_2 emissions over three years for low-emission cars. Consistent monitoring via a third party will ensure compliance and progress of these set goals within the specified timeframe.

[6]Source: https://earth.org/social-cost-of-carbon/

The need for a tailored approach

The framework proposed above advocates for integrating sustainability into competition assessment. However, it is crucial to acknowledge that a one-size-fits-all approach to competition assessment is not feasible due to the diverse landscape of businesses and their intent.

Regulators should ideally evaluate each case individually and continually refine their approach based on insights gained from initial cases. To adapt to these evolving demands, regulators can enhance their capabilities by investing in specialised training, hiring ESG matter experts or collaborating with external sustainability organisations. However, overregulation must be avoided as it can lead to unintended consequences for businesses, such as increased compliance costs and lower incentives to innovate. Furthermore, self-regulation by businesses, as advocated by the UN[7], can be a tool to ensure a balance between market and competition goals and resource efficiency, aiding environmental preservation.

Learning from global practices

As other jurisdictions balance competition and environmental interests, India can learn from their experience on navigating the balance between safeguarding present competition and future environmental degradation. Our endeavour is for the implementation of the framework outlined to be considered as a catalyst to trigger debate on frameworks or guidelines that can be developed to review competition from an environmental lens and vice versa. We also hope this encourages innovative thinking by businesses to navigate the dichotomy between achieving sustainability objectives and market competitiveness, all while deterring greenwashing practices.

[7]Source:https://unglobalcompact.org/what-is-gc/mission/principles/principle-8

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