

Sweden: Competition Authority

Artikel av Rikard Jermsten, generaldirektör, Konkurrensverket, publicerad i The European, Middle Eastern and African Antitrust Review 2019, Global Competition Review, Juli 2018.

Article by Rikard Jermsten, Director General, the Swedish Competition Authority, published in Global Competition Review, The European, Middle Eastern and African Antitrust Review 2019, Global Competition Review, July 2018.

Over the past year the Swedish Competition Authority (SCA) has seen the introduction of new decision-making powers, new detection tools and new international agreements, all of which will lay the foundation for even more efficient and effective enforcement work in the future. Digitalisation is a theme which has characterised much of what the SCA has achieved over the past year. We have given significant attention to the question of competition enforcement in the digital era, and we look forward to taking on the challenges and opportunities that are presented by digitalisation over the coming year. The past year has also brought important precedent from the courts. As we look forward, we will give consideration to this precedent in ensuring that we prioritise the right cases in our work to promote effective competition to the benefit of consumers.

Anticompetitive agreements

In February 2018 the Patent and Market Court of Appeal overturned the court of first instance's ruling against Telia, and found that it had not engaged in illegal cooperation prior to a public procurement procedure. In another case involving non-compete clauses in the removals sector, the appeal court upheld the District Court's decision and rejected the SCA's application for fines.

In each of these cases, the appeal court found that there was no restriction by object. Furthermore, the court found that the SCA had not cited specific evidence that the conduct had an anticompetitive effect.

These judgments confirm that the scope for 'by object' restrictions is extremely small. They contribute to establishing important precedent in the question of anticompetitive agreements in Sweden. It is right that we pay due consideration to this when we pursue cases in the future. By doing so, we can allocate our resources in the most effective manner possible. This does not mean that we will no longer pursue by object cases. The SCA remains committed to prioritising the detection, investigation and prosecution of practices which by their very nature are harmful to competition. At the same time, we will work to sharpen our methods and tools to ensure that, when necessary, we can robustly demonstrate the harmful effects of the conduct that we investigate.

In two other cases in the latter half of 2017, concerning the markets for catering equipment and ice-hockey agents respectively, the SCA closed the case after the companies concerned changed their behaviour to address the competitive concerns that the SCA had identified. When appropriate, proceeding in this manner can be an effective way to promptly bring competition concerns and potential infringements to an end.

Other investigations are ongoing. In 2017 the SCA carried out unannounced inspections at 13 different companies as part of our enforcement efforts, and we continue to investigate a number of suspicions of anticompetitive practices involving both vertical and horizontal aspects in markets of key importance to Swedish consumers. We are dedicated to rigorously enforcing the rules against anticompetitive agreements as a way of deterring future infringements.

Abuse of dominance

The case against Nasdaq OMX had its main hearing in the autumn of 2017. The SCA alleged that the company had exerted pressure on the owner of a server hall not to allow a competitor to place its computers near Nasdaq OMX's own servers, to the detriment of a new actor that wished to enter the market. The Patent and Market Court judged that Nasdaq was dominant, but ruled that it had not abused its dominance. The SCA has appealed the judgment and the case awaits a hearing in the Patent and Market Court of Appeal.

In February 2018, the SCA issued an infringement decision in a case against a company in the waste management sector. The SCA judged that the company had abused its dominant position by terminating a contract that had given a competitor access to the company's recycling facilities. The SCA has ordered the company to revoke the termination of the contract, and the decision comes with a penalty of 20 million kronor in the event of non-compliance. The company has appealed the decision.

Another case pending in the appeal court is the SCA's case against Swedish Match. As reported in last year's Antitrust Review, the court of first instance fined Swedish Match 38 million kronor for abusing its dominant position by limiting

competitors' ability to market their snus (wet snuff) products. The company appealed the decision, and the case will be heard in May–June 2018.

A further investigation in 2017 concerned an alleged abuse of dominance relating to online marketplaces for cars. The leading online marketplace enforced a condition which meant that advertisers were forced to advertise on a sister company's website. The SCA was concerned that this type of tying could limit the customer base for other platforms. The company removed the terms that had given rise to the competition concerns, meaning that the SCA could close its investigation.

New ways to uncover competition infringements

There are several ways that the SCA can detect competition issues. Our leniency programme is, of course, an extremely important tool in the uncovering of competition infringements. We receive, on average, approximately five leniency applications annually.

In addition to this, we receive approximately 600 competition-related tip-offs and complaints every year. These tip-offs and complaints are a vital component in many of our cases. The possibility to tip us off about potential infringements has been further enhanced by the recent introduction of an encrypted whistle-blower tool. This allows people to provide information to us anonymously without fear of personal or professional repercussions.

In addition to these channels into the SCA, we also work proactively on the detection of competition infringements. We are continuously refining our econometric tools for detecting suspicious patterns in procurement data, which may provide signs of bid-rigging. We have also established methods for using open-source data in uncovering signs of cartels and other infringements.

With an expanding toolbox for uncovering competition concerns, infringers run a significant risk of detection.

Effective prioritisation

Given the volume of indications of competition problems that we receive, we must carefully prioritise the cases we pursue in order to have the greatest possible impact with the resources at our disposal. We have for some time had a publicly available prioritisation policy, and recently put out a revised policy for consultation. As before, we will continue to consider the harm to competition and consumers, the importance of securing a guiding precedent, whether the authority is best placed to intervene, and whether it is possible to effectively investigate and remedy the competition concern in question.

A new criteria in the revised policy is whether the conduct under investigation demonstrates signs of corruption. Corruption and conflicts of interest are harmful

to competition and consumers, and can facilitate and aggravate competition infringements. We will therefore give particular attention to suspicions of corruption when we prioritise cases for further investigation.

New merger powers

In recent years we have seen an upward trend in the number of mergers notified to the SCA. Last year, 80 cases were notified, and three were subject to an in-depth investigation. Despite this trend, the SCA has bolstered its reputation for dealing with mergers quickly and efficiently. In 2017, Phase I investigations were concluded within fourteen working days on average.

With new powers now in place since 1 January 2018, meaning that the SCA can adopt decisions to prohibit mergers that are damaging to competition, I am convinced that the merger control process will be even more efficient for all parties involved. It will cut the time between notification and the parties receiving a decision. At the same time, it is vital that due process is respected, and we have made some changes to our merger procedures to introduce oral hearings in cases that raise competitive concerns, and to strengthen the role of our chief legal officer and chief economist. Prohibition decisions can also be appealed to two court instances.

International convergence

These new decision-making powers bring us further in line with the majority of our EU and Nordic partners in respect of merger control. My hope for the future is that the SCA can take on greater decision-making powers in other areas, for example with regard to competition fines. We believe that this would help to make our investigations quicker and more efficient. It would also enhance our convergence with the majority of the EU's competition authorities. With any enhancement of powers, legal certainty must be upheld. I am aware of the great importance of maintaining confidence in the work we do, which we can achieve by carrying out efficient investigations and adopting decisions based on rigorous analysis.

We also look to achieve further convergence with our closest partners through international cooperation. In September 2017, the Nordic competition authorities signed a new cooperation agreement on competition issues. The agreement will replace a previous agreement which was more limited in scope. It enables our authorities to assist one another with inspections and other fact-finding measures, as well as exchange information in the course of investigations.

Within the EU, we are also following with interest the ongoing discussions over a directive to strengthen the national competition authorities, known as ECN+. We strongly support the initiative, which would see the introduction of certain common minimum standards on investigative powers, sanctions and leniency. The SCA has assisted the Swedish government during the preparation of the

proposal in the Council of the EU, and we look forward to a directive which could be adopted in the coming year.

Advocacy

Market studies are vital in helping us to understand the functioning of competition in different markets. They can inform us in making proposals for regulatory changes to promote well-functioning markets. However, they can also inform us in our own enforcement work by helping us to understand where competition is not functioning well. I believe that making use of these synergies is essential to fulfilling our mandate to promote effective competition to the benefit of consumers.

In February 2018 the SCA published a wide-ranging report on 'Competition in Sweden 2018'. The report analyses the competitive conditions in over 20 different markets in Sweden, and looks at overarching themes of digitalisation and the circular economy. The report concludes that competition in Sweden is generally functioning well, with the notable exception of the banking and construction sectors. The report also confirms that digitalisation entails new challenges for competition authorities.

Enhanced investigative toolbox for the digital world

Through our studies of digital markets, we have been able to conclude that the competition rules are still well-suited for dealing with issues in digital markets. However, we as competition authorities must improve our tools and methods to handle investigations in the digital economy.

For example, our investigations require us to handle ever larger quantities of digital evidence and data. This is why we intend to invest in hardware and staff recruitment in order to strengthen our tools, capacity and expertise with regard to IT-forensics.

Deterrence through effective communication

Our enforcement and communications work are intrinsically linked, since both play a central role in deterring future infringements. By spreading information about the rules and the work we do, we can work towards building a competition culture in society. This can lead to fewer breaches of the law, better informed consumers and better quality tip-offs and complaints.

Recent surveys of both stakeholders and the general public clearly tell us that there is an overall positive attitude towards competition in Sweden. However we have also identified areas for improvement. We remain committed to investing in digital communication, such as interactive guidance tools, podcasts, videos and live-streaming of seminars.