

The Swedish Competition Authority's Prioritisation Policy for Enforcement

The selection of matters for further investigation by the Swedish Competition Authority is performed based on this prioritisation policy, whereby various circumstances are weighed against each other. We focus on investigating matters which are of general interest and which will lead to clear results. Our aim is always to promote effective competition in the private and public sectors for the benefit of consumers, as well as to promote an effective public procurement process to the benefit of the general public and market participants.

This policy is divided into three parts. The Swedish Competition Authority has several functions with regard to the enforcement of the competition and procurement rules. The two initial sections of the policy therefore contain explanations of our priorities in respect of competition and procurement enforcement. The final section of the policy outlines the information which we may include in our decisions to close investigations where such decisions have been taken with reference to the prioritisation policy.

Prioritisation in competition enforcement

In its prioritisation of competition enforcement, the Swedish Competition Authority considers the following factors:

- If the problem causes harm to competition and consumers.
- The importance of securing a guiding precedent.
- Whether the Swedish Competition Authority is best suited to intervene.
- If conditions exist to investigate and remedy the issue effectively under the competition rules.
- If there are signs of corruption or other behaviour which undermines trust.

If the problem causes harm to competition and consumers

The most important basis for prioritisation is whether the conduct has the capacity to harm competition and consumers. In such cases, we assess the benefits of intervention for a larger group of consumers, as well as the importance from an economic perspective of eliminating the anti-competitive conduct in question.

Cooperation between competitors

Cooperation between competitors (so-called horizontal cooperation) may result in significant harm to consumers. We give high priority to investigating and prosecuting anti-competitive cooperation, in particular cartels. In this context, "cartels" refers to conduct whereby firms active on the same level of a production or distribution chain fix prices, limit or control production or partition markets.

Cooperation between non-competitors

Cooperation between firms active on different levels of the supply chain (so-called vertical cooperation) generally leads to efficient distribution and increased competition. Nonetheless, under certain conditions, it may result in restrictions that harm competition and consumers.

We prioritise investigating vertical restrictions which have the capacity to harm effective competition at any level of the supply chain. In our prioritisation, we give particular consideration to the share of the relevant markets that is affected by the restraints, the market power held by the parties engaged in the cooperation, and how concentrated the markets are. If other actors in the same markets are engaged in similar forms of cooperation, this may cause us take a more serious view of the conduct.

Abuse of dominance

The desire of firms to attain and maintain market power and profitability is a key driving force in competitive markets. However, under certain conditions, unilateral conduct by dominant firms may result in harm to competition and consumers.

We prioritise investigating conduct by dominant firms that is capable of excluding firms which are able to exercise effective competitive pressure on some level of the supply chain. In our prioritisation, we give particular consideration to the share of the market that is affected by the conduct and, in cases where foreclosure concerns an input, to what extent the input is essential to enable effective competition on the market. In assessing price-based conduct, we also consider whether the pricing is capable of excluding a competitor which is hypothetically as efficient as the dominant firm.

Anti-competitive sales activities by public entities

Where public entities operate on a competitive market, this may lead to distortion of the conditions for effective competition or may hamper the existence or

development of such competition. We prioritise investigating cases where the conduct of the public entity in question hampers or distorts the long-term conditions for effective competition.

We prioritise matters where the competition concerns are clear, such as where one or several private firms can demonstrate harm or the risk of harm. By way of examples, such harm may include where the development and growth of private firms are hampered, where they are forced to close all or parts of their business, and where new private firms find it difficult to establish themselves or expand.

The importance of securing a guiding precedent

We take into account if a matter is expected to have a significant deterrent effect and/or if there is a need for guidance among a larger group of actors. This means that a matter may be prioritised where an intervention or a reasoned decision to close a case can prevent firms and other market actors from infringing the rules and where we, through our enforcement, can clarify how to act correctly.

There may be a need for guidance if an infringement is considered to be commonly occurring. Guidance may also be required in cases where the legal position is unclear, or where rules have not had the effect that the legislator intended.

Whether the Swedish Competition Authority is best placed to intervene

We may entirely refrain from intervening in a matter if another authority or party is better placed to intervene. Where another authority has more suitable tools to address a particular competition or market concern, we may choose not to prioritise the case.

Whether conditions exist to investigate and remedy the issue effectively under the competition rules

As a public authority, we have a responsibility to use our resources in the most efficient manner possible. The expected use of resources is therefore weighed against the benefits of intervention. In this assessment, we give particular consideration to whether conditions exist to effectively investigate the matter, to gather essential evidence and to apply the competition rules to remedy the problem in an effective manner.

Where an individual enforcement matter is not deemed an efficient way to achieve results, the Swedish Competition Authority may opt to address the competition concern in a different manner, such as through an external report.

If there are signs of corruption

Corruption, conflicts of interest, and other types of behaviour which undermine trust are damaging to competition and consumers. Such actions also have the capacity to facilitate and aggravate infringements of the competition rules. We

therefore give particular consideration to suspicions of corruption when prioritising the tip-offs and complaints that we receive.

Prioritisation in procurement enforcement

In order to work as efficiently as possible, we divide our enforcement activities into two strands; planned enforcement and reactive enforcement.

In our planned enforcement, we identify in advance which legal questions, sectors, and authorities we should review. Our planned enforcement is preceded by an analysis with the aim of creating a solid basis on which to undertake different enforcement projects and matters. In order to analyse more thoroughly what we should be focusing on in our planned enforcement, we perform horizon scanning. The aim of this is to identify legal matters that should be clarified, sectors that should be reviewed, and contracting authorities or matters which might be appropriate for a more detailed procurement review. The goal of this exercise is to attain greater foresight in our enforcement activities.

In its prioritisation of procurement enforcement, the Swedish Competition Authority considers the following factors:

- The deterrent effect and/or a need for guidance.
- Shortcomings in the conduct of the contracting authority or entity.
- The extent of the public interest.
- Whether the Swedish Competition Authority is best placed to intervene.
- The resources required in relation to the ability to achieve the desired results.
- If there are signs of corruption or other behaviour that undermines trust.
- If our horizon scanning for planned enforcement activities has brought attention to the contracting authority or entity.

Whether a matter can have a deterrent effect and/or there is a need for guidance

We take into consideration whether a matter may be expected to have a significant deterrent effect and/or there is need for guidance among a larger group of actors. This means that a case may be prioritised where a supervisory decision or an application for a procurement fine can be expected to prevent several contracting authorities or entities from infringing the procurement rules, and where we, through our enforcement, can clarify how to act correctly. An infringement that may result in a procurement fine being imposed is deemed to have a significant deterrent effect. There may be need for guidance if an infringement is considered to be commonly occurring. Guidance may also be required in cases where the legal position is unclear, or where rules have not had the effect that the legislator intended.

Whether there are shortcomings in the conduct of the contracting authority or entity

We take into consideration shortcomings in the conduct of the contracting authority or entity. Deficient routines or competence, as well as inadequate or unstructured documentation, can often result in infringements. Suspicions that an authority or entity has inappropriately favoured a particular supplier or failed to comply with decisions and legal judgments are taken into account. Repeated infringements are generally regarded as a shortcoming of a serious nature. Less importance is given to shortcomings if an authority or entity has taken remedial action or recently been subject to a decision or a ruling concerning a similar infringement.

Whether there is a large public interest

We take into account the extent of the public interest. Therefore, it may be of relevance if the Swedish Competition Authority has received several complaints or information regarding the same or similar infringements, or if the alleged infringement has received attention elsewhere. The public interest is considered higher where the value of the agreement is high or where the agreement is expected to hamper competition in a more concrete manner.

Whether the Competition Authority is best placed to intervene

We may refrain from intervening entirely where it is deemed that another authority or party is better placed to intervene. For instance, there may be a possibility to have the matter tried in court, or there may be ongoing or recently concluded court proceedings.

If conditions exist to effectively investigate and intervene against the problem

We assess which investigative measures may be relevant, the scope and cost of the investigation in relation to the results that are expected to be achieved and how difficult it is to prove the infringement. Where an individual decision or application is not regarded as an efficient method to achieve a result, we may choose to take some other action, for instance by discussing the problem in a report.

If there are signs of corruption

Corruption, conflicts of interest, and other types of behaviour which undermine trust are damaging to competition and consumers. Such actions also have the capacity to facilitate and aggravate infringements of the procurement rules. We therefore give particular consideration to suspicions of corruption when prioritising the tip-offs and complaints that we receive.

If the contracting authority or entity stands out in our horizon scanning

In our planned enforcement, we perform horizon scanning each year. In this analysis, we consult multiple sources to ensure that we prioritise correctly. An authority or entity that has appeared in our horizon scanning may therefore be

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prioritised following a tip-off. The same is true for legal matters that our horizon scanning has revealed to be of interest.

What information is included in the decision of the Competition Authority when the Competition Authority chooses not to prioritise a certain case?

It is the endeavour of the Swedish Competition Authority to be transparent in decisions to close cases. Where a case has been closed with reference to the prioritisation policy, this shall be clear from the decision. Where possible, it shall also be clear in the decision which part of the prioritisation policy has been applied when not prioritising the investigation.

Where a case is closed at an early stage of the investigation, the decision shall only include a general reference to the prioritisation policy. This is to enable us to notify those affected by the decision without undue delay, as well as to utilise the Swedish Competition Authority's investigative resources in a way that leads to the greatest benefit.