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COMPETITION COMMITTEE****Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note  
by Sweden****5 December 2017**

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More documents related to this discussion can be found at [www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm](http://www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm)

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## Sweden

### 1. Introduction

1. Safe harbours and legal presumptions provide important means for efficient supervision of competition rules, allowing competition authorities and courts to save investigative resources by relying on, e.g., different thresholds and presumptions regarding market power, and presumptions regarding the competitive effects of different types of conduct.

2. The efficiency gains in enforcement from relying on safe harbours and legal presumptions have to be weighed against the possible risks of prohibiting conduct that is actually to the benefit of competition and consumers (over-enforcement), or allowing conduct that is harmful for competition and consumers (under-enforcement). Therefore, safe harbours and legal presumptions must be based on robust theory and experience in order to reduce such risks.

3. The risk of over-enforcement can further be reduced by combining an enforcement based on safe harbours and presumptions with initial prioritisation filters to sort out conduct unlikely to harm competition and consumers given the market conditions at hand, even though the conduct might fall under a presumption of illegality. For competition authorities with limited investigative resources, such initial filters can provide tools to allocate resources to conduct most likely to harm competition and consumers.

4. In its prioritisation of cases concerning different types of vertical agreements, the Swedish Competition Authority (hereafter the SCA) gives particular consideration to the market conditions at hand. The prioritisation thereby includes an initial assessment of the likelihood of harm of the conduct in order to allocate the SCA's investigative resources to conducts most likely to harm competition and consumers. The prioritisation is done for all types of potentially harmful vertical agreement cases, irrespective of what legal presumption might apply to the conduct. This submission describes under what circumstances vertical agreements are prioritised for further investigation by the SCA.

### 2. Presumptions regarding agreements in EU and Swedish competition rules

5. The EU and Swedish competition rules include a number of presumptions regarding the competitive effects of agreements between undertakings, both horizontal and vertical. Some types of agreements are considered so-called hard core restrictions, and are thereby presumed to be harmful for competition and consumers, although the presumption can be rebutted if the conduct at hand has overall positive effects for competition and consumers.

6. As regards horizontal agreements between competitors on e.g. prices, sales volumes or market partitioning (i.e. cartels), theory and experience provides solid basis for a presumption that such agreements are generally harmful for competition and consumers, which can only rarely be rebutted based on overall positive effects of the agreement. The SCA gives the highest priority to investigating and prosecuting cartels.

7. The competition rules also include safe harbours for certain types of vertical agreements in the Vertical Block Exemption Regulation (VBER)<sup>1</sup>, as well as presumptions of harm to competition and consumers regarding certain types of vertical agreements, e.g. fixed or minimum resale prices (resale price maintenance), or vertical agreements that imply territorial restraints or restrictions on passive sales. In comparison to horizontal agreements, theory and experience show that there is generally a higher likelihood that the overall effects of vertical agreements can be positive for competition and consumers. In its prioritisation of vertical restrictions, the SCA therefore considers the likelihood of harm of the conduct with particular consideration to the market conditions at hand.

### 3. The effects of different types of vertical agreements on competition

8. According to economic theory, cooperation between undertakings active on different levels of the value chain can enable efficient distribution and increase competition. Undertakings active on different levels of the value chain generally have a common interest in attracting customers and increasing sales, and agreements between such undertakings can be used to align incentives and solve principal agent problems such as, e.g., limiting free-riding and double marginalisation, or enabling product launches or new market entry.<sup>2</sup>

9. However, under certain conditions, vertical cooperation may cause harm to competition and consumers. For example, vertical agreements can be used to enable or facilitate horizontal cooperation between competitors, partition markets, or foreclose competition in the upstream or downstream level, or both levels, of the value chain.

10. Resale price maintenance can primarily harm competition by enabling effects similar to those of horizontal cooperation, i.e. collusion, on the manufacturing or retail level, or both levels. However, the likelihood of such effects depends on the market conditions at hand. They are less likely in fragmented markets. The likelihood of such cooperation is also higher if manufacturers apply resale price maintenance in parallel.

11. Resale price maintenance by a single manufacturer can also harm competition between retailers. However, the risk of such harm depends, inter alia, on the level of inter-brand competition on the upstream level. A manufacturer that faces fierce competition from other manufacturers is less likely to be able to increase prices and impose significant harm to competition between its retailers through resale price maintenance, since the manufacturer then risks losing sales to other manufacturers. Thus, such conduct will generally not be profitable for a manufacturer exposed to ample inter-brand competition. It is therefore less likely that resale price maintenance by a single manufacturer exposed to fierce competition from other manufacturers is harmful for competition and consumers.

12. Thus, theory and experience shows that, under certain market conditions, such as fragmented manufacturing and retail levels, ample inter-brand competition, and the

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<sup>1</sup> Reg 330/2010, OJ 2010 L 102/1, available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0330&rid=1>

<sup>2</sup> Positive effects of vertical agreements are also described in the Commission Guidelines on Vertical Restraints, 2010/C 130/01, p. 106-109, available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF>

conduct being applied solely by a single manufacturer with limited market power, there is generally a low likelihood of harm to competition and consumers from vertical cooperation.

#### 4. The SCA's Prioritisation Policy for Enforcement

13. The SCA's Prioritisation Policy for Enforcement<sup>3</sup> describes the issues that are prioritised for enforcement. The main objective of the SCA is to promote effective competition for the benefit of consumers. Therefore, the most important basis for prioritisation is whether a conduct is able to harm competition and consumers.

14. As regards cooperation between non-competitors, i.e. vertical cooperation, the SCA prioritises vertical cooperation which is capable of harming effective competition in product or distribution markets. In its prioritisation, the SCA particularly considers what share of the market is affected by the cooperation, the market power held by the parties engaged in the cooperation, the concentration of the markets and whether other firms on the same market are engaged in similar forms of cooperation.

#### 5. The SCA prioritisation decision in *13:e Protein Import AB (559/2013)*<sup>4</sup>

15. In 2013 the SCA received an anonymous tip-off claiming that the company 13:e Protein Import AB (hereafter 13:e Protein Import), a manufacturer of sport nutrition and health food products under the brand Self Omminutrition, had infringed the competition rules through resale price maintenance. The complainant attached an e-mail and a price list that had been sent to 13:e Protein Import's Swedish online retailers, stating specific minimum internet prices for approximately 60 protein powder products.

16. An initial investigation by the SCA of retailers' pricing of the different products online showed that retailers had adhered to the minimum price list. For all observed products, at least one retailer had raised its prices after the e-mail was sent out. Based on the initial investigation the SCA therefore concluded that the conduct could constitute resale price maintenance, and thereby a type of vertical restraint considered as a hardcore restriction in the EU competition rules.

17. 13:e Protein Import also confirmed that the e-mail was sent out to all of the company's online retailers, and described that the e-mail was sent out as a reaction to one of the company's retailers offering their products at heavily reduced prices. According to 13:e Protein Import the e-mail was sent to ensure that the retailers would make large enough margins on their sales for them to continue selling 13:e Protein Import's protein powder products.

18. The SCA also conducted an initial investigation of the market conditions. 13:e Protein Import had a total turnover of approximately EUR 6m in 2013, and about half of the turnover came from sales in Sweden. Furthermore, the investigation showed

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<sup>3</sup> The SCA's Prioritisation Policy is available here: [http://www.konkurrensverket.se/globalassets/english/about-us/english\\_prioritisation\\_policy\\_for\\_enforcement.pdf](http://www.konkurrensverket.se/globalassets/english/about-us/english_prioritisation_policy_for_enforcement.pdf)

<sup>4</sup> The decision is available in English here: <http://www.konkurrensverket.se/globalassets/english/news/559-2013-besluteng-20141216.pdf>

that the company's share of total sales of protein powder products in Sweden during 2013 was below 3 per cent.

19. The investigation showed that a large number of manufacturers were present in the product segment of protein powder in Sweden. More than one hundred brands were observed in the product segment, where many manufacturers, like 13:e Protein Import, only produced one brand. Moreover, more than 30 per cent of the protein powder products sold in Sweden was manufactured by vertically integrated firms with their own sales channels on the retail level. The SCA found no significant barriers to entry to the market for manufacturers of protein powder products.

20. As regards the retail level, the sale of sports nutrition in Sweden was characterised by a large number of sales channels and retailers. The products were sold by a wide variety of retailers such as gyms and exercise facilities, sport nutrition stores and health food stores, pharmacies, grocery stores, and sports and leisure stores. There were also a large number of online retailers selling protein powder products in Sweden, where more than 35 online retailers sold 13:e Protein Import products at the time. The online retailers typically carried a large number of brands in protein powder products, most often close to ten brands, but some retailers carried a significantly larger selection of brands.

21. The initial investigation thus showed that 13:e Protein Import was active in a fragmented manufacture level with a large number of manufacturers of protein powder products, where 13:e Protein Import had a small share of total sales in Sweden. Furthermore, the investigation showed that the retail level was fragmented with several different sales channels and a large number of retailers that generally sold many different brands of protein powder products. Based on the circumstances found in the investigation the SCA therefore did not find that the likelihood of harm to competition and consumers was significant enough to prioritise an in-depth investigation, and the SCA closed the case.

## 6. The role of legal presumptions in the SCA's investigations of vertical agreements

22. The legal presumptions regarding vertical agreements in the EU and Swedish competition rules are important tools for the SCA to conduct efficient investigations of anti-competitive vertical agreements. The presumption of harm to competition and consumers for certain types of conduct implies that the investigative requirements are lower in some aspects in such cases. The presumptions thereby provide means for the SCA for a more efficient supervision of the competition rules.

23. However, even when taking into account the procedural efficiencies created by such legal presumptions, the SCA must still focus its resources on conduct that is most likely to harm competition and consumers. The initial investigations that the SCA conducts as part of its prioritisation of vertical cooperation cases, giving particular consideration to the market conditions at hand, are a tool to do this. These initial investigations also limit the risk for the SCA of spending investigative resources on over enforcement by prohibiting conduct that is actually to the benefit of competition and consumers.

24. Furthermore, since the legal presumptions in the EU and Swedish competition rules can be rebutted in individual cases based on overall positive effects for consumers of the conduct, the initial investigations also serve to limit the risk for the SCA of spending investigative resources on investigations of conducts that are later rebutted in

court. In general, conduct where the market conditions at hand show a low likelihood of harm to competition and consumers is more likely to be able to be rebutted based on efficiency justifications.

25. In the SCA's experience, initial investigations of the market conditions at hand are an efficient first screening tool in vertical cooperation cases in order to prioritise conduct that is able to harm competition and consumers.