

Greening the anti-trust law

IN THE WORLD of cut-throat competition, in their drive to maximise the upside for the present, some businesses may endanger ecological balance, threatening the sustainability of life on earth. Hence, environmental, social and governance (ESG) obligations have been integrated into business operations globally in recent years to create a sustainable growth path. There is a desperate but concerted attempt now to use every state intervention—policy, legislation, and regulations—to restore the balance.

Competition is a key driver of growth. It is the State policy to promote competition. Anyone who comes in its way is considered an enemy of the economy. Competition law (CL) has a firm mandate to defend the economy from such enemies. Therefore, some experts believe that CL is pristine and must be left alone. It must not be used for or diluted to pursue any other objective. Using one stone to kill two birds is frustrating if they are flying in opposite directions.

Some others, however, believe that competition is a means to an end. That is why everything anti-competitive is not illegal. Further, CL usually excludes certain segments from its purview. For example, the Competition Act 2002 excludes all activities relating to sovereign functions of the government. It also empowers the government to exclude any enterprise/practice from its purview, in the public interest. Therefore, CL should join environmental law (EL) in the war against enemies of the environment, at least where environmental concerns arise from the competition.

Competition and environment have a symbiotic relationship. They ensure today's and tomorrow's growth respectively. One is not subject to the other and vice versa. However, CL and EL could be conflicting at times. EL imposes obligations on business that may increase

**MS SAHOO
& ABHA YADAV**

Respectively, distinguished professor, and assistant professor, NLU Delhi. Views are personal



prices/reduce output, at the cost of the competition. CL promotes competition which may reduce costs/increase output at the cost of the environment. They could also be complementary. EL incentivises afforestation, which may reduce costs. CL promotes innovation, which may restore the environment. They could overlap: either CL or EL may promote a technology that could be friendly to both competition and environment. They can have a synergistic effect since many competition and environmental concerns emanate from businesses.

The competition regime can promote the cause of environment without compromising its objectives in three ways.

First, CL prohibits anti-competitive agreements like cartels, which have an appreciable adverse effect on competition. It, however, excludes agreements, which increase efficiency in production, even if they are anti-competitive. It can exclude agreements which are indispensable for sustainability or promote ecological balance. There are three possibilities here. One, CL may exclude agreements that have the sole objective to promote the environment such as a concerted effort to discontinue plastic usage. Two, it may allow the competition authority to tolerate agreements that have pro-environmental effects which

outweigh the anti-competitive effects. Three, it may allow the competition authority to impose a higher penalty where the agreement has both anti-competitive and anti-environmental effects. A similar approach can be followed in respect of combinations.

Second, CL prohibits the abuse of dominance, which reflects market failure arising from market power and externality. The most common form of abuse is predatory pricing, which means selling below cost in common parlance. For determining if someone is selling below the cost, the competition authority typically considers the direct costs/financial costs to the enterprise, or

private cost, which is less than the total cost where the business suffers from a negative externality.

Take an example. To produce a product, an enterprise spends ₹10, which is its private cost. However, this product damages the flora and fauna of the vicinity, estimated at ₹10, which is a cost to society. The total cost of the product is ₹20, assuming constant returns to scale. The competition authority considers it as an abuse if the enterprise sells the product below ₹10. Let us say that the demand for the product is 100 at a price of ₹10, 50 at ₹20, and 25 at ₹30. The damage to the

environment at these prices is ₹1,000, ₹500, and ₹250, respectively. The lower the price, the higher is the demand for the product and consequently production, and the higher is the damage to the environment. If CL considers selling below the total cost of ₹20, instead of ₹10, as predatory, production and consumption would be limited to 50, and environmental damage to ₹500. Fiscal policy/EL can apportion the environmental damage among producers and consumers.

The private cost could be higher than the social cost in case of a positive externality. Let us say the private cost is ₹20 and the social cost is ₹10. CL may consider selling below ₹10 instead of ₹20 as predatory. It may prohibit sales below total cost instead of private cost to address market failure. Competition should focus on reducing total cost and not selling below cost. This would require an amendment to competition regulations that specifies the determination of cost for this purpose.

Third, CL has a powerful cousin, namely, competition policy, which lays down principles and plans to promote competition. A key element of competition policy is competition assessment, which helps any policy or law to achieve its objective without any or minimum competition concerns. Environmental policy is similar as it carries principles and plans to protect the environment. A key element of environmental policy is environmental assessment, which helps any policy or law to achieve its objective without any or minimum environmental concern. Since competition and environment are high priorities, competition and environmental policies should be pressed to service to supplement CL and EL. Every policy, law, and regulation should undergo both competition assessment and environmental assessment and incentivise business innovations which are competition- and environment-friendly.

While the competition law prohibits cartels, it can be tweaked to allow such arrangements if these have demonstrable positive impact on sustainability or are indispensable for preserving the ecology