

## Competition Law and Policy in Sweden

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### Introduction

Sweden's 1993 Competition Act (CA) remains the foundation of a broad policy approach that includes prohibitions against restrictive agreements and abuse of dominance, control of concentrations, advocacy and support for academic research. Enforcement of this legislation by the Swedish Competition Authority (SCA) marked a shift towards a judicial, rules-based approach.

But after 15 years of experience with the reformed competition policy regime, the system may now be ripe for a next step. Reliance on informal resolution of cases may save resources, but it also reduces transparency. Courts have appeared sceptical of the SCA's cases, and competition cases take a long time between initiation and final resolution. Yet in the end, sanctions imposed are not sufficient to deter. The balance of resource allocation between advocacy and enforcement may need adjustment, as advocacy results are mixed. The SCA needs stronger legal and economic capacities, yet its resources have been cut in recent years, even in nominal terms. The terms of appointment for the head of the Competition Authority and the President of the Market Court may raise concerns about their perceived independence.

Issues relating to powers, independence, sanctions and impact of advocacy may be addressed by giving the SCA powers to decide fines, strengthening the independence of the competition agency and the Market Court, strengthening sanctions for serious violations by introducing fines for individuals, and making consultation compulsory about trade-offs between competition and other policy interests. A competition agency with new and enhanced powers might need a decision-making council, in order to meet high standards of legal certainty and separation of adjudication from investigation. ■

### How is Sweden's law related to EC competition policy?

Sweden's first effective competition law, superseding a 1925 law about enquiries into monopolistic enterprises, was the 1953 Restrictive Trade Practices Act. This major turning point, the result of intense debate between the wartime system based on planning and control and an open market economy based on competition, called for action to eliminate the harmful effects of restrictive behaviour. But action was mostly negotiation, not enforcement, and one of the instruments for promoting competition was a public cartel register. The post-war regime also retained price control.

The next turning point came in the sweeping reforms triggered by the economic crisis in the early 1990s. These reforms included a wave of product market liberalisation, the end of price controls and a new competition law and enforcement agency, the Swedish Competition Authority (SCA). In promoting the 1993 Competition Act (CA), the government considered competition to be decisive for dynamic growth and an organising principle for the economy. Where competition enforcement for nearly 40 years had relied chiefly on information, influence and negotiation, the new SCA regime, inspired by the approach of the European Communities, would rely on clear prohibitions and vigorous enforcement against infringements.

The cornerstones of the CA are the prohibitions of restrictive agreements and abuse of dominance and the control of concentrations. Primary and secondary legislation are largely harmonised with European Community competition rules. Important recent developments include the introduction of a leniency programme and procedural changes following the EC modernisation programme.

- Agreements are prohibited if they prevent, restrict or distort competition "to an appreciable extent". Horizontal price fixing or market sharing and resale price maintenance agreements are always considered to have an appreciable effect. Agreements linked to technical or economic progress and benefit to consumers are exempt from the prohibition, under terms like those that define exemptions from the parallel EC prohibitions. The government may issue block exemptions, and the SCA may revoke the applicability of a block exemption to an individual agreement. As under EC law, companies must assess for themselves whether or not an agreement qualifies for exemption. Seven block exemptions have been issued. Six are based on EC rules. One of them permits certain vertical restraints where the supplier has a market share of up to 35%.
- Abuse of a dominant position is prohibited. EC decisions guide application of Sweden's matching rules. In the liberalised infrastructure sectors, these rules have helped to prevent customer lock-in from fidelity rebates, tying or predatory pricing. The CA has been less effective in enforcing third party access to networks and bottlenecks.
- Merger control rules are under review, to take account of changes in the corresponding EC rules. A concentration is prohibited "if it creates or strengthens a dominant position which significantly impedes, or is liable to significantly impede the existence or development of effective competition".

Other policies, of “national security or essential supply interests”, are also relevant to merger control decisions. But merger cases cannot be reviewed by the government.

- State aid regulation at the EC level prohibits direct and indirect subsidies if they are liable to distort competition and there is an effect on trade between member states. State aid that does not affect trade between member states can also distort competition. Several reports, including reports from the SCA, have highlighted the problem, but no action has yet been taken. The SCA now has a role in monitoring an important state aid issue arising under the EC Transparency Directive.
- Public procurement is regulated by EC law, above certain thresholds, and by two Swedish laws aiming at equal treatment of competing suppliers and efficient use of public funds. The Public Procurement Act implements EC directives, and the Act on Undue Behaviour in Public Procurement targets government discrimination against a tendering company. But effective sanctions are lacking, and in a few cases local governments refused to abide by court judgements. The government is planning to transfer the surveillance of public procurement to the SCA. ■

### Does SCA have enough independence and resources?

The SCA is a robust agency with a clear identity. Its broad approach to competition policy includes law enforcement, advocacy for pro-competitive reform, action to strengthen the competition culture and support for academic research. The government sets its annual budget and its overall mission and tasks, and the government appoints the Director General. The government cannot intervene in the SCA’s decisions and business, though. Responsibility for these rests with the Director General, who serves for a term of six years (with the possibility of renewal for three years). The nomination process is not transparent. Dismissal during the period of office is exceptional, and general elections have no influence.

Unlike most competition enforcement authorities, the SCA has no power to decide on fines or to prohibit a merger. Instead, its enforcement role is as a prosecutor bringing these matters to court. The Stockholm City Court (SCC) is the first instance decision-maker for cases about inspections, fines and

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#### Box 1. EC TRANSPARENCY DIRECTIVE

The EC Directive on the transparency of financial relations between member states and public enterprises requires separate accounting for undertakings that are active in both the reserved sector and the competitive sector. The Directive aims at facilitating the European Commission’s analysis and control of state subsidies that might distort competition. An important example is cross-subsidisation of a public enterprise’s economic activities in competitive markets using profits from activities protected by monopoly rights. Information that has to be available may be required by the Commission through a competent authority of the member state. Under Swedish legislation giving effect to the Directive, the SCA has been designated to monitor observance of the transparency provisions, and it has powers to request relevant information from companies on behalf of the European Commission.

mergers. Rulings of the SCC may be appealed to the Market Court. Judges of the Market Court are appointed for a fixed term, under a non-transparent process like that for the SCA Director General. The Market Court is last instance for competition cases, and its rulings cannot be reviewed by government.

The SCA is integrated into European co-operation. It is part of the European Competition Network, for co-operation among EC competition authorities and the European Commission, and of the group of European competition authorities that co-ordinates merger matters. In 2003, Sweden joined the co-operation agreement among the Nordic countries, which enables them to exchange confidential information.

With about 100 staff, the SCA is about the same size as competition agencies in other countries of Sweden's size. Its budget has been reduced in recent years, though, and the budget squeeze has affected staff quality. The SCA loses staff to private law firms because it cannot offer such attractive employment terms. The SCA has asked for a budget increase to sustain its activities and enhance its capacities, pointing to its need for staff with new skills and experiences.

Few SCA decisions formally seek sanctions or termination of an infringement. Most enforcement takes a softer approach, of an SCA decision to close a matter because parties have made commitments or discontinued the practice. In mergers too, the clear tendency is to solve issues by means other than formal orders and prohibitions. Since 1993, the SCA has sought court orders against five mergers (losing three of those in court; the remaining two were abandoned), and it has approved 17 notified concentrations based on voluntary commitments. Closing a case at the SCA may be resource efficient, but it is less transparent than a court hearing and decision. A fair share of transparent formal rulings would bolster confidence that the "negotiation economy" has been replaced by a rules-based approach.

The SCA's success rate when it does go to court could be improved. Independent research commissioned by the SCA in 2004 found that it won 45% of its court proceedings, had partial success in 14% and lost 42%. To be sure, a perfect success rate would imply that an agency is avoiding complex, difficult cases. ■

### Do Sweden's courts support competition enforcement?

Sanctions against infringement are administrative fines that can range from SEK 5000 to 5 million or more, up to 10% of the company's annual turnover. There is a leniency programme, under which companies that disclose their participation in an illegal cartel and meet certain conditions may avoid fines, in whole or in part. There are no criminal penalties. The SCA has argued that criminal sanctions would undermine the leniency programme and jeopardise Sweden's participation in the European Competition Network. The issue of criminal sanctions is under review by the government.

The fines ordered by the courts have always been much lower than the amount claimed by the SCA. The courts may take a more lenient view

of the conduct at issue, or the SCA may have failed to justify the fines it has requested. Perhaps courts would apply higher fines if the SCA could demonstrate companies' gains from infringement. The SCA now asks for higher fines than it has before. But the level of fines actually imposed so far is not a serious disincentive and may be too low to support an effective leniency programme.

Competition cases take a long time. In several cases the time span from the SCA's opening of the case to last instance ruling has been 5 to 8 years. To be sure, competition cases can be complex, and the SCC, with its first instance role, is perceived to have insufficient resources. Still, these delays are unsatisfactory from the point of view of correcting malfunctioning markets. ■

**How does sector regulation affect competition?**

Legislated exemptions apply in only two sectors, agriculture and taxis. The agricultural exemptions, which include forestry, apply to co-operation between farmers and other primary producers. In the taxi industry, a block exemption regulates joint marketing and legislation permits some other agreements. Sweden has liberalised entry and pricing in the taxi market, but these special measures are nonetheless thought necessary to sustain services in sparsely-populated areas where private demand is low. In addition, there are three legal monopolies, for gambling and for retailing of pharmaceuticals and alcohol. These are motivated by public health. Their compatibility with EU law is uncertain, though, and they risk being undermined by e-commerce.

Sector legislation for telecommunications and postal services has an impact on competition policy. The Postal Services Act promotes competition through access to the postal infrastructure. The Electronic Communications Act calls for consultation with the SCA in defining markets. In each, the sector legislation applies concurrently with the Competition Act. Government commercial activities, such as those of state-owned enterprises, are covered

**Table 1.**  
**FINE REDUCTIONS AND DELAYS IN MAJOR COMPETITION CASES**

Respondent (abuse of dominance) or industry (cartel)	Fines (SEK 000s, total) in:			Date of:	
	SCA petition to SCC	Stockholm City Court decision	Market Court decision	SCA petition to SCC	Final court decision
State Railways	30 000	8 000	8 000	Jan 1996	Feb 2000
SAS	10 000	1 000	1 000	Oct 1996	
Nitro Nobel	5 000	200	400	Mar 1997	Sep 1999
AGA Gas AB	3 000	600	0	Apr 1999	Sep 2002
plastic pipe	17 500	10 600	10 600	Aug 1999	Jan 2003
petrol	651 000	52 000	112 000	Jun 2000	Feb 2005
asphalt	1 242 640	pending		Mar 2003	
ventilation	23 000	150		Jul 2003	
car dealers	71 300	pending		Mar 2004	
car rescue	1 020	pending		Oct 2004	
petroleum (bitumen)	394 000	pending		Dec 2004	
TeliaSonera (broadband)	144 000	pending		Dec 2004	
TeliaSonera (fixed line)	44 000	pending		Oct 2005	

Source: Swedish Competition Authority.

in principle by the Competition Act. But here the Competition Act has been less effective, especially about activities of local government. ■

### Is advocacy for reform effective?

SCA advocacy includes reports and consultations with other government agencies and civil society. Close to 30% of SCA resources were allocated to competition advocacy in 2005. This share is high in international comparison, although its Nordic neighbours also devote considerable resources to advocacy. The government's instructions to the SCA identify several types of advocacy tasks on which the SCA must report annually. In 2005, over 160 SCA consultation statements on government committee reports covered topics ranging from occupational pensions to waste management, as well as specific competition law issues such as the calculation of fines. The SCA published 11 other reports, some in co-operation with the competition authorities of other countries. The most comprehensive SCA report, *Competition in Sweden*, presents policy options for ten markets of particular importance to consumers.

SCA advocacy efforts appear more successful when suggesting concrete regulatory solutions in non-controversial areas, but less so in sensitive areas such as public procurement. Its broad, more descriptive studies may require disproportionate resources relative to their impact on the reform agenda. The competition voice is not always strongly heard in other agencies. The SCA's quantitative output is impressive. Yet pro-competitive reform has lost momentum in Sweden since the 1990s. ■

### How could Sweden strengthen its competition policy?

- *Confer powers to decide fines to the competition agency*

Strengthening competition policy is closely related to strengthening the competition agency. In the international perspective, allowing a competition agency to decide on fines is not exceptional. Giving the competition agency power to impose fines could boost tougher attitudes about serious anti-competitive conduct.

- *Strengthen the independence of the competition agency and the Market Court*

In addition to powers, an effective competition agency needs real and perceived independence. Sweden's Regulatory Reform Commission noted that an appointment for a limited term can create a situation of dependence vis-à-vis the nominating body, in particular where there is an option for a second term. But that is the model that now applies for the head of the SCA and of the Market Court. Employment terms that give more job security should be considered for these posts.

- *Strengthen sanctions for serious violations of competition law*

The fines that have been applied to date fall short of levels needed to deter serious violations such as hard core cartels. Measures to raise those levels would be welcome. Many countries have concluded that sanctions against individuals would make deterrence more effective. Adopting criminal

sanctions for competition law infringements raises concerns about effects on the leniency system and the efficiency of enforcement, because of the higher burden of proof and the need to refer competition cases to the general prosecutors. A different model to consider would be administrative fines for individuals.

- *Strengthen compulsory consultation with the competition agency*

A competition agency may have an important role in preventing public authorities from adopting or applying rules that distort or eliminate competition in a disproportionate way. The SCA is active in this field, but its persuasive voice may not be strong enough, or it may be heard too late in the process. Clear rules requiring consultation with the competition agency may help in finding the best trade-off between competition and other policy interests.

- *Find an organisational structure for the competition agency that matches new and enhanced powers*

A competition agency with powers over fines (including administrative fines to individuals), strong independence and compulsory consultation responsibilities might not be best organised like the SCA today, where decisions are adopted by the head of the SCA. With stronger powers, decision-making should meet high standards of legal certainty, and it would be important to separate adjudication from investigation. Thus some form of collective decision-making procedure could be an alternative to the current model. Moreover, such an agency must have the resources needed to maintain professional qualities at high level. ■

### For further information

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### For further reading

OECD (2007), **Economic Survey of Sweden**, ISBN: 978-92-6403197-5, 136 p., €49.

OECD (2004), **Economic Survey of Sweden**, ISBN: 978-92-6402047-4, 204 p., €28.

OECD (2007), **OECD Reviews of Regulatory Reform, Sweden: Achieving Results for Sustained Growth**, ISBN: 978-92-6400851-9, 106 p., €45.

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