

Sweden: Collaboration and Enhanced Deterrence

Artikel av Rikard Jermsten, generaldirektör, Konkurrensverket, publicerad i The European, Middle Eastern and African Antitrust Review 2022, Global Competition Review, juli 2021

Article by Rikard Jermsten, Director General, the Swedish Competition Authority, published in Global Competition Review, The European, Middle Eastern and African Antitrust Review 2022, Global Competition Review, July 2021.

In summary

This article describes the activities of the Swedish Competition Authority (SCA) during the past year in the field of competition. It covers the SCA's competition enforcement, advocacy, international cooperation and communications work. It describes important legislative developments and work to develop internal case handling routines to deliver an effective and deterrent competition enforcement. It outlines findings from the SCA's sector inquiry on digital platform markets.

Discussion points

- Effective antitrust and merger control
- Digital platform markets
- A strengthened investigative toolbox
- The development of EU competition law and policy
- International cooperation
- Advocacy and strategic communication

Referenced in this article

- Recent antitrust and merger cases
- ECN+ Directive and amendments to the Swedish Competition Act
- Nordic memorandum on digital platforms and the potential changes to competition law at the European level
- Sector inquiry on digital platform markets in Sweden
- Digital Markets Act
- Nordic report on online pharmacy markets in the Nordics

Introduction

There have been a number of notable developments in Swedish competition law and policy over the past 12 months. Against the backdrop of the covid-19 pandemic, we at the Swedish Competition Authority (SCA) have successfully investigated and concluded important cases within our enforcement work.

Significant enhancements have also been made to our enforcement toolbox in the form of decision-making powers for antitrust fines, new procedural fining powers that can help incentivise cooperation with our investigations and better opportunities to cooperate with fellow competition authorities in the Nordic region and the European Union. Hand in hand with this, we continue to hone our internal methods to deliver effective and deterrent enforcement.

We have continued to stay at the forefront of developments regarding competition law in relation to digital platform markets, cooperating with our Nordic colleagues in a joint report and delivering findings from a sector inquiry. We continue to engage constructively in discussions on competition law and policy developments within the European Union, with the goal of ensuring coherent application of joint competition rules.

Looking forward to a post-pandemic situation where economic recovery is a priority, we have a strong basis to continue to deliver results for consumers at a time when robust competition enforcement and advocacy is needed the most.

Anticompetitive agreements

Competition fines were imposed in two cases of anticompetitive agreements in 2020. In both cases, the parties agreed to pay competition fines, resulting in the SCA imposing fine orders.

The first case involved an investigation into retailers of interior decoration, furniture and design products. Through its investigation, the SCA found that the companies had coordinated their prices for a specific brand of chair.

The other case involved retail price maintenance involving a wholesaler of lighting products and its retailers. The SCA found that the wholesaler had taken measures to encourage or require a retailer to raise its prices, which the retailer had consented to.

The SCA also filed a summons application with the courts in December 2020 against one of two companies suspected of having exchanged information regarding the procurement of dairy products. The other company was declared bankrupt during the investigation. The company that was the subject of the SCA's summons application applied for leniency, but the SCA concluded that the conditions had not been fulfilled for this to be granted. Nevertheless, the competition fines that the SCA had requested in its summons have been reduced by half to reflect the company's assistance during the investigation.

An investigation into an exercise aggregator – a company that offers different exercise services via an app – was brought to a close with a decision to accept commitments from the company in question. The SCA had adopted an interim decision in late 2019 to prohibit the company from applying exclusivity agreements with its fitness studio partners – a decision that was upheld in the courts. Through binding commitments, the company undertook to limit the application of those exclusivity agreements, and the SCA closed the case in July 2020.

The SCA is currently looking into a number of other alleged anticompetitive agreements. We have been able to adapt our investigations to the conditions imposed by the covid-19 pandemic to continue our work apace. Thanks to the careful planning of our staff, the SCA was able to carry out dawn raids in a safe and effective manner in one case in late 2020. We will continue to utilise the full range of our investigative tools where appropriate, with due observance of any restrictions and recommendations in place owing to the pandemic.

Abuse of dominance

In 2020, we investigated an alleged abuse of dominance in the market for lawyers' insurance. The case was initiated based on complaints from an insurance company that the undertaking subject to our investigation had engaged in predatory pricing. The case was closed in November 2020 after it was shown that under the prevailing market conditions, the company was not dominant in any of the relevant markets investigated.

Mergers

The SCA received a total of 80 merger notifications in 2020, which is on par with levels in previous years. One of those cases proceeded to a Phase II investigation. The case was ultimately cleared in April 2021, subject to commitments proposed by the parties to remedy the competitive problems identified.

The case involved the merger of the Finnish Altia Plc and the Norwegian Arcus ASA, both involved in the production, import and export, sale and distribution of wines and spirits. The commitments accepted by the SCA involved, among other things, the divestment of different brands of spirits.

Digital platform markets

Digitalisation has been a question of strategic importance to us in recent years, and digital markets have been the subject of various investigations and market studies. The past year is no exception.

In September 2020, we published a joint report with our colleagues in the Nordic competition authorities in which we assessed various potential competition problems related to digital markets and offered a joint perspective on potential EU legislative initiatives in the area.

We also recently concluded our own far-reaching sector inquiry, which we launched in 2019 to get a deeper insight into digital platform markets in Sweden. In the course of the study, we analysed five digital platform markets, as well as our own case experience. Our study found that there are significant variations between and within platform markets, meaning that each market must be assessed separately and in detail. The study also confirmed our view that the competition law framework is a flexible tool that is often sufficient to address competition concerns on digital markets, even if certain practices, such as access to data and self-preferencing, could benefit from further analysis in case law.

On the other hand, there are some limitations built into existing competition law. Although actions can be taken against specific undertakings, competition law cannot always effectively address problems arising from market structures or involving multiple market participants that contribute independently to serious competition concerns.

The ongoing work involving the Digital Markets Act (DMA) at the EU level has the potential to address some of the problems identified in our sector inquiry. However, implicit to the European Commission's proposals is the fact that they will target certain very large platforms acting as gatekeepers.

Our analysis does not indicate that more ex ante rules concerning digital platforms are needed at the Swedish level in addition to the DMA. However, it does show a need for a flexible framework that can be used to tackle competition concerns that cannot be remedied in an effective manner under current competition law prohibitions. We, therefore, propose that an inquiry be assigned to look into the question of introducing a supplementary framework at the Swedish level. One source of inspiration could be the United Kingdom's market investigation tool, although different models should be explored.

We also propose that it should be investigated whether there is a need for any supplementary tools for merger control. We are, for example, aware that in some jurisdictions, such as in Norway, there are certain disclosure requirements whereby companies active in a particular market can be imposed with a duty to inform the competition authority of mergers under the threshold for mandatory notification.

Legislative developments

In March 2021, a range of changes to the enforcement powers of the SCA came into force. Most notably, the SCA has been granted decision-making powers for competition fines. This brings us in line with the vast majority of other European competition authorities and is an important step for enhancing the effectiveness and deterrent effect of our enforcement work.

A raft of amendments were also brought about by the implementation of the ECN+ Directive. Importantly, we now have the ability to decide on fines for non-compliance with dawn raids and other fact-finding measures. This is a long-awaited strengthening of our powers that we believe will enhance the incentives for companies to cooperate with us in antitrust cases.

Our powers during inspections have also been expanded. For example, a previous requirement of consent to continue an inspection on the Authority's premises has now been removed. Although we will still pursue a dialogue with companies, the new powers mean that the option will be available to us even when an undertaking objects.

For the first time, it was also clarified that the SCA can impose structural remedies to bring an infringement to an end, subject to certain important proportionality safeguards. Based on the experiences of other European competition authorities, these are not powers that are likely to be exercised frequently; however, it cannot be ruled out that those structural measures may be appropriate in specific circumstances.

The cooperation mechanisms within the European Competition Network (ECN) have been reinforced, meaning that members can now assist one another with the notification of documents, such as statements of objections, and with the enforcement of decisions. As competition infringements become increasingly cross-border, our powers of enforcement and sanctioning must follow suit.

Looking beyond the specific perspective of the Swedish competition regime, the great success of the ECN+ Directive is the minimum harmonisation of powers across the European Union. The enforcement of the EU competition rules is a collective endeavour, carried out in a spirit of cooperation within the ECN, and it is, therefore, vital that the national competition authorities can now carry out their work from the same starting point, irrespective of national boundaries.

Delivering effective and deterrent competition enforcement

We continue to take various steps to achieve our goal of intervening against more infringements of the competition rules. Although we saw an increase in interventions in 2020, we need to monitor our progress over time in order to draw proper conclusions on trends.

I want us to achieve the above goal with shorter case handling times, despite the complexity and resource-intensiveness of competition enforcement continuing to increase. We are making use of various methods in our efforts to square the circle.

One key element in this regard is which cases we choose to investigate. Guided by our prioritisation policy, we must ensure a balance in respect of the level of complexity of investigations so that we can continue to push forward the development of case law in Sweden, while also ensuring that our enforcement work has a strong deterrent effect.

Effective enforcement also requires a strong toolbox. As outlined above, we are convinced that the new powers that came into force in March 2021 will contribute to more effective and efficient investigations. Our ability to cooperate within the ECN has also been enhanced, which will aid us in cross-border investigations.

Nevertheless, we recognise that new powers alone cannot guarantee effective enforcement. We must continually dedicate efforts to enhancing our own internal working methods to make sure that we work efficiently and with legal certainty. One step that has been taken is the introduction of internal deadlines for our enforcement cases, meaning that we communicate an overall time frame for each case that we investigate. To effect this, we will also be more restrictive in terms of extensions for requests for information.

We have also strengthened our procedural safeguards even further, introducing a new function, separate from our case teams, which will be responsible for questions of due process. Another function will offer an independent perspective on our investigations that is entirely separate from the case team, reporting directly to the Director General.

Although decision-making powers for competition fines is a new addition to our arsenal, the SCA already has experience of being a decision-making instance for mergers and cases involving the finding of a competition infringement, and we are well-placed to take on our new powers in a legally secure and efficient manner.

When it comes to cases in court, the court of first instance has sided with the Authority in a number of cases, while the court of appeal has subsequently arrived at another decision. The overturn rate is problematic since it contributes to uncertainty for us as an enforcer and for parties.

In our investigations and court proceedings, we must consider the underlying reasons why the court of appeal has not shared the SCA's position in cases. We have initiated an evaluation of our court proceedings, which we believe will be an important support in this work.

The development of EU competition law and policy

We welcome the wide-ranging review of EU competition law and policy that is being undertaken at the EU level. While I believe that the fundamentals of EU competition law are sound, we must keep up with evolving challenges, not least those resulting from digitalisation and the apparent growing prevalence of cross-border infringements.

In addition to the work on digital markets outlined above, we are actively engaging with the European Commission by providing our input to various processes, such as the reviews of the horizontal and vertical block exemption regulations and guidelines, as well as initiatives on the EU Green Deal and collective bargaining for solo self-employed workers. It is vital that we maintain a coherent approach to competition enforcement across the European Union. Given that the vast majority of decisions under the EU competition rules are taken by the national competition authorities in the European Union, it is clear that the ECN has had an integral role in this work.

Nordic cooperation

After its ratification in Iceland in July 2020, the Nordic agreement on cooperation in competition cases is now in force across the region. The agreement gives the Nordic competition authorities greater powers to assist one another in dawn raids and exchange confidential information in the course of investigations. The agreement fills an important role in facilitating formal cooperation between EU and non-EU competition authorities in the Nordic region, and provides mechanisms for cooperating in merger investigations and national-only investigations that do not exist within the European Union.

The vast majority of our international cooperation takes place within the Nordic region and the European Union. We value the ability to engage in exchanges with our sister agencies, and the cooperation agreement was instrumental for enabling cooperation in the course of a recent merger notified in Norway, Sweden and Finland.

Advocacy and strategic communication

As part of our mandate to promote effective competition to the benefit of consumers, we must deliver a clear message to stakeholders about the importance of creating the conditions for competition to flourish, whether that is in our communication to government and other public bodies, or to market actors and consumers. I believe competition is a crucial component of the collective efforts to promote economic recovery in the wake of the covid-19 pandemic; therefore, we

must communicate clearly about the importance of having well-functioning markets.

One important strand of our advocacy work is our market studies. In one report over the past year, we revisited the subject of locum healthcare professionals and noted that regions in Sweden have continued to encounter problems in recruiting doctors and nurses to GP clinics. The reliance on the hiring of locum professionals can entail significantly increased costs for the Swedish regions. Nevertheless, compliance with the procurement rules has improved, meaning that costly direct procurements without prior publication have decreased.

In collaboration with our Nordic colleagues, we published a report in April 2021 on online pharmacy markets in the Nordic region. In the report we provide an account of the varying national markets and reflect on the potential reasons for the differences across the region. The report notes that Sweden has the largest market in the Nordics. One likely reason for this is that Sweden has fewer restrictions on ownership and establishment of online pharmacies.

Our advocacy work also centres on our responses to official consultations of legislative proposals and inquiries. By adding our expertise to those policy discussions, we can ensure that government and Parliament are able to weigh up the potential positive and negative competitive effects of different proposals. We responded to 163 consultations from government offices and other public authorities throughout 2020.

We must communicate clearly to stakeholders and consumers to explain how the competition rules work and what their benefits are. Our investment in digital communication through live-streamed webinars, podcasts and social media, as well as the modernising of our website, is indispensable to us in this work and has taken on a new significance during the covid-19 pandemic. We believe that effective communication can add to the deterrent effect of our enforcement work, encourage companies to turn to us with tip-offs and complaints, help undertakings to self-correct potentially problematic conduct and contribute to fewer infringements of the rules.