Pros and Cons of Sustainability Considerations

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I would like to thank Konkurrensverket for maintaining an important debate on important topics, year after year, with the Pros and Cons conference.

Thank you also for the invitation to join you, this year.

The current sustainability debate and policy developments

Let me start with the state of the art in terms of policy debate.

Sustainability has taken center stage in the agenda of competition policy discussions in the past two or three years and has since kept that center stage.

Over the past years, we heard concerns of businesses being unsure whether they can pursue sustainability agreements with competitors.

We heard competition law being indicated as a barrier to sustainability efforts.

We also perceived a **lack of awareness** as to the leeway that exists in competition law for sustainability agreements.

One thing became clear. Further communication and guidance were needed in order to make the existing flexibility in competition visible, as well as to provide simple and clear guidelines to businesses on sustainability agreements.

It is important that businesses know what they can and cannot do.

Legal uncertainty can be a barrier to entry and expansion and, therefore, it can be negative to competition. Under legal uncertainty, businesses may also make worse, less efficient decisions.

We can imagine, in some circumstances, that sustainability agreements may be useful to green transition. The aim of guidance, in this regard is that firms do not shy away from welfare-enhancing sustainability agreements.

Simple and clear guidelines seek to ensure that the most common sustainability agreements, with lower harmful potential, are streamlined.

There is some expectation that sustainability agreements are likely to become more common in the future. And this is why we need streamlined decisions, so as to make sure neither firms nor competition authorities are overburdened with complex competition assessments. This is partly where the current debate lies today. We will come to this later.

In general, I think it is fair to say that there has been important progress on two fronts.

First, I believe there were important contributions to overcome myths that place competition and sustainability at odds.

Second, it was possible to strike a good balance in the new draft horizontal guidelines of the European Commission, with sustainability agreements now having its own chapter.

Competition as a catalyzer for the green transition

Not all sustainability agreements are going to be straightforward. And these should require a more in-depth assessment.

Competition and sustainability span across all sectors of the economy and may interact in multiple ways. For this reason, competitive assessments involving sustainability are not necessarily trivial nor obvious. But, in my view, it makes little sense to frame competition as being adversarial to sustainability.

The relationship between competition and sustainability will depend on the specifics of the market and of the agreement. This is why a deeper assessment is necessary.

Competition and sustainability may go opposite ways if competition increases negative externalities. This may be true for societies where consumers do not value "green".

This may happen, for example, if reducing costs to be price competitive is done at the expense of the environment. Firms would then ignore the social environmental cost of their activity.

My own view is that given the current consumer willingness to pay for "green", competition and sustainability often go hand-in-hand.

This is mostly so because **competition is a major driver of innovation**.

And innovation is really what we need at this point in order to achieve the Green Deal goals.

The green transition will require new technology and products. And green innovation is an integral part of firms' drive to reduce costs. F or a given production level, firms aim at spending less energy, using less materials, reducing and reusing waste or using renewable or more durable inputs. Therefore, cost cutting does not necessarily mean environmental harm.

Competition will therefore be instrumental in the transition to a greener and more sustainable economy.

How do we **preserve incentives for innovation**? We do this preventing incumbent entrenchment and by fostering contestability. Much of the innovation we need will likely be driven by disrupters, in a competitive environment. And we want to make sure that markets do not settle for less.

Moreover, consumers are increasingly willing to pay for green. Which is also a powerful driver of innovation. It can also be said that sustainability may be valuable to consumers as a by-product. Consumers may not even really care about it directly. However, they may want to save on energy costs or to use products that last longer.

In addition, as said before, an increasingly larger number of consumers value sustainability on its own. We are today witnessing a shift of social attitudes and social norms towards sustainability. We are increasingly willing to pay for products built with more expensive yet sustainable materials, for example.

If consumers want green, firms will have to respond to that consumer demand. And they will do so faster and more fully if they operate in a competitive environment. So, in such cases, a so-called sustainability agreement between firms will likely decrease their incentives to innovate.

The competitive assessment of sustainability agreements

I addressed the progress we achieved so far. But as we move on to putting the new guidance in practice, we must be mindful of the challenges ahead.

As I said before, because of its effects on innovation, competition is likely to be an effective **catalyzer** in the transition to the green economy.

Less competition would thus entail reduced incentives to innovate. For this reason, competition authorities must take a close look at claims of indispensability.

These claims must be supported by **tangible evidence** showing that:

1) Under the existing competitive set up (i.e., with unilateral action), it is not feasible for firms to achieve sustainability benefits;
2) The proposed agreement does achieve the alleged benefits; and
3) There are no alternative less restrictive agreements that could achieve those benefits

In addition, and again because of the non-obvious interplay between competition and sustainability, agreements may generate a complex set of effects. Competitive assessments will depend on what parties and effects are considered, as well as on how these effects are measured.

What is meant by sustainability, for instance, matters when judging efficiencies.

- A narrower definition, focusing on environmental effects, would have a more limited scope and entail less degrees of discretion.
- A broad definition would have sustainability include issues such as human rights, animal welfare or resilient supply chains.

This increases the degrees of freedom in competitive assessments, thereby making them more complex.

The way we measure consumers' valuation raises similar questions. For example, consumer valuation may depend on whether there are other consumers with a similar valuation. In such cases, consumers only reveal themselves to be sustainability-conscious if they feel they can make a significant difference, alongside other consumers.

Likewise, issues such as the preferences of future generations or the "true" preferences of consumers, are also likely to increase the degrees of freedom in competitive assessments.

What I want to highlight is that significantly increasing the number of degrees of freedom or the complexity of competition analysis comes with risks.

There is a risk of negatively affecting the so-called "administrability" and the legal certainty of competition law enforcement. What we expect is that, in assessments of sustainability effects, economic analysis will be put at the front and center, whether quantitative or qualitative. Decisions by competition authorities and by courts will rely on sound economic analysis.

It is true that there is a rich economic literature on the measurement of sustainability effects. But there is a wide portfolio of methods. Decisions may have to be made based on conflicting and incommensurable models and estimates.

We must also be mindful that discussions on sustainability effects may analyze matters such as the value of animal welfare, the shape of "true" preferences of consumers or the discount rate of future welfare.

This is why I mentioned the issue of administrability. Consumers, firms and competition authorities alike value good decisions that stand in court and that are predictable and reasonable for all parties. In order to keep competition enforcement "administrable", it is important to make sure that considerations on sustainability efficiencies are well-grounded in economic analysis and aligned with the principles that govern our current practice.

Out-of-market efficiencies

The issue of administrability brings me to the last point I want to make, about out-of-market efficiencies. This has likely been the most discussed point in the past two years.

In particular, it has been suggested that some agreements between firms may reduce negative environmental externalities at the expense of higher prices for consumers. This has to do with the first possible tension between competition and sustainability I have mentioned: that firms cut costs at the expense of the environment.

Because of these arguments, some call for competition authorities to fully account for out-of-market effects in competitive assessments. That is, to take a total welfare rather than a consumer welfare approach. However, fully accounting for out-of-market efficiencies requires competition authorities to make a judgment call: between the welfare of a specific group of consumers in the relevant market against a wider group.

This approach entails a much wider notion of social welfare. This would include individuals and sustainability effects well beyond the relevant market. This would, again, raise issues of administrability and legal certainty in competition enforcement. And it would also go beyond the current competition policy mandate and practice.

Competition enforcers' mandate is to pursue the competition policy goal. That means, in particular, ensuring that the dynamics of competition and consumers are not hurt by agreements between firms. This mandate comes from the legislator.

As to the balancing exercise between two groups of people, this is likely best made by public policy decision-makers who have full political legitimacy to balance such conflicting goals. It is debatable whether competition authorities have such legitimacy. And, even if sustainability concerns were enshrined in competition law as a goal of competition policy, the balancing exercise would likely remain political as it would be a redistributive action.

There is, however, some scope for out-of-market efficiencies. One in which competition authorities do not have to make this balancing exercise. If the consumers being harmed by the agreement are fully compensated by the sustainability effects, there is no balancing exercise [during the assessment] to be made and no redistribution.

I believe that the solution found in the draft guidelines set up the right threshold to green light a sustainability agreement.

Risk of greenwashing *is still material*

All in all, when cases are complex, it is important to proceed on a case-by-case basis.

Enforcers must make sure the agreement is indeed necessary and there must be a robust assessment of consumer valuation of the alleged benefits.

And as we move ahead, we must not lose sight of the risk of *greenwashing*.

There is always a risk that cartels may hide behind sustainability claims, as has been seen in past cases. While for environmental policy and enforcement there are several entities responsible, for anti-cartel enforcement, **there is no one else responsible** – it only us, competition authorities.