European Commission

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Competition policy and the Green Deal

This written contribution constitutes the Swedish Competition Authority's (SCA's) views on the questions posed in the public call for contributions. They should not be interpreted as necessarily conveying the Swedish government's views, nor can they be taken to bind the Swedish government's own possible position on the matters in question.

Summary

Introductory comments

- The SCA supports the European Commission's ("Commission's") initiative to explore how the competition rules can best complement regulation in the area to ensure that competition law does not create unnecessary obstacles for environmental cooperation.

- Sustainability agreements and environmental and climate-related matters have not been highlighted within the SCA's enforcement activities to any significant extent thus far. However, given the importance of these matters, they will be a focus area for the SCA.

- The primary purpose of competition policy in Sweden and the EU is to improve consumer welfare. Enforcing the competition rules with a basis in the consumer welfare standard can in and of itself contribute to the attainment of sustainability objectives within the framework of the existing rules, when combined with appropriate instruments such as regulation and taxation.

- The SCA looks forward with interest to partaking of the results of the Commission's consultation in order to gain more insight into how affected stakeholders view the need for further guidance from competition authorities and what form such guidance should take. With a basis in, among other things, the discussions on competition law that are ongoing in various international forums, the SCA can already conclude that there is a need for

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greater clarity on how legitimate public interests such as environmental and climate concerns are to be balanced against consumer welfare in competition law assessments.

- According to the SCA, the Commission is best placed to issue guidance, or coordinate the work to do so, as this will ensure uniform competition enforcement throughout the EU and provide more predictability for undertakings.

Regarding the consultation's questions on antitrust rules

- There is already a good basis within existing case law and guidelines for finding certain kinds of sustainability agreements to be unproblematic from a competitive standpoint.

- Some anticompetitive agreements can be exempted from prohibition if they lead to efficiencies that benefit consumers. However, the current Commission guidelines may mean that some agreements that have environmentally positive effects but restrict competition cannot be concluded, as not all the positive effects of the agreement can be taken into account to an equal extent.

- While awaiting the results of the ongoing consultation with affected stakeholders, and without pre-empting the results of the consultation, the SCA can conclude that there are ways, even in the short term, to provide increased clarity regarding the matters encompassed by the consultation. A first step could be considering the creation of a procedure, as was recently done due to the COVID-19 crisis, whereby the Commission offers undertakings individual guidance through so-called comfort letters. With adequate coordination measures in place within the European Competition Network (ECN), national competition authorities could also contribute to increased clarity for undertakings, for example through informal guidance. Formal decisions from the Commission in individual cases would also provide valuable guidance.

- In a second step, it may be relevant to include general guidance in the horizontal block exemption regulations or associated guidelines, for example. However, practical experience is needed first which can provide a basis for later general guidance, for instance through the issuance of individual guidance.

- When the results of the Commission's ongoing consultation are available and all affected stakeholders have described the issues for which further guidance is needed and in what form, these matters should become the focus of further deliberation.

Regarding the consultation's questions on merger control

- Anticompetitive practices can among other things lead to higher prices, decreased quality, poorer service, less product variety or lower innovation. To the extent that environmental impact or sustainability aspects can be attributed to such factors, there is no obstacle in principle to taking them into account during the competitive assessment in merger control.

- However, there are grounds for suggesting that sustainability aspects not already priced in by market actors are not a factor in establishing the level of competition on the market.

- Sustainability aspects could, in theory, be taken into account within the framework of an analysis of efficiencies in merger control. However, the SCA sees certain challenges in demonstrating that sustainability aspects satisfy the requirements set under EU competition law, i.e., that they entail benefits for consumers, are merger-specific and are verifiable.

Introduction

The SCA works to promote effective competition in private and public operations for the benefit of consumers and to promote effective public procurement for the benefit of the public sector and market actors.

The SCA underlines the importance of finding effective solutions to achieve the environmental and climate targets of Sweden and the EU and the goals in the Paris Agreement and Agenda 2030. The SCA supports the Commission's initiative to explore how the competition rules can best complement regulation in the area to ensure that competition law does not create unnecessary obstacles for environmental cooperation. However, the SCA shares the Commission's view that competition rules play a subordinate role in this context and that there are more effective tools and instruments (such as regulation and taxation) to achieve these targets.

The SCA lacks in some respects relevant experience to be able to respond to specific questions as posed in the call for contributions, and some questions appear to be aimed at directly affected stakeholders. This includes, for example, the question on actual or theoretical examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to EU antitrust risks (question 1 on the antitrust rules). It also includes the question on if there are circumstances in which the pursuit of Green Deal objectives would justify anticompetitive agreements beyond the current enforcement practice (question 3 on the antitrust rules). As the SCA has no such actual examples and perceives these questions as being aimed at other stakeholders, the authority does not provide any such examples in this contribution.

With the goal of contributing to the consultation from the perspective of a competition authority, the SCA gives an overview in this contribution of the ways in which sustainability matters to a certain extent can be taken into account in competition enforcement without any changes to the legal rules. The SCA also highlights certain situations in which there might be uncertainty regarding how sustainability aspects should be assessed from a competition law perspective.

Explicit sustainability issues have very rarely arisen in the enforcement work of the SCA following the implementation of the modernised system for the enforcement of EU competition rules. Likewise, there is only limited case law from the Court of Justice of the European Union ("CJEU"), the Commission, and the other national competition authorities within the EU that touches on sustainability aspects within competition law. However, the SCA has dealt with some matters affecting sectors associated with sustainability issues, such as waste management[1] and the gas market.[2]

Competition law is subject to continuous development and it is likely that environmental concerns will be given greater significance in competition matters in the future than they have been thus far. However, this is a development that takes time and may cause legal uncertainty for undertakings in the meantime.

The SCA therefore views it as positive that the Commission, through this call for contributions, casts light on the areas in which affected stakeholders believe there are sustainability initiatives that cannot be implemented due to perceived EU antitrust risks.

The SCA believes that there is a good basis within the framework of existing case law from the CJEU and the current guidelines issued by the Commission for certain types of sustainability agreements to be concluded in a way that is unproblematic from a competition perspective. Most agreements are legal and not subject to competition rules. Other agreements that restrict competition can be exempted if they lead to efficiencies that benefit consumers. The SCA wishes to underline the importance of ensuring that environmental concerns are not used as a cover for cartel-like collaborations or other types of conduct that typically damage competition.

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[1] See case no PMÖÄ 1519-19 *Svenska Förpacknings- och tidningsinsamlingen AB ./. Konkurrensverket* (28 February 2020).

[2] See Dnr 339/2018. The SCA has also touched on sustainability matters in various consultation responses and reports, such as the opinion on the memorandum Mer fastighetsnära insamling av förpackningsavfall och returpapper - utveckling av producentansvaren (Dnr 201/2018), in the report *Konkurrensen i Sverige* (Report 2018:1), Chapter 4 on the circular economy, and in a joint report with the Nordic competition authorities, *Competition in the waste management sector – preparing for a circular economy*, Nordic reports, 2016.

The consumer welfare standard

The main purpose of competition policy in Sweden and the EU is to promote the welfare of consumers. The competition rules are designed for the benefit of consumers and if market conduct causes damage to competition, consumers must be compensated in order for such conduct to be approved.[3] This means that the focus is on preventing and limiting measures that impact negatively on consumers from an economic perspective. Usually, this also means that the consumers affected by a restriction on competition must be compensated, directly or indirectly, through improvements such that the measure is at least competition-neutral in relation to the affected consumers if it is to be accepted.

An enforcement of the competition rules with a starting point in the consumer welfare standard can, in and of itself, contribute to the attainment of sustainability objectives, when combined with appropriate instruments such as regulation and taxation. The consumer welfare standard is not limited to promoting lower consumer prices. The competition rules also have the goal of creating conditions for innovation and quality improvements, including from an environmental and sustainability perspective. Thus, the rules themselves contribute to creating improved conditions for the environment and sustainability through their market impact to the benefit of consumers.[4] On the other hand, competition can lead to pricing pressures and the overuse of resources unless negative externalities such as carbon emissions are internalised in prices, for example in the form of a carbon tax.

In this context, it is worth mentioning the obligations that follow from the integration principle in Article 11 of the Treaty on the Functioning of the European Union (TFEU) and the requirement in Article 7 TFEU that the EU shall ensure consistency between its policies and activities, taking all of its objectives into account. The Commission and national competition authorities shall therefore, in the enforcement of Articles 101 and 102 TFEU, give consideration to the environment.[5] That said, the SCA wishes to underline that it can, in practice, be difficult to take public interests such as environmental and climate concerns

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[3] Compare, inter alia, the wording in Article 101(3) TFEU that consumers must get a fair share of the benefit resulting from an agreement encompassed by Article 101(1) TFEU, the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("the EC Merger Regulation"), the Official Journal of the European Union L 24/1, 29 January 2004, item 29, Communication from the Commission, Notice, Guidelines on the application of Article 81(3) of the Treaty, (2004/C 101/08), the Official Journal of the European Union C 101/97, 27 April 2004, item 13, and Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, (2009/C 45/052), the Official Journal of the European Union C 45/7, 24 February 2009, item 5.

[4] The Swedish Competition Authority (2018), *Konkurrensen i Sverige,* report 2018:1, p. 6.

[5] Lidgard, Hans Henrik and Samuelsson, Patrik (2016) *Konkurrens och miljö,* Konkurrensverkets uppdragsforskningsrapport 2016:1, p. 39. Compare also the CJEU's statements on state aid in the case C-594/18 P *Republic of Austria v European Commission* EU:C:2020:742, paras 45 and 100.

into account, for example within a competition law-based proportionality assessment.

Challenges in balancing consumer welfare with environmental objectives

All production and consumption decisions can affect markets and society both on and beyond the market on which the operations in question are conducted. Such externalities can be either beneficial or damaging from a societal perspective. However, externalities are not usually a parameter included in market actors' decisions on pricing, production and consumption, or are only taken into account to a limited extent. This means that the existence of externalities can lead to over- or under-production/consumption as compared with what would be ideal from a socioeconomic perspective. This could also lead to goods and services being produced through other processes or with other input goods or materials than would be desirable from an overall societal perspective.

From a societal perspective, it is desirable that externalities can be internalised in the decision-making processes of market actors, in order to achieve a more optimal resource-usage in society.[6] As regards environmental aspects, where negative externalities entail a risk for overuse of limited shared resources with potentially disastrous effects, internalisation of externalities is crucial.

Competition policy and sustainability both have the objective of facilitating optimal resource use within society. However, the beneficial effects that the limiting of negative externalities could have do not necessarily lead to benefits for consumers of the goods or services in question, which is at the heart of the consumer welfare standard.

A reduction of greenhouse gases has an impact at a global level, i.e. for all consumers – not only the consumers of a specific good or service. Improvements made in the vicinity of a manufacturing site will benefit those living nearby, not those who purchase the manufactured goods or services. Sustainability improvements resulting from cooperation between competitors can occur far into the future in the case of new developments in production. In such situations, a conflict can arise between the consumer welfare standard as traditionally applied within EU competition law and the benefits that sustainability efforts give rise to. This is described in greater detail in the sections below on efficiencies within Article 101(3) TFEU and merger control.

One method that competition authorities could, in theory, use to balance consumer welfare against sustainability concerns is the calculation of a *shadow price*, the theoretical price that, if it were added to the price of the good or service causing the externality, would entirely internalise the externality. One example of

[6] See Lidgard, Hans Henrik and Samuelsson, Patrik (2016) *Konkurrens och miljö* Konkurrensverkets uppdragsforskningsrapport 2016:1, Section 1.2.

a mechanism that establishes shadow prices is the trade in emission rights conducted within the EU emissions trading system (EU ETS). Such a calculation would encompass an assessment of any environmental damage, a valuation of this environmental damage and an attempt to emulate the predictive assessment of the market performed in the trading of emission rights.

The SCA believes that establishing shadow prices in individual competition enforcement cases would require competition authorities to perform complex calculations using an analytical method that has not traditionally been part of the competitive assessment. This could lead to challenges for an effective and foreseeable application of the competition rules. In addition to this, there are challenges of a strategic nature. Competition authorities would, for example, also need to determine if the long-term motives of the undertakings are truly related to sustainability and not something else (so-called greenwashing).

Overall, the SCA's assessment is that establishing shadow prices as a method for internalising environmental and climate-related externalities is better suited to regulatory mechanisms such as the EU emissions trading system, than to competition authorities calculating shadow prices in individual competition enforcement cases.

Competition rules and sustainability aspects

The following section describes specific sustainability considerations as regards the competition law prohibitions on anticompetitive agreements and abuse of a dominant position, and as regards merger control. It primarily gives an account of how sustainability issues can already be taken into account within the framework of existing legislation.

Anticompetitive agreements

One reason that undertakings might want to conclude environmental agreements could be to avoid so-called free-riding problems, i.e., when undertakings benefit from the investments of other undertakings without covering any of the investment costs themselves. Undertakings may also identify large risks and costs associated with being the first to develop sustainable products and production processes (the so-called first-mover disadvantage). These problems can be solved through agreements between competitors. Some agreements are legal and fall outside the scope of the competition rules, while other types of cooperation can be anticompetitive and prohibited under the competition rules.

Environmental agreements that are not anticompetitive

There are a number of situations in which agreements between competitors can generally be considered unproblematic from a competition standpoint. There is no block exemption for sustainability agreements in the EU competition rules. However, cooperation for environmental or sustainability purposes in the form of

standardisation agreements are not normally anticompetitive within the meaning of Article 101(1) TFEU if they satisfy certain established criteria in the Commission's horizontal guidelines.[7]

The guidelines on standardisation agreements apply mainly to agreements that do not oblige any undertaking to comply with the standard and that give access to the standard on fair, reasonable and non-discriminatory conditions, where participation in the establishment of the standard is unrestricted and the procedure for implementing it is transparent.[8]

It can be noted that earlier guidelines,[9] presented in 2001, contained specific provisions on environmental agreements that were not considered anticompetitive and were therefore not encompassed by the prohibition on anticompetitive cooperation in then Article 81(1) EC (now Article 101(1) TFEU).[10] These provisions covered:

- Agreements where the parties are not imposed with any particular individual obligations or where they have loosely committed to contribute to the attainment of a sector-wide environmental target;[11]

- Agreements on setting the environmental performance of products or processes that do not appreciably affect product and production diversity in the relevant market or whose importance is marginal for influencing purchase decisions; and

- Agreements that give rise to genuine market creation.[12]

Anticompetitive agreements that give rise to efficiencies

Sustainability cooperation can be exempted from the prohibition on anticompetitive agreements if it gives rise to efficiencies. The Commission's decision in the *CECED* case provides one example of such a collaboration. Under an agreement between manufacturers, importers and industry organisations, it was no longer permitted to manufacture or import washing machines that did not meet a new efficiency standard implemented through the agreement. Even

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[7] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), item 280.
[8] *Ibid,* item 280.
[9] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001/C 3/02).
[10] Lidgard, Hans Henrik and Samuelsson, Patrik (2016) *Konkurrens och miljö* Konkurrensverkets uppdragsforskningsrapport 2016:1, p. 42–43.
[11] See the Commission's cases *JAMA* (Case IV/F-2/37.634) and *KAMA* (Case IV/F-2/37.611) and *CEMEP* (COMP/37773) regarding sustainability agreements that the Commission has accepted fall outside the scope of Article 101(1) TFEU.
[12] See *DSD* (COMP/34493). Compare also the Netherlands Authority for Consumers and Markets' proposed guidelines on sustainability agreements, Chapter 4.

though the agreement limited options for consumers, which could result in higher prices, the Commission made the assessment that the agreement would likely contribute to technical and economic progress and that a fair share of the benefits would reach users.[13]

Under Article 101(3) TFEU, such cooperation is exempted from the prohibition on anticompetitive agreements if four cumulative criteria are satisfied: (i) The agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress, (ii) the consumers must be ensured a fair share of the resulting benefit, (iii) the restrictions must be indispensable for the attainment of these objectives, and (iv) the agreement does not afford the parties the possibility to eliminate competition in respect of a substantial part of the products in question.

It is primarily the assessment of the first two of these criteria that is brought to the fore in relation to sustainability agreements (although all four criteria must still be satisfied). As regards *the first criterion,* it was stated in the 2001 horizontal guidelines that economic benefits can be "net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken".[14] A number of older decisions have considered environmental benefits as economic or technical progress.[15] Under the guidelines currently in force, the collaboration should however give rise to "objective economic benefits",[16] making it possible for the undertakings in question to perform tasks at a lower cost or with higher added value for consumers.[17]

The second criterion requires that the consumers be ensured "a fair share" of the efficiencies that the cooperation gives rise to. The discussion here centres largely on whether this means that consumers affected by the restriction on competition must also be compensated in full or if the efficiency can arise on another relevant market (so-called *out of market* efficiencies). The Commission's standpoint is that the net effect of the agreement must be at least neutral from the viewpoint of the consumers directly or most likely affected by the agreement.[18] However, there is some case law from the courts (and older decisions from the Commission)

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[13] Commission Decision of 24 January 1999 in case IV.F.1/36.718 – *CECED* (2000/475/EC), para 57.
[14] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001/C 3/02), para 193.
[15] Lidgard, Hans Henrik and Samuelsson, Patrik (2016) *Konkurrens och miljö* Konkurrensverkets uppdragsforskningsrapport 2016:1, p. 49 with reference to the cases *CECED* (IV.F.1/36.718), *CEMEP* (*Commission Press Release)* (IP/00/508) and *EACEM* (OJ 1998 C12/02) (environmental improvements through decreased energy use), *VOTOB* (COMP REP EC 1992) and *DSD* (COMP/34493) (improved waste management), *Exxon/Shell* (IV/33.640) (decreased resource use), *BBC Brown Boveri* (IV/32.368), *Carbon Gas Technologie* and *Assurpol* (IV/33.100) (development of greener production methods), and *ZVEI/Arge Bat and Philips/Osram* (IV/34.252) (decreased emissions from manufacturing).
[16] Commission's notice of guidelines on the application of Article 81.3 of the EC Treaty, para 33.
[17] *Ibid,* paras 59 and 62.
[18] *Ibid,* para 85.

indicating that there has been scope for also taking into account benefits and efficiencies, including environmental benefits[19], on other relevant markets than the one exposed to the competition restrictions.[20] This is a topic for debate.[21]

The last two criteria in the exemption assessment require that *"the restrictions are indispensable"* (i.e., proportional) and that *"competition is not eliminated"*. The proportionality assessment under the third criterion means that the agreement may not prescribe restrictions that are not indispensable to attaining the objective benefits. It must not be possible for the parties to find less restrictive alternatives to solving the same problem.[22] Even if the indispensability criterion is satisfied, another condition is that the collaboration does not eliminate all competition on the market in question (the fourth criterion).

The guidelines from the Commission can thus mean that some agreements that would lead to environmental gains, but restrict competition, cannot be concluded, since not all positive effects of an agreement can be taken into account to an equal extent. As long as the requirement is that direct and indirect consumers are fully compensated for any restrictions on competition, it may be the case that efficiencies that occur *out of market* cannot be taken into account in the competitive assessment, unless deviations from the usual competitive assessment are permitted.

Cooperation that constitutes a legitimate public interest

In its case law, the CJEU has developed what has been considered by some to be a *rule of reason*, where some legitimate public interests are weighed against a restriction on competition using a proportionality assessment and, where applicable, have been found to fall outside the scope of the rules on anticompetitive agreements. However, this doctrine, which has its basis in the *Wouters* case[23], has been applied restrictively by the CJEU.[24] Despite that fact, it has been claimed that the doctrine as such could also be applied in relation to some kinds of sustainability agreements, where the competition restriction is

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[19] See, e.g., the Commission's decision in the aforementioned *CECED* (IV.F.1/36.718), paras 55, where account was taken of the collective environmental benefits of the agreement. The social benefits of the agreement were calculated to be more than seven times greater than the increased purchasing costs for more energy-efficient washing machines.

[20] See, e.g., case T-86/95 *Compagnie Générale Maritime and Others.* EU:T:2002:50, para 343 and the joined cases C-501/06 P *GlaxoSmithKline Services and Others,* EU:C:2009:610.

[21] See, e.g., OECD (2020), Sustainability and Competition, OECD Competition Committee Discussion Paper, http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf, p. 25.

[22] See, e.g., *CECED* (IV.F.1/36.718*)* paras 58–59.

[23] Case C-309/99 *Wouters and Others* EU:C:2002:98.

[24] The doctrine was confirmed in the case C-519/04 P *Meca Medina* EU:C:2006:492 where the competition restriction caused by the International Olympic Committee's anti-doping rules were justified for reasons of health and fairness within sports. The doctrine was more recently applied in case C-1/12 *Ordem dos Técnicos Oficiais de Contas* EU:C:2013:127 and case C-136/12 *Consiglio nazionale dei geologi* EU:C:2013:489.

(objectively) indispensable to achieving the objective of the collaboration.[25] As the doctrine has been developed in case law, the matter would need to be reviewed by the CJEU for a final determination of whether the doctrine can be developed to encompass sustainability agreements.

Abuse of a dominant position

The prohibition against abuse of a dominant position in Article 102 TFEU has no explicit exemption provision of the kind found in Article 101(3) TFEU. In general, undertakings that have a dominant position are placed under stringent requirements not to weaken competition further through their conduct. However, case law from the CJEU shows that there is a possibility to justify conduct that would normally be classed as abuse if the dominant undertaking can show that the conduct is objectively necessary/objectively justified or if it can be balanced by advantages in terms of efficiency that also benefit consumers.[26] Regarding efficiencies, case law has defined four cumulative criteria that must be satisfied.[27] These criteria are similar but not identical to the criteria under Article 101(3) TFEU.[28] Thus, there should – at least in theory – be situations where conduct that is motivated by environmental reasons could be justified if it would lead to advantages in terms of efficiency. Further, it follows from the Commission's guidance that exclusionary conduct that is motivated by reasons of health and safety can be considered objectively justifiable in exceptional cases, assuming that the conduct is also proportional.[29] This ought also to imply that conduct that is motivated by environmental concerns could, in principle, be considered objectively justifiable.[30]

However, there are few examples where abuse has been considered objectively necessary, even less for environmental reasons. This is, among other things,

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[25] See OECD (2020), Sustainability and Competition, OECD Competition Committee Discussion Paper, http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf, p. 24 with reference to Monti (2017), De Stefano (2020), Gerbrandy (2020) and HCC (2020). The doctrine has many similarities with, and is sometimes treated as part of, the doctrine on objectively necessary (ancillary) restraints, where the court has accepted that (ancillary) competition restraints that are objectively necessary for a competitive commercial transaction may fall outside the scope of Article 101(1) in TFEU.

[26] See, e.g., the CJEU's judgment of 27 March 2012 in case C-209/10 *Post Danmark A/S/Konkurrencerådet* EU:C:2012:172, paras 40–41.

[27] Case C-209/10 *Post Danmark A/S/Konkurrencerådet,* item 42. See also Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), para 30.

[28] Lidgard, Hans Henrik and Samuelsson, Patrik (2016) *Konkurrens och miljö,* Konkurrensverkets uppdragsforskningsrapport 2016:1, p. 66.

[29] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty, para 29.

[30] See Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty, para 29, where the Commission states that "[e]xclusionary conduct may, for example, be considered objectively necessary for health or safety reasons related to the nature of the product in question." See also J. Nowag, "Environmental Integration in competition and free-movement laws" (OUP, 2017), pp. 239, e.g., with reference to the Competition Council of Luxembourg which, in one case, determined that a dominant undertaking's exclusionary conduct was objectively justifiable due to environmental protection concerns (Conseil de la Concurrence S.A. Tanklux Décision N° 2009-FO-02 (3 August 2009)).

because the assessment shall take into account if the interest in question can better be met through other measures that are not anticompetitive. Further, it is not considered the task of a dominant undertaking to restrict competition on its own initiative because it makes the assessment –rightly or wrongly – that it is better, for example, from an environmental standpoint.[31]

The aforementioned is also in line with the assessment that the SCA and, later, the Patent and Market Court made in the so-called FTI case.[32] In this case, regarding the termination on the part of Förpacknings- och Tidningsinsamlingen AB (FTI) of a competitor's access to the recycling system owned by FTI, FTI stated that the termination was objectively justifiable. This claim was made with reference, among other things, to high environmental standards, control of recycling, and the fact that the undertaking had set higher recycling targets than those required by law. According to the Patent and Market Court, FTI had not shown that there were no less restrictive measures, such as renegotiation of the contract, that could serve the same purposes, and that it did not fall upon FTI to determine which standards should apply concerning recycling targets.[33]

Merger control

Sustainability aspects in the competitive assessment

The SCA believes that merger control as it currently stands contributes to ensuring that competition on the market is not impeded, which provides the conditions for development and innovation with a focus on the environment and sustainability.

Environmental and sustainability issues can also have a direct impact on how the definition of the relevant market or markets is performed in a case and, ultimately, what market power the merging undertakings will have, which has relevance for the substantive assessment. In this regard, there is no specific account taken of environmental and sustainability aspects, but their impact on the functioning of the market and their significance for consumer behaviour become a natural part of any assessment of competitive pressures on the market.[34]

Impediments to competition can manifest themselves in for example higher prices, decreased quality, poorer service, decreased product variation and decreased innovation. To the extent that environmental impact and sustainability

[31] See Guidance on the Commission's enforcement priorities in applying Article 82, item 29.
[32] PMÄ 2741-18 (21 January 2019).
[33] PMÄ 2741-18, pp. 39. The judgment of the Patent and Market Court was later reversed by the Patent and Market Court of Appeal ("PMCA"), as that court, unlike the Patent and Market Court, did not consider the recycling system to be an essential facility. However, the PMCA did not touch on the matter of objective justification (see PMÖÄ 1519-19 (28 February 2020)).
[34] Environmental and sustainability aspects in a market definition respect have been discussed, for instance, in Gasum's acquisition of Lidingö Clean Gas and Natuitcor, Dnr 7/2020.

aspects can be attributed to such factors, there is no restriction in principle against taking them into account in a competitive assessment.

As mentioned above, sustainability aspects in the form of externalities are characterised by the fact that they are often not taken into account by market actors when they make decisions on production or consumption. This suggests that sustainability aspects that are not already priced in by market actors are not a factor in establishing the level of competition on the market. This, in turn, makes it harder to show that such aspects have an impact on effective competition.

Sustainability aspects in the assessment of efficiencies

Sustainability aspects could potentially be taken into account within the framework of an efficiency analysis provided that these efficiencies provide benefits to consumers, are merger-specific and are verifiable. To the extent that sustainability aspects lead to such efficiencies, there is no formal obstacle to competition authorities taking them into account within the framework of a merger assessment.

The larger the restrictions on competition, the more certain and significant the efficiencies must be to balance them out. If a proposed merger leads to a quasi-monopolistic position, this considerably decreases the incentives to pass on any efficiencies to consumers. Under such circumstances, it would therefore be unlikely that efficiencies consisting for example of greater sustainability would lead to the clearing of a merger.

There is also a potential challenge in the fact that positive effects from a sustainability perspective can be hard to incorporate into the concept of "benefit to consumers". If efficiencies in the form of sustainability improvements occur on other markets than those relevant for the merger assessment, and thus do not benefit the direct consumers, this will make it harder to take into account sustainability aspects as efficiencies.

In order for sustainability aspects to be taken into account, it must be clear that there are no other feasible, less anticompetitive ways to achieve the efficiencies. If efficiencies in the form of environmental or sustainability concerns follow from environmental legislation, the efficiencies cannot be considered merger-specific. The requirement of verifiability means that the parties to the merger must clarify the benefit to consumers of the alleged sustainability aspects and prove that the sustainability effects will be realised for consumers within a reasonable space of time, and that any negative effects of the merger are thereby compensated for. Research into the environmental economic estimation of costs/benefits from sustainability aspects is under development, which makes it more difficult to assess verifiability as a basis for an efficiency assessment.

Compared with Article 101(3) TFEU, the description of efficiencies in the context of merger control is worded differently. In practice, the differences are likely to be small. In both cases, the focus is on efficiencies that will actually arise as a consequence of the merger/conduct, without there being other, less anticompetitive alternatives that would achieve the same efficiencies, where the efficiencies are shared with the consumers and where competition is not eliminated (which is implicit to the substantive assessment in a merger assessment). To the extent there is a difference, there may be a shorter timeframe in the case of merger control.

Is there a need for further clarification or more support concerning sustainability agreements and how should the guidance be designed?

It can be concluded that conduct related to sustainability, for example sustainability agreements, can be subject to competition enforcement. Given the limited experience regarding the assessment of such agreements and other conduct that can be connected to sustainability issues, and with a basis in discussions taking place within the area of competition law in various international forums, the SCA deems that there is cause to provide greater clarity regarding how such matters will be assessed within competition enforcement.

To achieve a uniform application of the competition rules within the EU, such guidance should primarily originate from, or be coordinated by the Commission.

The results of the Commission's ongoing consultation with affected stakeholders will provide further insight for assessing in which areas and in what form further guidance is needed. Without pre-empting the results of the consultation, the SCA presents here various possibilities that the Commission has to provide guidance in specific matters within competition enforcement, and how such guidance could be given as regards sustainability matters in particular. When the results of the Commission's ongoing consultation with affected stakeholders are available, the question of which areas require further guidance and in what form should be the topic of continued deliberation.

On the Commission's possibilities to provide guidance for competition enforcement

Since the entry into force of Regulation 1/2003,[35] undertakings that are subject to the EU competition rules are themselves expected to assess whether or not their conduct is in line with the competition rules. Under earlier rules in Regulation 17/62,[36] there was a possibility for undertakings to report to the Commission any agreements that might fall under the scope of Article 101 TFEU. Undertakings could then get negative clearance from the Commission, i.e., a statement that the

[35] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
[36] Regulation No 17, First Regulation implementing Articles 85 and 86 of the Treaty.

reported agreement was assessed not to be in breach of Article 101 TFEU. However, this became too onerous for the Commission and caused difficulties in performing effective enforcement of the most damaging conduct.[37] The change in approach could also be justified by the Commission having built up case law on permitted and prohibited conduct over the course of time, which the reporting procedure under Regulation 17/62 contributed to.

To counterbalance the elimination of the reporting system and improve the possibilities for undertakings to assess their own actions, the Commission has various tools for guiding undertakings.

There are block exemption regulations that exempt certain kinds of agreements from the application of Article 101 TFEU. The most relevant block exemption regulations in this context are those relating to cooperation between competitors, i.e., the block exemption regulations regarding research and development agreements and specialisation agreements respectively.[38] The Commission has also published several guidance documents, intended for example to aid the assessment of whether a certain conduct might be permitted or prohibited.[39]

Furthermore, the Commission still has the possibility to provide individual guidance to undertakings. The decisional practice of the Commission is a source of guidance on case-specific circumstances. The Commission can establish that that a certain procedure is in breach of Article 101 or Article 102 TFEU or that a certain procedure is not in breach thereof.[40] However, it should be noted that a decision on non-applicability is, thus far, an unutilised possibility for guidance in individual cases, as the Commission has never issued a decision pursuant to Article 10 in Regulation 1/2003.

There is also a possibility for the Commission to issue informal guidance regarding novel questions in the form of guidance letters or so-called comfort letters.[41] Such guidance differs from the comfort letters that the Commission could issue to undertakings under the reporting system pursuant to Regulation 17/62. The Commission can now choose to issue informal guidance on novel questions relating to the application of both Articles 101 and 102 TFEU and can, at its own

[37] Regulation 1/2003, recitals 3–4.
[38] Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements [2010] OJ L 335/43; Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2010] OJ L 335/36.
[39] See, for example: Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27 April 2004, p. 97–118.
[40] Regulation 1/2003, Art. 7 and Art. 10.
[41] Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) [2004] OJ C 101/78; see also Regulation 1/2003.

discretion, determine if it will issue a comfort letter.[42] Following the modernisation through Regulation 1/2003, national competition authorities have no explicit possibility to issue comfort letters.

At the time of writing, the Commission has not made use of the possibility to issue guidance through comfort letters. However, due to the ongoing COVID-19 pandemic, the Commission has adopted a temporary framework to provide guidance to undertakings in matters of competition law and has issued a comfort letter based on this framework.[43] In a joint statement, the national competition authorities within the ECN, including the SCA, have also made themselves available to provide certain informal guidance to undertakings in response to the COVID-19 crisis.[44]

Lastly, it can be mentioned that both the Commission and other competition authorities within the ECN have the competence to prioritise which cases are investigated. This means that competition authorities can actively choose not to prioritise cases related to conduct that, e.g., is not usually considered to harm competition or that is difficult to rectify using the tools at their disposal. To provide guidance to undertakings, competition authorities can adopt a prioritisation policy that explains which kinds of cases will usually be prioritised. The SCA has a general prioritisation policy regarding competition enforcement, while the Commission has only published a prioritisation policy covering exclusionary abuse in breach of Article 102 TFEU.[45]

On guidance regarding sustainability aspects within competition enforcement

Given the different possibilities available to the Commission for providing guidance to undertakings, the question is which of these possibilities are best suited with regard to sustainability matters.

In principle, there are advantages to providing guidance through general guidelines and/or within the framework of block exemption regulations. Such guidance can, because of its general wording, be of use to several undertakings. The advantage for the Commission is also that general guidance is efficient, in the

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[42] Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) [2004] OJ C 101/78; see also Regulation 1/2003, para 5.
[43] Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak [2020 OJ C 116 I/02]; Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients (COMP/OG – D(2020/044003)), https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf.
[44] https://www.konkurrensverket.se/nyheter/konkurrensreglerna-under-coronakrisen--gemensamt-uttalande-av-european-competition-network-ecn/.
[45] The Swedish Competition Authority's Prioritisation Policy for Enforcement https://www.konkurrensverket.se/globalassets/english/about-us/english_prioritisation_policy_for_enforcement.pdf; Guidance on the Commission's enforcement priorities in applying Article 82.

sense that the guidance must only be written once, as opposed to individual guidance, which needs to be adapted based on the specific circumstances in each case. The Commission's current revision of its horizontal block exemption regulations should be noted in this context.[46] Thus, there is a good possibility to include matters related to sustainability in these regulations. However, the new regulations will not enter into force until early 2023.[47] In other words, the timescale before general guidance could be in place is relatively long. There is a possibility to adopt more specialised guidance, but it appears unlikely that such guidance could be adopted within the near future, as it would also require thorough preparation on the part of the Commission. Another consideration is that general guidance is usually based on experience from case law, built up over a longer period of time. However, case law does not exist to any greater extent from either the Commission or the national competition authorities. There is therefore a risk that general guidelines would be either too broad or too narrow in their wording and that they would therefore not enable undertakings to assess their actions.

As mentioned above, the Commission has been restrictive in its stance regarding individual guidance through comfort letters, as it has wanted to avoid creating a "back door" for negative clearance. However, within the framework of the ongoing COVID-19 outbreak, the Commission has moved away from this stance, with reference to the crisis created by the outbreak.[48] It could be argued that the climate crisis is also a crisis, with the difference that it extends over a longer timeframe. The severity of the climate crisis could thus also potentially legitimise the issuing of comfort letters for conduct related to sustainability aspects, while procedures would not change in a corresponding manner for other conduct.

The issuing of comfort letters from the Commission can therefore serve two purposes: First, to facilitate for undertakings to contribute to counteracting the climate crisis, and second, to build up case law and experience regarding how sustainability aspects may impact on competition enforcement. When some experience has been built up, the Commission could also issue general guidance that is more precise. In order to make such experience available to both national competition authorities and undertakings, it would be beneficial if the Commission made public non-confidential versions of its comfort letters.

The drawback of comfort letters from the Commission is that they only apply to the Commission's own enforcement. National authorities are strictly speaking not prevented from carrying out enforcement regarding conduct within their

[46] See https://ec.europa.eu/competition/consultations/2019_hbers/index_en.html.
[47] See https://ec.europa.eu/competition/consultations/2019_hbers/index_en.html.
[48] Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak [2020] OJ C 116 I/2, recital 1.

jurisdiction.[49] While the Commission is charged with ensuring that the EU competition rules are applied as uniformly as possible throughout the EU,[50] undertakings might view comfort letters as legally uncertain. It is also possible that undertakings would view the risk of requesting a comfort letter as too large, as it would call the attention of the competition authority to the conduct in question. However, this is likely to be a lesser issue, as genuine sustainability cooperation would not, typically, have to be conducted in secret. If the undertakings have good intentions with their cooperation, both they and competition authorities should benefit from the possibility of having an open and transparent dialogue.

Another possibility to provide guidance that should be the subject of continued consideration is whether the Commission could increase clarity by, when appropriate, making formal decisions pursuant to Article 10 in Regulation 1/2003 where the Commission establishes that Articles 101 and 102 TFEU are not applicable to a certain agreement or conduct.

The Commission and national competition authorities can also provide a certain amount of guidance to undertakings within the framework of a prioritisation policy for enforcement work. However, a prioritisation policy does not affect how, e.g., a sustainability agreement would be assessed in court proceedings when a party brings an action on invalidity or damages on competition law grounds. It is not certain that a prioritisation policy, at least on its own, is a sufficient tool to provide clarity to undertakings in the matters to which this consultation pertains (the results of the consultation will clarify whether or not this is the case).

A general opinion regarding guidance is that it is of great importance to avoid fragmentation in the assessments made within the EU regarding the matter of how sustainability aspects should be assessed in competition enforcement. It is therefore important that the Commission and the members of the ECN continue the close collaboration already in place within this area. In many respects the Commission serves as an example for the members of the ECN. Furthermore, only the Commission can issue regulations regarding the application of Article 101(3) TFEU to certain groups of agreements and make decisions on negative clearance, whereby the Commission establishes that a certain conduct is not in breach of Articles 101 and 102 TFEU.[51] As regards comfort letters, there is currently no system for reporting and following up on comfort letters issued by the Commission or on any informal guidance from national competition authorities in the same way as for other enforcement matters. If a greater shift in the position on

[49] Case C-547/16 *Gasorba SL and Others v Repsol Comercial de Productos Petrolíferos SA*, EU:C:2017:891, para 30.
[50] Article 17 TEU; Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27 April 2004, p. 43–53, para 43.
[51] Regulation 1/2003, Art. 10; Council Regulation No 19/65/EEC on application of EU treaties to certain types of agreements and concerted practices between companies.

individual guidance occurs, it might be appropriate to create such a system. This might also eliminate forum-shopping on the part of undertakings.

In summary, it is the SCA's view that there is a need for greater clarity on how sustainability aspects should be assessed within competition enforcement. The Commission is best suited to issue guidance, as this will ensure uniformity of competition enforcement throughout the EU. In a first step and in the short term, it may be considered if the Commission could provide individual guidance, for instance in the form of comfort letters or through decisions in individual cases. With adequate coordination mechanisms in place within the ECN, national competition authorities could also contribute to increased clarity for undertakings, for example through informal guidance.

In a second step, it may be appropriate to include general guidance in the horizontal block exemption regulations or the associated guidelines. However, this would first require relevant practical experience that could provide a basis for such general guidance, for example through the issuing of individual guidance.

This written contribution has been decided by the Director General. The rapporteur was International Affairs Director Graeme Jarvie.

The written contribution is not signed by hand and therefore does not contain any signatures.

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Graeme Jarvie