

กฎหมายแข่งขันทางการค้ากับปัญหาโลกร้อน : การเสนอข้อยกเว้นความผิดต่อการจำกัด  
การแข่งขันในข้อตกลงทางธุรกิจระหว่างบริษัท  
ที่มีนโยบายสนับสนุนการพัฒนาอย่างยั่งยืนด้านสิ่งแวดล้อม  
Competition Law and Climate Change : A Proposal to Exempt Cartels on  
Environmental Initiatives

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### บทคัดย่อ

ปัญหาโลกร้อนถือเป็นวิกฤตระดับโลก และผลกระทบของการเปลี่ยนแปลงสภาพภูมิอากาศที่ทวีความถี่และความรุนแรงมากขึ้นตลอดมาในรูปแบบต่าง ๆ ในขณะที่บางบริษัทนั้นต้องการความร่วมมือกันด้านนโยบายสิ่งแวดล้อมที่สำคัญต่อการแก้ไขปัญหาโลกร้อน แนวปฏิบัติของพวกเขามักฝ่าฝืนข้อห้ามในการตกลงร่วมกันที่จำกัดการแข่งขันภายใต้กฎหมายการแข่งขันทางการค้า เนื่องจากคณะกรรมการการแข่งขันทางการค้าในหลายประเทศ รวมถึงประเทศไทย ยังไม่ได้ให้ความสำคัญที่เพียงพอต่อการพิจารณาวัตถุประสงค์ที่ส่งเสริมการดูแลสิ่งแวดล้อม ด้วยเหตุนี้ ประเด็นว่ากฎหมายการแข่งขันทางการค้าอาจเป็นอุปสรรคต่อการพัฒนาความยั่งยืนด้านสิ่งแวดล้อมหรือไม่ จึงเป็นที่หวั่นและถกเถียงกันอย่างกว้างขวางในหมู่นักวิชาการและผู้ที่มีความสนใจด้านสิ่งแวดล้อม

บทความนี้ชี้ให้เห็นว่า การตกลงร่วมกันทางธุรกิจระหว่างบริษัท ที่จำกัดการแข่งขันทางการค้า อันมีจุดประสงค์เพื่อสนับสนุนการพัฒนาอย่างยั่งยืนด้านสิ่งแวดล้อม สมควรได้รับการยกเว้นจากข้อห้ามตามกฎหมายการแข่งขันทางการค้า โดยส่วนแรกของบทความนี้จะศึกษาหลักการพื้นฐานของกฎหมายการแข่งขันทางการค้า ตามด้วยความสัมพันธ์กันระหว่างกฎหมายการแข่งขันทางการค้ากับความยั่งยืนด้านสิ่งแวดล้อม จากนั้นจะดึงความสนใจไปที่ความเคลื่อนไหวและแนวปฏิบัติใหม่ต่อประเด็นนี้ในต่างประเทศ ได้แก่ การจัดทำคำนิยามและหลักเกณฑ์ของ “Sustainability Agreements” ใน Horizontal Cooperation Block Exemption Guidelines ของคณะกรรมการยุโรป และบทบัญญัติที่แก้ไขและบังคับใช้แล้วของประเทศต่าง ๆ ในยุโรปอย่างออสเตรียและเนเธอร์แลนด์ เมื่อกลับมาพิจารณาในส่วนของประเทศไทยนั้น บทความนี้สรุปด้วยการวิเคราะห์เชิงลึกของผู้เขียนถึงเหตุผลของการยกเว้น รวมถึงแนวทางการแก้ไขเพิ่มเติมข้อยกเว้นดังกล่าวไว้ในบทบัญญัติที่เกี่ยวข้องภายใต้พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2560 เพื่อเคารพต่อเจตนารมณ์และหน้าที่ของกฎหมายการแข่งขันทางการค้าอย่างเหมาะสม และป้องกันปัญหาที่อาจตามมาจากการบังคับใช้ข้อยกเว้น เช่น การสร้างภาพลักษณ์โดยอ้างการรับผิดชอบต่อสิ่งแวดล้อมเพื่อให้ได้รับข้อยกเว้น เป็นต้น

**คำสำคัญ :** พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2560, กฎหมายการแข่งขันทางการค้า, การตกลงร่วมกันจำกัดการแข่งขัน, ปัญหาโลกร้อน, ความยั่งยืน

## Abstract

Climate change is a global crisis, and its impact accelerates over time. While some businesses may wish to cooperate on pursuing environmental initiatives important for climate mitigation, their practice may violate the cartel prohibition –a central point of competition law– as competition authorities in many countries, including Thailand, still attach little weight to environmental objectives when balancing anti-competitive effects and environmental benefits in cartel enforcement. The issue of whether competition is an obstacle to environmental sustainability has therefore been intensely debated among scholars and advocates of environmentalism.

This article suggests that cartels associated with environmental objectives should be exempted from prohibition. It concentrates, firstly, on the literature review on the fundamental principles of competition law and the interplay between competition law and environmental sustainability. Attention is then drawn to other jurisdictions’ developments of considering these competing interests, including the European Commission’s recent insertion of “Sustainability Agreements” chapter in its Horizontal Cooperation Block Exemption Guidelines and the Austria and Netherlands’ already-implementing green competition provisions. Returning to Thai competition law, the article concludes with the author’s in-depth analysis of reasons for the exemption and guidelines for incorporating such exemption in cartel provisions under the Trade Competition Act B.E. 2560 to compromise respect for the goals of competition law and to prevent problems that may arise after enforcing the exemption, such as greenwashing.

**Keywords :** Trade Competition Act B.E. 2560, Competition law, Cartels, Climate change, Sustainability

## I. Introduction

For decades, cooperation agreements among businesses that restrict competition or “cartels” have been strictly regulated by competition laws in many jurisdictions as their impacts might ultimately lead to severe market inefficiencies. For instance, in the European Union (“EU”), the European Commission (“**Commission**”) had previously imposed a fine of almost €1 billion on a cooperation agreement between car manufacturers on technical development in eliminating nitrogen oxide emissions from vehicle exhaust, claiming that it restricted competition on product features important to customers (the “**Car Emissions**

**Case”).**<sup>1</sup> Similarly, under Thai competition law, namely sections 54 and 55 of the Trade Competition Act B.E. 2560 (“TCA”), cartels are also generally prohibited.

In recent years, however, the increasing frequency of weather events have driven the political agenda of achieving carbon neutrality a priority in many governments worldwide.<sup>2</sup> In addition to implementing regulatory policies to tackle climate change directly, such as charging carbon taxes and setting emissions standards on polluters, the agenda has led to an idea of amending competition law by exempting cartels that pursue sustainability objectives, including environmental objectives, that would otherwise be considered a violation. The already-adopting jurisdictions are, for example, Austria<sup>3</sup> and the Netherlands.<sup>4</sup> Yet, this exemption paradigm has raised a debate among the competition law community regarding its potential conflicts with the goals of competition law. To clarify, on the one hand, some people say that these cartels are more effective than agreements that do not restrict competition in generating broad and concrete environmental benefits; consequently, they should be exempted from violations of competition law.<sup>5</sup> Meanwhile, on the other hand, others contend that such cartels are unlikely to promote faster adoption of environmental-friendly initiatives than competition and therefore should remain prohibited.<sup>6</sup>

For Thailand, in the APEC 2022 meetings, the Trade Competition Commission of Thailand (“TCCT”) also brought up the topic of competition law and sustainability for discussion among competition authorities in the APEC countries. The discussion aimed at finding an approach on policy formulation and competition law enforcement in line with the sustainability development following the Bio-Circular-Green-Economy (BCG) model.<sup>7</sup> However, no further consultations indicate yet whether and how Thailand will adopt the approach.

<sup>1</sup> European Commission, ‘Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars’ (European Commission, 8 July 2021) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_3581](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581)>

<sup>2</sup> United Nations, ‘Net Zero Coalition’ (UN) <<https://www.un.org/en/climatechange/net-zero-coalition>>

<sup>3</sup> Plattner, Severin, *Leitlinien zur Anwendung von § 2 Abs 1 KartG auf Nachhaltigkeitskooperationen* (Nachhaltigkeits-LL) (Bundeswettbewerb, 2022)

<sup>4</sup> Autoriteit Consument & Markt, ‘Guidelines: Sustainability Agreements – Opportunities with competition law’ (ACM) <<https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>>

<sup>5</sup> กานต์รพี พลฤทธิ์, ‘ผูกขาดเพราะรักโลก: ความร่วมมือด้านธุรกิจด้านความยั่งยืนและกฎหมายการแข่งขันทางการค้า’ (TCCT) <<https://tcct.or.th/assets/portals/1/files/ISSUE16.pdf>>

<sup>6</sup> Cento Veljanovski, ‘The Case against Green Antitrust’ (2022) 18(3) *European Competition Journal* 501-503

<sup>7</sup> สำนักงานคณะกรรมการแข่งขันการค้า, ‘สำนักงาน กขค. จัดประชุมกลุ่มผู้เชี่ยวชาญกฎหมายแข่งขันทางการค้าเอเปค ปี 65 หรือแนวทางกำกับการค้าบนเศรษฐกิจวิถีใหม่ พร้อมรื้อสร้างตลาดที่เท่าเทียม’ (สำนักงานคณะกรรมการแข่งขันการค้า, 14 กุมภาพันธ์ 2565) <<https://www.tcct.or.th/assets/portals/1/files/PressRelease1-2565.pdf>>; สำนักงานคณะกรรมการแข่งขันการค้า, ‘สำนักงาน กขค. จัดประชุมกลุ่มผู้เชี่ยวชาญกฎหมายและนโยบายการแข่งขันเอเปค หรือ APEC Competition Policy and Law Group (CPLG) ประจำปี 2565 ในหัวข้อ “กฎหมายแข่งขันและพัฒนาอย่างยั่งยืน”’ (สำนักงานคณะกรรมการแข่งขันการค้า, 9 พฤศจิกายน 2565) <<https://tcct.or.th/assets/portals/1/files/PressRelease8-2565.pdf>>

This article critically examines whether there should be an exemption shielding cartels associated with environmental objectives from the cartel prohibition. In particular, it provides an in-depth analysis of how the approach, if adopted, could be incorporated in Thai competition law. The author's main argument is that the discussed exemption should be adopted under Thai competition law to facilitate the efforts to tackle climate change. However, the competition assessment must properly balance environmental benefits and anti-competitive effects to exempt those cartels targeted at environmental sustainability.

## II. Literature Review on the Goals of Competition Law

This part of the paper is dedicated to the fundamental principles of competition law, particularly the underlying goals of competition law, since they are beneficial to shaping the application of competition law that possibly interacts with other interests, including environmental sustainability.

From the economic perspective, the liberal ideology aims for the private sector to compete freely in performing economic activities by letting the economic system be driven by the market mechanism that changes according to the demand and supply.<sup>8</sup> However, merely relying on the market mechanism creates possibilities for business operators to exploit such an opportunity to achieve their prosperity unlimitedly, thereby distorting the market.<sup>9</sup> For instance, if one business operator employs a price-cutting strategy for a certain period of time to attract consumers to purchase its products, some other business operators might struggle to survive and subsequently leave the market. In this scenario, that business operator who remains in the market might raise prices or reduce the quality of products to maximize its profits. At the same time, consumers will have no other choices than purchasing such business operator's products. As such, since the market mechanism without state intervention can lead to market failures, governments seek to intervene and control the market to be competitive through an instrument called "competition law".<sup>10</sup>

The objective of competition law in Thailand<sup>11</sup> and many other countries<sup>12</sup> is to protect the competitive process, helping to remove obstacles to free trade and fair competition among businesses. However, the main goal of enforcing competition may vary from country to country. To illustrate, while the United States' antitrust laws aim to protect economic freedom and opportunity by promoting free and fair competition in the

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<sup>8</sup> 'New Chapter of Thai Competition Law' (2019) 60

<sup>9</sup> Ibid.

<sup>10</sup> สำนักงานคณะกรรมการกฤษฎีกา, เศรษฐศาสตร์และกฎหมายขั้นพื้นฐาน: ตอนที่ 1 ตลาด-กลไกตลาด และการแข่งขัน (สำนักงานคณะกรรมการกฤษฎีกา) <<https://lawreform.go.th/uploads/files/1589344918-a8ddp-6cl0o.pdf>>

<sup>11</sup> TCA, notes

<sup>12</sup> Eleanor M. Fox, 'The Efficiency Paradox' in Robert Pitofsky (ed) *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press 2008) 77.

marketplace,<sup>13</sup> the EU competition law focuses on protecting consumer welfare and economic efficiency,<sup>14</sup> with Thailand leaning on both sides.<sup>15</sup> If the enforcement of competition law is effective, competition law would positively affect the country's overall economic system. This is because a competitive market will lead to an efficient resource allocation and motivate business operators to invest in innovation and the development of quality products and services,<sup>16</sup> allowing consumers to benefit from competitive prices and product choices.<sup>17</sup>

To achieve these aims, a universal approach to competition law is to govern three anti-competitive conducts that are believed to typically result in market distortions by either preventing or reducing competition in the market. First, competition law prohibits abuses of dominance power, meaning that a business operator with the ability to distort the market cannot act in certain ways, such as predatory pricing and margin squeeze. Second, competition law prohibits cooperation agreements between business operators who are in the same or different level in the production line or distribution chain that restrict competition by object or effect, known as horizontal cartels and vertical cartels, respectively. However, there may be an exemption for those with redeeming virtue, such as enhancing economic efficiency. Last but not least, competition law prohibits mergers that substantially reduce competition, cause a monopoly, or lead to a dominant position in a market.

### III. Interplay between Competition Law and Environmental Sustainability

Can sustainability play a role in competition enforcement, and should it? A response to this question requires, first of all, an understanding of the interplay between competition law and environmental sustainability.

<sup>13</sup> Antitrust Division U.S. Department of Justice, 'Antitrust Laws' (*Antitrust Division U.S. Department of Justice*, 14 September 2023) <<https://www.justice.gov/atr/mission#:~:text=The%20goal%20of%20the%20antitrust,better%20quality%20and%20greater%20choice.>>

<sup>14</sup> Anna Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law' (2017) 40 *World Competition* 539.

<sup>15</sup> According to the Trade Competition Act B.E. 2560, the reason to pass this Act is to regulate business operators to ensure free and fair competition [more] effectively [than the Trade Competition Act B.E. 2542]. However, Thai competition law also intends to protect consumer welfare as reflected in factors which the TCCT takes into account when enforcing competition. Notably, when the TCCT considers whether cartels under section 55 TCA is exempted from the prohibition under section 56(2) TCA i.e. if "the joint business agreement is for the purpose of developing production, distribution of goods, and promotion of technical or economic progress", economic efficiency and the impact on consumers in terms of price, quality, quantity, or choice of using goods or services must be considered (see The Trade Competition Commission Notice on Guidelines for the Assessment of Collective Practices by Undertakings that are Monopolization, Competition Reduction, or Competition Restriction in Market B.E. 2561 (2018), no 12)

<sup>16</sup> Stephen Davies, Heather Coles, Matthew Olczak, Christopher Pike, and Christopher Wilson, *The Benefits from Competition: some illustrative UK cases* (Centre for Competition Policy, University of East Anglia 2004)

<sup>17</sup> สำนักงานคณะกรรมการการแข่งขันทางการค้า, 'ความเป็นมาของกฎหมายการแข่งขันทางการค้าของไทย' (สำนักงานคณะกรรมการการแข่งขันทางการค้า) <[https://www.tcct.or.th/view/1/Background\\_of\\_Thai\\_Trade\\_Competition\\_Law/TH-TH](https://www.tcct.or.th/view/1/Background_of_Thai_Trade_Competition_Law/TH-TH)>

Thailand is a member of the United Nations (UN), and it ratified the Paris Agreement. Adopted in 2015 by the UN, the 2030 Agenda for Sustainable Development provides a blueprint consisting of ‘plans of actions for people, planet, and prosperity’ to guide its member countries towards sustainable development by 2030.<sup>18</sup> Moreover, the Paris Agreement also aims for reducing greenhouse gas emissions by 2030.<sup>19</sup> In response to these international commitments, Thailand launched its BCG model, which is a strategy for promoting sustainability and inclusiveness to the nation’s economy, society, and environment.<sup>20</sup> Under this BCG model, environmental sustainability requires not only public regulations and support, but also private investments and contribution.<sup>21</sup> In turn, private investments need cooperative actions due to costly investments in research and development (R&D) to develop new environmental technologies, as well as the fear of first-mover disadvantage in investing heavily to convince consumers to try a new product.<sup>22</sup>

However, competition law in many countries is about individual business operators remaining independent to restrict competition, and Thailand is no exception. To illustrate, section 54 paragraph 1 TCA stipulates that business operators who are competitors in the same market cannot jointly undertake certain conducts that monopolize, reduce, or restrict competition in that market. Taken out of these provisions, three elements must be met for a horizontal cartel. First, there are two or more business operators, each of which operate at the same level in the production or distribution chain. Second, there is a joint undertaking between or among such business operators, including formal and informal agreements, decisions of associations of undertakings, and concerted practices, irrespective of whether they are legally enforceable and whether there is any enforcement mechanism.<sup>23</sup> Third, such joint undertaking is related to price fixing, output restriction, bid rigging, or market allocation. The only exception to this cartel prohibition is that their conduct is treated as a single economic entity, meaning that they are related through policies or managerial powers under section 54 paragraph 2 TCA. If a conduct meets all

<sup>18</sup> United Nations, ‘United Nations Sustainable Development’ (UN) <<https://www.un.org/sustainabledevelopment/>>

<sup>19</sup> United Nations Climate Change ‘The Paris Agreement’ (UNFCCC) <<https://unfccc.int/process-and-meetings/the-paris-agreement>>

<sup>20</sup> National Science and Technology Development Agency, ‘BSG Concept’ (NSTDA) <<https://www.bcg.in.th/eng/background/>>

<sup>21</sup> กระทรวงการอุดมศึกษา วิทยาศาสตร์ วิจัยและนวัตกรรม, *ข้อเสนอ BCG in Action: The New Sustainable Growth Engine* โมเดลเศรษฐกิจสู่การพัฒนาที่ยั่งยืน (สำนักงานสภานโยบายการอุดมศึกษา วิทยาศาสตร์ วิจัยและนวัตกรรมแห่งชาติ 2562) 31, where it states that “Necessary conditions to achieve the BCG Model includes...private investments in the development of technologies...”.

<sup>22</sup> Robert Wagner, ‘What role can Competition Law play in tackling climate change’ (Wolf Theiss, 15 July 2020) <<https://www.wolftheiss.com/insights/what-role-can-competition-law-play-in-tackling-climate-change/>>

<sup>23</sup> Trade Competition Commission Thailand, The Trade Competition Commission Notice on Guidelines for the Assessment of Collective Practices by Undertakings that are Monopolization, Competition Reduction, or Competition Restriction in Market B.E. 2561 (2018), no.6.

three conditions and is not exempted, then it is punishable up to imprisonment.<sup>24</sup> Moreover, the per se illegality approach applies, meaning that the conduct is illegal, regardless of whether business operators in question have supporting reasons. Hence, this means that there is no room for the TCCT to exempt horizontal cartels targeted at environmental sustainability.

Similarly, another relevant provision, section 55 TCA, also prohibits business operators from jointly undertaking certain conducts that monopolize, reduce, or restrict competition in a market. However, this provision differs from section 54 TCA in three aspects.

First, section 55 TCA applies to both joint undertakings between competitors and non-competitors in the market. Second, in addition to prohibiting price-fixing, output restriction, and market allocation as referred in section 54 TCA among non-competitors, section 55 TCA extends its prohibition to other conducts, including: to reduce the quality of goods, to appoint or assign an exclusive seller, to set conditions for a purchase or production of goods, as well as to act in other manners as prescribed in the TCCT's notification. Third, while section 54 TCA aims to regulate joint undertakings that are seriously harmful to competition by nature and therefore only gives exemption to the case of a single economic entity only, section 55 TCA views that in-scope joint undertakings may sometimes be required for achieving certain objectives and consequently have more exceptions. Such exemptions are provided under section 56 TCA, which includes when 'the joint business agreement is for the purpose of developing production, distribution of goods, and promotion of technical or economic progress'.<sup>25</sup> Nevertheless, in assessing whether this exception should be granted, the TCCT only clearly takes into account consumer welfare and economic efficiency<sup>26</sup> (and not societal or sustainability benefits such as climate change mitigation).

Therefore, as demonstrated, it is impossible to exempt horizontal cartels with environmental sustainability objectives under section 54 TCA; for other cartels falling into section 55 TCA, the TCCT's exercise of enforcement discretion to exempt cartels with environmental sustainability is unclear. Consequently, it is argued that competition law is an obstacle to environmental sustainability to the extent that they dissuade businesses from pursuing agreements that might promote environmental sustainability.<sup>27</sup>

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<sup>24</sup> TCA, s 72

<sup>25</sup> TCA, s 56(2)

<sup>26</sup> Trade Competition Commission Thailand, The Trade Competition Commission Notice on Guidelines for the Assessment of Collective Practices by Undertakings that are Monopolization, Competition Reduction, or Competition Restriction in Market B.E. 2561 (2018), no.12.

<sup>27</sup> Robert Hardey and Chazz Sutherland, 'European Commission guidance for EU competition-compliant possibilities for cooperation between competitors in realizing sustainability objectives' (LEXOLOGY, 8 June 2023)



## IV. Case Studies: Foreign Competition Law and Sustainability

### A. European Commission's Approach

As an active actor in addressing world challenges, the EU is a well-established organization whose developments often inspire changes in other countries.<sup>28</sup> Regarding climate change, the Commission also introduced a new strategy called “the European Green Deal” in 2019,<sup>29</sup> which aims at integrating climate neutrality goals in laws and policies,<sup>30</sup> including competition law.

According to Article 101(1) of the Treaty on the Functioning of the European Union (“TFEU”), horizontal and vertical cartels affecting trade between EU member states that could restrict competition are generally prohibited. Moreover, although there are exceptions on case-by-case basis or through block exemptions for certain R&D and specialization agreements under Article 101(3) TFEU, the Commission had historically accepted climate change to weigh in on the competition assessment in narrow circumstances.<sup>31</sup> In light of the European Green Deal, however, the Commission recognized the tension between competition law and environmental sustainability and accordingly added a separate chapter to “Sustainability Agreements” to the revised Horizontal Guidelines, which will soon come into effect.<sup>32</sup> The interesting features of the chapter are varied.

First, it explains that the scope of “sustainability objectives” includes but is not limited to tackling climate change, reducing pollution, and limiting the use of natural resources. Second, it describes “sustainability agreement” as any kind of horizontal cooperation agreement which genuinely pursues one or more sustainability objectives.

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<<https://www.lexology.com/library/detail.aspx?g=b4606a81-5f94-443f-a017-e18d873bb2aa>>; Compass Lexecon, ‘Expert Q&A on Competition Law and Sustainability (COMPASS LEXECON, 20 September 2022) <<https://www.compasslexecon.com/expert-qa-on-competition-law-and-sustainability/>>

<sup>28</sup> Silmon Holmes, ‘Climate Change, Sustainability, and Competition Law’ (2020) 8 *Journal of Antitrust Enforcement* 354.

<sup>29</sup> European Commission, ‘A European Green Deal–Striving to be the first climate-neutral continent’ (*European Commission*) <[https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en)>

<sup>30</sup> Communication, ‘Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Green Deal’ [Document 52019DC0640] COM (2019) 640 final

<sup>31</sup> There were some individual cases where the Commission attached significant weight on sustainability benefits in competition enforcement. For instance, in the *CECED washing machine*, the Commission exempted an agreement between producers of washing machines to phase out washing machines that are least energy efficient and pursue more environmentally-friendly machines instead. In this case, despite higher prices for consumers, the Commission took into account the individual and collective environmental benefits on society (i.e. energy savings and reductions in pollution, respectively) and concluded that they outweighed anti-competitive effects. (see Case IV.F.1/36/718 CECEd). However, the Commission’s approach towards these kinds of agreements is inconsistent; there have been many cases where the Commission ignored incorporating sustainability benefits in its competition enforcement (See Car Emissions Case)

<sup>32</sup> European Commission, ‘Antitrust: Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines’ (*European Commission*, 1 June 2023) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_2990](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2990)>



Third, it introduces “sustainability standardization agreements”, which refer to horizontal cooperation agreements to adopt and comply with certain sustainability standards. For instance, competitors may agree on phasing out non-sustainable products and processes and replacing them with sustainable ones or on purchasing only production inputs that are manufactured in a sustainable manner. In this regard, the chapter then sets out three ways where sustainability standards may restrict competition: through price coordination, foreclosure of alternative standards, and the exclusion of or discrimination against competitors. Moreover, restriction by object and restrictive effects on competition are clarified.

For restriction by object, it refers to sustainability standards that do not in fact aim to achieve a sustainability objective but cover up price fixing, output restriction, or market allocation. For instance, if competitors agree on increasing sale prices of their products towards customers because of the increased costs resulting from adopting a sustainability product, such agreement would restrict competition by object. For restrictive effects on competition, the chapter creates a soft safe harbor for sustainability agreements that are unlikely to have appreciable negative impacts on competition, provided that seven cumulative conditions are met. First, the procedure for establishing the sustainability standard is transparent and open for interested competitors’ participation. Second, the participation is voluntary. Third, the parties remain free to implement a higher sustainability standard. Fourth, there is no exchange of commercially sensitive information that is unnecessary for developing or modifying the standard. Fifth, the outcome of the standardization procedure is accessible in an effective and non-discriminatory manner. Sixth, the outcome of the standard does not significantly increase price or reduce choice of products in the market. Seventh, a mechanism or monitoring system is in place to verify the parties’ compliance with the standard. If an agreement benefits from the soft safe harbor, further assessment of effects will not be required, and the agreement will be deemed as having no effects on competition.<sup>33</sup>

One hypothetical example of sustainability agreements that benefit from the soft safe harbor, as listed in the chapter, is an agreement among cereal producers to limit the excess packaging of their products. In this example, the agreement even has a downward effect on the price of cereals, as the cost of packing reduces. Moreover, an agreement only restricts competition on marketing to a limited extent (i.e. the contracting parties can no longer make big cereal boxes to attract the customers), while the cereal producers can still fully compete on the main parameters of price, quality, and innovation of their products.

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<sup>33</sup> David Little, Werner Berg, Clement Pradille, and Axelle Aubry, ‘The European Commission’s Draft Guidelines on Sustainability Agreements – a legal analysis and practical implications’ (2022) 43(9) *European Competition Law Review* 520-531.

Moreover, all other conditions are met. Therefore, since this agreement actually benefits a sustainability objective and has little impact on competition, it falls into the soft safe harbor.<sup>34</sup>

Besides, the chapter clarifies how sustainability agreements that infringe Article 101(1) TFEU can be exempted under Article 101(3) TFEU by describing types of benefits to be considered when proving four cumulative conditions under the provisions.

Regarding the first condition under Article 101(3) TFEU, it requires that the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress. The chapter provides a broad spectrum of sustainability benefits to be taken into account as efficiency gains, ranging from cleaner production to quicker entry of sustainable products to the market. However, these sustainability benefits must be objective, concrete, and verifiable.<sup>35</sup>

Regarding the second condition under Article 101(3) TFEU, it requires that consumers must receive a fair share of the resulting benefits, meaning that the agreement must lead to benefits more than harm.<sup>36</sup> The chapter provides that sustainability agreements may produce consumer benefits in forms of, for example, improved product quality resulting from qualitative efficiencies and price decrease resulting from cost efficiencies. To illustrate, replacing plastic with more durable (and more expensive) materials would allow consumers to enjoy the use of the products longer and may outweigh the harm due to price increase.<sup>37</sup> In addition, materialized collective benefits to society, such as cleaner air, may be taken into account. However, the collective benefits must be significant sufficiently to compensate consumers in the relevant market for the harm suffered. Therefore, this would require parties' solid evidence concerning the benefits in question and the beneficiaries. Still, it must be noted that the parties can bring both types of consumer benefits (i.e. individual and collective benefits) to compensate consumers for the harm caused by the agreement.<sup>38</sup>

Regarding the third condition of Article 101(3) TFEU, it requires that the restrictions of competition must be dispensable for achieving these objectives. In the context of sustainability agreements, this requirement therefore means that there are no other economically practicable and less restrictive means of achieving sustainability benefits. For instance, if laws and regulations already require business operators to comply with sustainability goals through individual actions, then cooperation agreements could not be

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<sup>34</sup> Commission, 'Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' 145-146.

<sup>35</sup> Commission (n34) 138.

<sup>36</sup> Case C-238/05 Asnef-Equifax v Administracion Del Estado (2005) 72.

<sup>37</sup> Commission (n34) 140.

<sup>38</sup> Commission (n34) 140-144.

considered dispensable. Moreover, the chapter stipulates that sustainability agreements must not impose obligations beyond what is necessary to pursue the aim of the agreements.<sup>39</sup>

Regarding the last condition of Article 101(3) TFEU, it requires that the agreement must not provide the parties the possibility to eliminate competition regarding substantial elements of the products. In other words, other important parameters for competition must still remain. For instance, although competitors agree on stopping the use of polluting technologies, if they continue to compete on price and/or quality of the final product, competition between them will not be deemed eliminated.<sup>40</sup>

One hypothetical example of sustainability agreements that restrict competition but are exempted under Article 101(3) is an agreement between producers of washing machines to phase out the production and sale of machine machines that are not energy- and water-efficient (the “**Washing Machine Case**”). In this example, the agreement contains all the producers, and it results in an increased purchase price and decreased choice of washing machine products towards consumers. However, the studies show that sustainable washing machines that replace the old ones reduce the energy and water consumption required for washing, allowing consumers to recoup the increase in the purchase price within one or two years, while life expectancy is at least five years. Moreover, there are no less restrictive means to achieve this sustainability benefit. For instance, assuming that advertising campaigns are used to promote sustainable washing machines, many people would still struggle to balance the impact of future reductions in electricity and water costs and the purchase price.

## B. EU National Initiatives

Setting aside the requirement of national laws to be compatible with EU law, this report observes national competition laws, which may take different approaches on competition and sustainability from EU competition law, for the purpose of studies.

Among other EU countries, Austria and the Netherlands are leading the way in realizing sustainability objectives in their competition assessment. Starting with Austria, the country is the first that enacted an explicit exemption provision to sustainability agreements, the text of which states “Consumers shall also be considered to be allowed a fair share of the resulting benefit if the improvement of the production or distribution of goods or the promotion of technical or economic progress substantially contributes to an ecologically sustainable or climate-neutral economy”.<sup>41</sup> From the provision, one

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<sup>39</sup> Commission (n34) 133-140.

<sup>40</sup> Commission (n34) 144.

<sup>41</sup> Viktoria H.S.E. Robertson, ‘Sustainability: A World-First Green Exemption in Austrian Competition Law’ (2022) 13(6) *Journal of European Competition Law & Practice* 426–434.

noteworthy condition is that contribution to an ecologically sustainable or climate-neutral economy must be substantial, in which such contribution allows a “fair share of benefits accruing to consumers”.<sup>42</sup> Hence, under the Austrian model, consumers are deemed to be sufficiently compensated in return for the achievement of specific sustainability benefits.<sup>43</sup>

Moving on to the Netherlands, the Dutch competition authorities ACM provides inspiring instruction. Under its approach, the benefits of environmental-damage agreements –agreements bringing benefits for society as a whole instead of only individual benefits–<sup>44</sup> are assigned environmental prices to be put in social-cost-benefit analysis in determining whether a sustainability initiative should qualify as efficient.<sup>45</sup> To facilitate the approach, the ACM, together with the Greek competition authorities HCC, published a technical report on sustainability and competition, which lays out possible methods to quantify environmental benefits under competition law using environmental economics knowledge. These methods include using case-specific data, such as preferences revealed from actual purchases; using case-specific impact, such as differences in costs resulting from reduced pollution; using data from existing studies, such as social cost of carbon; and using government data.<sup>46</sup>

To date, following its draft guidelines regarding sustainability agreements, the ACM favors two initiatives where competitors cooperate. The first initiative deals with the joint purchase of wind energy by businesses. In this case, an association for business energy users asked the ACM whether its members can collectively conclude a contract with a wind farm in order to fix their electricity rate for green energy for multiple years, claiming that it will allow businesses involved to subsequently promote the generation of sustainability. In response, the ACM opined that procuring green energy directly from the producer helps realize the climate goals, and it promotes the construction of wind farms. Moreover, this initiative involves one specific wind farm that still needs to be subject to tender, meaning that wind farms and businesses will continue to sell and buy green energy elsewhere. Thus, due to the reasons stated, the ACM decided that the initiative does not violate competition rules.<sup>47</sup>

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<sup>42</sup> Plattner, Severin, Leitlinien zur Anwendung von § 2 Abs 1 KartG auf Nachhaltigkeitskooperationen (Nachhaltigkeits-LL) (Bundeswettbewerb, 2022)

<sup>43</sup> David Little, Werner Berg, Clement Pradille, and Axelle Aubry, ‘The European Commission’s Draft Guidelines on Sustainability Agreements –a legal analysis and practical implications’ (2022) 43(9) *European Competition Law Review* 520-531.

<sup>44</sup> ACM, ‘Guidelines: Sustainability Agreements – Opportunities with competition law’ (2020) 12.

<sup>45</sup> ACM, ‘Guidelines: Sustainability Agreements – Opportunities with competition law’ (2020) 15.

<sup>46</sup> ACM and HCC, ‘Technical report on sustainability and competition’ (2021) 54.

<sup>47</sup> ‘ACM favors collaborations between businesses promoting sustainability in the energy sector’ (ACM, 28 February 2022) <<https://www.acm.nl/en/publications/acm-favors-collaborations-between-businesses-promoting-sustainability-energy-sector>>

The other initiative concerns the agreement between system operators on using a uniform (initial) price for emitting one ton of CO<sub>2</sub> when calculating grid investments. The agreement makes it more attractive to make investments that lead to lower CO<sub>2</sub> emissions, while the less CO<sub>2</sub> emissions they emit would lead to lower costs. In response to this initiative, the ACM viewed that the agreed piece does not have an appreciable effect, thus qualifying this initiative for an exception to the cartel provision.<sup>48</sup>

These Austrian and Dutch models illustrate one distinctive feature from the Commission's approach. That is, while the Commission demands full compensation of consumers but appears to emphasize on individual benefits, the Austrian and Dutch models demonstrate a more expansive stance on considering benefits for society in the analysis of granting the exemption.

## V. Analysis and Proposals for Development of Thai Competition Law to Promote Environmental Sustainability

There are countless voices weighing pros and cons of exempting cooperation agreements between businesses that pursue environmental sustainability objectives.

On the one hand, the proponents assert that given the need for immediate climate change actions, competition law should employ all available tools in this regard; since the private sectors must play a part, sustainability agreements should be one of the tools.<sup>49</sup> Furthermore, given that the main goal of competition law is consumer welfare, this concept can be construed under “a progressive economic and legal thinking not disconnected from reality”.<sup>50</sup> On the other hand, the opponents contend that there is no need to relax competition laws to allow collective actions (which restrict competition) further than self-commitments since competition in the free market can itself incentivize businesses to make more environmentally sustainable products.<sup>51</sup> In other words, they argue that the permissive approach would suppress the gathering market forces for businesses to produce more sustainably, as well as accommodating abusive cartel greenwashing<sup>52</sup> and shunning governments' responsibility for designing proper regulations to fight against climate change.<sup>53</sup>

<sup>48</sup> ACM (n47)

<sup>49</sup> Maria Campo Comba, 'EU Competition Law and Sustainability: The Need for an Approach Focused on the Objectives of Sustainability Agreements' (2022) 15 *Erasmus Law Review* 190.

<sup>50</sup> Ibid.

<sup>51</sup> Cento Veljanovski, 'The Case against Green Antitrust' (2022) 18(3) *European Competition Journal* 501-503

<sup>52</sup> Edit Loozen, 'EU Antitrust in Support of the Green Deal. Why Better Is Not Good Enough' (2023) 12(1) *Journal of Antitrust Enforcement*, 75-97.

<sup>53</sup> Maarten Pieter Schinkel and Leonard Treuren, 'Green antitrust: (More) friendly fire in the fight against climate change' (2020) *Amsterdam Center for Law & Economics*, Working Paper No. 2020-07.

Under Thai competition law, the preceding examination reveals that section 54 TCA is absolutely silent on exempting horizontal cooperation agreements that pursue environmental sustainability objectives, and section 56 TCA still lacks an explicit exemption to cooperation agreements between businesses –including between competitors– that infringe section 55 TCA. Consequently, this means that various kinds of sustainability initiatives may violate the cartel provisions under TCA.

First, industry agreements between competitors to stop supplying less environmentally sustainable products (such as the Washing Machine case where the producers agree to phase out least energy- and water-efficient machines and switch to more sustainable models) can be regarded as restricting competition by way of output restriction, thereby violating sections 54(2) TCA. Second, the setting of mandatory sustainability standards by competitors beyond what is required by law (such as the Car Emissions case where the car manufacturers agree to reduce harmful emissions stricter than EU emission standards and exchange information about product characteristics)<sup>54</sup> can be considered as removing competition between them and amounting to output restriction, thereby violating section 54(2) TCA. Third, the exchange of information concerning sustainability efforts among competitors (such as an agreement among food producers to share production information with suppliers to ensure that they do not contribute to unsustainable practices, such as deforestation)<sup>55</sup> may constitute price-fixing under section 54(1) TCA if the exchanged information relates to competitor's production costs of competitors that can affect the composition of a pricing policy. Fourth, an agreement not to develop technologies<sup>56</sup> that are not environmentally friendly may be regarded as reducing the quality of products and infringing section 55(2) TCA.

In the author's opinion, the exemption for cooperation agreements between businesses from the cartel prohibition should be incorporated in Thai competition law. To explain, according to NOAA's data, global temperature has risen by an average of 0.08 degrees Celsius per decade since 1800, and the global surface temperature for 2022 marks the world's sixth-warmest year in the 1800-2022 record.<sup>57</sup> This data shows that we are amidst the accelerating frequency and impact of weather events, and it emphasizes the reality that our current efforts to mitigate climate change are far from enough. Accordingly, it illustrates that such measures as regulation and taxation alone are unable to handle

<sup>54</sup> Case AT.40178 - Car Emissions (2021) 4955 final

<sup>55</sup> 'The great convergence between sustainability and competition law: Recent developments' (ALLEN & GLEDHILL, 15 September 2020) <<https://www.rahmatlim.com/sg/perspectives/articles/16776/sgkh-the-great-convergence-between-sustainability-and-competition-law-recent-developments?agreed=cookiepolicy>>

<sup>56</sup> กัญจน์ศักดิ์ เพชรานนท์, 'บทวิเคราะห์พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2560: การควบคุมการร่วมกันจำกัดการแข่งขันระหว่างผู้ประกอบการธุรกิจ' (2561) 47(4) วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 917-943.

<sup>57</sup> 'Assessing the Global Climate in 2022' (NOAA, 12 January 2023) <<https://www.ncei.noaa.gov/news/global-climate-202212>>

these challenges; thus, efforts from all legal fields from both the public and private sectors, including competition enforcers, should have a role to play. Alternatively speaking, while political or budgetary difficulties might slow down other regulatory initiatives, competition law should be able to facilitate those efforts.<sup>58</sup> Consequently, as cooperation agreements between businesses can contribute to environmental sustainability benefits, the cartel provisions should be amended to remove a barrier for businesses to pursue such agreements.

Still, to respect the legitimate interests that competition law aims to protect, the amended cartel provisions should reflect a balance between promoting environmental sustainability benefits and restricting anti-competitive conducts. In this regard, the author proposes the following actions to be taken by policymakers for subsequent compliance of the TCCT competition enforcers:

First and foremost, there should be precise conditions for the exemption in place, the implementation of which can be achieved through two stages. At an early stage, the author proposes that the TCCT issue an announcement prescribing the exemption as soon as practically possible, since this would immediately affirm Thailand's positive stance on applying competition in the pursuit of environmental sustainability. Simultaneously, the TCCT should proceed to a later stage, which is to propose the amendment of sections 54, 55, and 56 TCA in the parliament.

Concerning the content of the exemption conditions, the author is inspired by foreign jurisdictions studied in this report and proposes that section 55 TCA should add a separate paragraph, stipulating:

“The provisions under paragraph one shall not apply to the joint business agreement that is for the purpose of promoting technical or economic progress which contributes to the green economy, provided that (a) the agreement genuinely pursues one or more environmental objectives as prescribed in the Commission's announcement, (b) consumers receive a fair share of the resulting benefits through individual benefits, collective benefits, or both types of benefits combined, and (c) the agreement does not provide possibility to eliminate competition regarding substantial elements of goods or services.”

To tackle greenwashing, the author suggests that condition (a) requires an agreement to pursue one or more environmental objectives as prescribed in the TCCT's announcement. The TCCT's announcement should list out environmental objectives to which an agreement may contribute, along with technical screening criteria that feasibility

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<sup>58</sup> Maria Campo Comba, 'EU Competition Law and Sustainability: The Need for an Approach Focused on the Objectives of Sustainability Agreements' (2022) 15 *Erasmus Law Review* 190.



studies of one sustainability initiative must reflect in order to qualify as environmentally sustainable in the competition assessment.<sup>59</sup> Moreover, the announcement should explicitly mention that an agreement must not harm other environmental objectives to which it does not contribute.<sup>60</sup>

Next, to ensure that anti-competitive effects are properly mitigated, the author suggests that condition (b) requires consumers to receive a fair share of the benefits resulting from the agreement. Concerning the scope of “benefits”, the author prefers an expansive approach following the Austrian and Dutch models to the Commission’s narrow approach. To explain, collective benefits should be considered along with individual benefits when determining compensation for the harm caused by the agreement because, after all, collective benefits on society would also benefit individual consumers. In order to quantify the benefits, there should be methods of quantification assessment from environmental economics in place similar to the Dutch and Greek competition authorities’ approach. Therefore, the TCCT is recommended to assign economic specialists to guide on the design of the assessment.

Finally, to preserve competitiveness in a market, the author suggests that condition (c) restricts the agreement from having possibility to eliminate competition regarding substantial elements of the products, similar to the Commission’s approach.

As for section 56 TCA, the author proposes amending section 56(2) TCA to include the phrase “which contributes to the green economy” similar to the proposal for section 54 TCA. Moreover, the exemption conditions should be listed in a different paragraph in the same manner as the proposal for section 54 TCA for clarification.

Moving to the second action, the TCCT should create a system of sustainability sandbox, allowing businesses to submit draft plans about their sustainability initiatives to the TCCT to provide an advanced ruling.<sup>61</sup> By acting this way, the sandbox would eliminate businesses’ fear of facing criminal sanctions and/or administrative fines, thus positively affecting investment sentiments for them to pursue environmental objectives together and ultimately contribute to climate change mitigation.

<sup>59</sup> Viktoria H.S.E. Robertson, ‘The World’s First Green Antitrust Provision Shows that Climate Action is the Newest Antitrust Frontier’ (*PROMARKET*, 10 March 2022) <<https://www.promarket.org/2022/03/10/the-worlds-first-green-antitrust-provision-shows-that-climate-action-is-the-newest-antitrust-frontier/>>

<sup>60</sup> EU Taxonomy, ‘EU Taxonomy Overview’ (*EU Taxonomy*, 2021) <<https://eu-taxonomy.info/info/eu-taxonomy-overview>>

<sup>61</sup> See OECD, ‘Sustainability and Competition – Note by Greece’ (*OECD*, 2020) <[https://one.oecd.org/document/DAF/COMP/WD\(2020\)64/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)64/en/pdf)>

## VI. Conclusion

Returning to the initial question, an exemption shielding cartels associated with environmental objectives from prohibition is beneficial for driving progress in climate change mitigation and therefore should be adopted in Thai competition law. However, since cartels create anti-competitive effects, the author proposes to amend the cartel provisions under TCA by setting out clearly strict conditions to compromise the respect for the goals of competition law.