

The Swedish Competition Authority's Prioritisation Policy for Competition Law Enforcement and Supervision of the Public Procurement Rules

The Swedish Competition Authority receives a large number of tip-offs and complaints each year and we have a responsibility to use our resources as efficiently as possible. Therefore, we need to prioritise between different matters. We base our selection of matters for in-depth investigation on this prioritisation policy, in which various circumstances are weighted against each other. Not all the factors that may be taken into consideration must be present for an individual case to be prioritised.

The Swedish Competition Authority's general starting point is that we focus on investigating cases that are of general interest and lead to clear results. The aim is always to promote effective competition in private and public activities, for the benefit of consumers, and effective public procurement for the benefit of the public and market actors.

This prioritisation policy is used during the initial prioritisation of whether a case should be investigated in depth. Available resources and the number and scope of other ongoing investigations, including reviews of concentrations, may influence our need for prioritisation.

The prioritisation policy serves not only to prioritise among tip-offs and complaints received by the Swedish Competition Authority. The policy also serves to identify the most serious indications among the signs we observe in the market. Tip-offs received are important, but we have multiple tools for identifying infringements also without the help of outside informants. We use media monitoring, but may also find suspected infringements through statistics on public procurements and other open sources.

The Swedish Competition Authority has multiple roles in the enforcement of the competition law and supervision of the public procurement rules. This is reflected in the policy, which is divided into two parts. The two sections below detail our

priorities in those two areas respectively. Case prioritisation with respect to the Swedish Competition Authority's power to order the filing of a concentration below the notification thresholds is not encompassed by this policy.¹ Nor does the policy cover the Swedish Competition Authority's other enforcement areas.²

More information on how we work in practice with the prioritisation of our enforcement work can be found on our website.

Prioritisation in competition law enforcement

In our prioritisation of competition law enforcement, the Swedish Competition Authority primarily takes into account the following factors:

- Whether the issue at hand causes harm to competition and consumers.
- Whether the conditions at hand allow for the issue to be effectively investigated and remedied.
- The deterrent effect and the need for guidance.
- Whether the Swedish Competition Authority is best placed to intervene.

In the choice between different cases that each fulfil one or more of the grounds for prioritisation mentioned above, harm to competition and consumers is the factor that carries most weight. If we see signs of serious harm, the case will always be prioritised, provided that we see a feasible way to investigate and remedy the issue under the competition rules.

Whether the issue at hand causes harm to competition and consumers

In assessing the capacity of the conduct in question to cause harm to competition and consumers, the Swedish Competition Authority takes into account the benefits of intervention for a larger group of consumers, as well as the importance, from a socioeconomic perspective, of eliminating the anti-competitive conduct in question or imposing a deterring sanction.

Corruption, conflicts of interest and other conduct that may undermine public trust are harmful to competition and consumers. Such conduct also has the capacity to facilitate and aggravate infringements of the competition rules. It is not

¹ More information on our review of concentrations can be found in Guidance from the Swedish Competition Authority for the notification and examination of concentrations between undertakings (Dnr 617/2017).

² The Swedish Competition Authority is the authority charged with enforcement of the Act (2021:579) Prohibiting Unfair Trading Methods in Purchases of Farming and Foodstuff Products, the Act (2005:590) on Transparency in Certain Financial Transactions, etc. (the Transparency Act), the Act (2008:962) on Freedom of Choice Systems, the Act (2010:536) on Freedom of Choice at the Swedish Public Employment Service and the Act (2013:311) on Freedom of Choice Systems as Regards Services for Electronic Identification, and the authority charged with keeping a public register under the Act (2019:668) on Procurement Statistics.

uncommon for competition law enforcement cases to also contain elements of corruption. These can, in and of themselves, be an indication that the conduct in question may cause damage to competition and consumers³.

Cooperation between competitors

Cooperation between competitors (so-called horizontal cooperation) may result in significant harm to consumers. The Swedish Competition Authority takes a serious view of undertakings jointly setting sales prices, limiting or controlling production or dividing markets between them. We give high priority to investigating and taking action against anti-competitive cooperation, in particular cartels.

Cooperation between non-competitors

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

We prioritise investigating vertical restrictions that 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 restrictions, the market power held by the parties engaged in the cooperation and how concentrated the markets are.

If there are other similar instances of cooperation on the market, this may increase the likelihood that we prioritise a case.

Abuse of a dominant position

The desire of undertakings to attain and maintain market power and profitability is a key driving force for competition. However, under certain conditions, unilateral conduct by dominant undertakings may result in harm to consumers, either directly or by causing harm to competition.

The Swedish Competition Authority prioritises, in particular, conduct that has the capacity to limit other undertakings' ability to exercise effective competitive pressure at any 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 the case of input foreclosure, 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 in question is capable of excluding a competitor that is hypothetically as efficient as the dominant undertaking. We may also prioritise

³ For more information, see for instance *Corruption that restricts competition*, Report from the Swedish Competition Authority (2018:10).



investigating exploitative abuse if a dominant undertaking is directly exploiting customers and consumers as a result of non-functioning competition.

Anti-competitive sales activities by public entities

When public entities operate on a market which is open to competition, this may lead to distortion of the conditions for effective competition or may hamper the existence or development of such competition. We prioritise cases where the conduct of the public entity in question, or its presence on the market, hamper or distort the long-term conditions for effective competition.

This may be the case when the public entity's sales activities decrease the incentives or possibilities for private undertakings to operate on the relevant market. This may lead to private undertakings being hampered in their development or growth or being forced to close their businesses entirely or partially, or new private undertakings finding it difficult to establish themselves or expand.

Whether the conditions at hand allow for the issue to be effectively investigated and remedied

As a public agency, the Swedish Competition Authority has a responsibility to use its resources in the most efficient manner possible and therefore weighs the expected use of resources against the benefits of an intervention. In this assessment, we give particular consideration to whether conditions exist to effectively investigate the case and to apply the competition rules to remedy the issue in an effective manner.

Where an individual enforcement case is not deemed an effective way to achieve results, the Swedish Competition Authority may in some cases opt to address the issue in a different manner, for instance through an official letter to the government or a published report.

The deterrent effect and the need for guidance

The Swedish Competition Authority takes into account if a case is expected to have a deterrent effect or if there is a need for guidance among a larger group of actors. This means that a case may be prioritised where an intervention or a reasoned decision to close a case can prevent undertakings 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 or if intervention is important in order to create a deterrent effect. This could be the case 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 cases where another agency or actor is better placed to intervene. Where another government agency has more appropriate tools to address a particular competition or market issue, we may choose not to prioritise a case.

Prioritisation in public procurement supervision

The Swedish Competition Authority prioritises matters that we assess will have a deterrent effect, lead to changed behaviour or have a preventive effect in some other way. Sometimes, we believe there is reason to prioritise a matter to cast light on a larger issue, provide guidance and create legal precedent.

Illegal direct awards of contract are among the most serious infringements in the public procurement area and the Swedish Competition Authority therefore focuses on these. Infringements of rules that may be particularly restrictive for competition if they are not observed are also central to our prioritisation. These include rules on transparency and other infringements of the public procurement law principles.

In its prioritisation of public procurement supervision, the Swedish Competition Authority weighs in the following factors:

- The deterrent effect or if there is and the need for guidance.
- Shortcomings in the conduct of the contracting authority or entity.
- If there are signs of corruption, conflicts of interest, other criminal actions or actions that may undermine public trust.
- Whether the Swedish Competition Authority is best placed to intervene.
- The resources required for the investigation in relation to the suspected infringement or the need for guidance.

Whether our supervision can have a deterrent effect or if there is a need for guidance

The Swedish Competition Authority takes into consideration whether our supervision may be expected to have a significant deterrent effect and if there is need for guidance among a larger group of actors. This means that an issue may be prioritised where the Swedish Competition Authority's supervision can be expected to prevent several contracting authorities or entities from infringing upon the rules, and where we, through our supervision, 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 needed where the legal position is

unclear or where rules have not had the effect that the legislator intended. We often see shortcomings in planning, governance and organisation in the purchasing work of contracting authorities or entities, which leads to infringements due to time constraints or a lack of knowledge.

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

The Swedish Competition Authority takes into consideration shortcomings that have come to light in the conduct of the contracting authority or entity. Poor routines or shortcomings with respect to competence, as well as inadequate or unstructured documentation, can often lead to infringements. Intentional or repeated infringements are generally regarded as shortcomings of a serious nature. In some cases, we may choose to delay an intervention on our part in order to see the effects of past supervision measures aimed at a certain entity.

If there are signs of corruption

Corruption, conflicts of interest and other actions that are criminal or may undermine public trust are harmful 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 that the Swedish Competition Authority receives, or when a certain issue is highlighted in our media monitoring.

Whether the Swedish Competition Authority is best placed to intervene

We may entirely refrain from acting in cases where it is deemed that another agency or actor 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.

The resources required for the investigation in relation to the suspected infringement or the need for guidance

The Swedish Competition Authority takes into account the resources which might be required and our prospects of investigating the case effectively, relative to the suspected infringement or the need for guidance.