

IN-DEPTH

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In-Depth: Public Competition Enforcement (formerly The Public Competition Enforcement Review) is an annual survey of the most important and relevant developments in public competition law enforcement in the most significant jurisdictions worldwide. Among other things, it examines the practical implications of recent enforcement activity regarding cartels, restrictive agreements, abuse of dominance, state aid and merger control.

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Introduction

The Swedish Competition Act (Competition Act)^[2] entered into force on 1 November 2008 and governs all types of actions that may distort competition. The Act contains rules against anticompetitive agreements and abuse of a dominant market position, modelled on Articles 101 and 102 in the Treaty on the Functioning of the European Union (TFEU), which apply in cases not affecting trade between Member States. It also contains rules on merger control and a prohibition against anticompetitive sales activities by public entities. The rules are interpreted in accordance with the case law of the Court of Justice of the European Union.

The Swedish Competition Authority (SCA) is the central administrative authority for enforcement of competition law in Sweden. It is entrusted with investigative and adjudicative powers, both of which have been expanded in recent years, meaning that the SCA can itself adopt decisions to prohibit mergers that harm competition and impose corporate fines of up to 10 per cent of company turnover in behavioural cases. The SCA's investigative powers include dawn raids, ordering information to be submitted and the issuing of corporate fines for procedural breaches during investigations (such as for obstructing a dawn raid).

The SCA's decisions can be appealed to the Patent and Market Court (PMC). The PMC's decisions and judgments can, in turn, be appealed to the Patent and Market Court of Appeal (PMCA). Leave to appeal is required if the PMCA is to hear a case. The PMCA is, in general, the court of final instance. However, in certain instances, the PMCA can grant leave for a judgment or decision to be appealed to the Supreme Court. If this were to happen, the Supreme Court would also need to grant leave to appeal before the case could be heard.

In addition to its enforcement activities, the SCA regularly conducts and commissions studies regarding sectors and markets perceived as suffering from limited competition. A trend in the reports summarising these studies is the SCA expressing the need for new flexible tools that would complement existing legislation. The SCA has stated that new tools are required to tackle structural competition problems in entire markets, in particular where such problems are not limited to specific undertakings.

Year in review

During 2023, the SCA, as in previous years, focused on breaches of the Competition Act that entail the greatest harm to competition and to consumers. As such, the SCA has stated that it will generally grant high priority to horizontal agreements restrictive of competition, and in particular cartels. The SCA will, however, also consider whether the SCA can effectively investigate a breach and whether the SCA is the authority best suited to investigate the matter.^[3] In practice, the SCA's enforcement during 2023 resulted in corporate fines in two cases, although further investigations have ended with the parties offering commitments to remedy the infringements or have been abandoned following a change in behaviour of the parties.

A trend in 2023 was the focus on the foodstuffs industry. Following a sharp increase in prices in several sectors during late 2022 and early 2023, the government tasked the SCA with investigating the competitive situation in these sectors, which thus far has resulted

in the SCA's preliminary finding that price increases on, inter alia, foodstuffs have gone beyond merely compensating for inflation.^[4] Heightened levels of scrutiny in the sector are expected to continue in 2024.

In October, the government announced that a government committee shall investigate the need for new competition tools to complement the Competition Act. The SCA has on multiple occasions in previous years expressed the need for such a more flexible tool. The results of the investigation are to be published in February 2025.^[5]

Cartels

Chapter 2 of the Competition Act holds the substantive provisions relevant for cartels and other anticompetitive agreements. Chapter 2, Sections 1 and 2 are modelled on Article 101(1) and 101(3) TFEU. Section 1 prohibits cooperation between undertakings that has as its object or effect the prevention, restriction or distortion of competition in the market to an appreciable extent, whereas Section 2 sets out the possible exemptions to the prohibition found in Section 1.

The Swedish leniency programme was amended in 2014 to better reflect the EU leniency system. The new leniency regime introduced a marker system whereby a company may apply for a marker and submit limited information about an ongoing infringement. The minimum requirement to obtain a marker is to submit information on the market affected by the infringement, the other companies involved and the nature of the infringement. To secure the marker, the company must submit a complete application within a specified period. If the company with the marker fails to submit the outstanding information, another company cannot jump the queue for immunity. In circumstances where either the company benefits from leniency or the individual has contributed and personally cooperated to a significant extent, the SCA may grant immunity from a director disqualification.

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i Significant cases

Water mixers – vertical price maintenance

In December 2023, the SCA fined Tapwell AB, a producer of water mixers and related accessories, 16.9 million Swedish krona for retail price maintenance. The decision was the result of an investigation that had been ongoing since 2021 and, inter alia, involved a dawn raid. Tapwell was found to have monitored its online retailers' pricing levels using publicly available price comparison tools, and retailers had moreover monitored each other's prices and reported deviances to Tapwell to ensure compliance with the pricing policy. When online retailers offered prices below 10 per cent of Tapwell's recommended price, Tapwell would contact the resellers, asking them to 'correct' the pricing. In deciding on the size of the fine, the SCA considered that vertical price maintenance was in itself a particularly serious restriction of competition. The fact that the violation concerned internet sales was aggravating, as restrictions on pricing could have particularly restrictive effects on such sales. With this in mind, the SCA considered that a fine amounting to 5 per cent of Tapwell's concerned turnover was warranted.^[6]

Transport of cargo by road – market sharing

In July 2023, the SCA fined Norrmejerier, a Swedish dairy products company that also provides temperature-controlled transportation via its subsidiary Lincargo, for its participation in a market sharing agreement with its competitor in the transport business, Frigoscandia. Frigoscandia had applied for leniency in 2021, thus revealing the agreement, and had also cooperated actively with the SCA during the investigation. Frigoscandia was therefore granted complete leniency from fines by the SCA. The cooperation consisted in an agreement not to approach each other's customers and to not offer transportation to customers located in the areas assigned to the other party. Finding that the agreement was a restriction by object, but that it was not obvious that the agreement had had any significant effect on how new customers were approached by the parties, the SCA found a fine of 8 per cent of Norrmejerier's concerned turnover to be warranted.^[7]

ii Trends, developments and strategies

On average, the SCA conducts a handful of dawn raids a year, and it receives approximately five leniency applications yearly, of which approximately half are summary applications.^[8] Sectors that have been investigated more recently include decontamination, retail and foodstuffs.

During 2023, the SCA initiated four matters regarding agreements restrictive of competition and completed five investigations into such behaviour. Two of these – as set out above – resulted in the SCA issuing corporate fines. Despite the low numbers in absolute terms, this highlights an increase in activity from the SCA in comparison to previous years.

In December 2018, the SCA conducted a questionnaire survey of the level of corruption in the construction industry.^[9] Among the responding firms, 49 per cent believed that there were cartels in the industry and 29 per cent of those believed that cartels operated on a regular basis.

iii Outlook

The fight against cartels is one of the main priorities of the SCA, and measures relating to the detection of cartels have increased, especially concerning bid-rigging cartels in public procurement procedures.

In recent years, the SCA has met limited success in cartel cases before the PMC and PMCA and has issued relatively low fines. With the foodstuffs industry in the spotlight, the SCA is bound to increase its scrutiny of any perceived cartels in the sector. Whether this will lead to any material decisions remains to be seen.

Antitrust: restrictive agreements and dominance

Chapter 2, Section 1 of the Competition Act prohibits cooperation between undertakings that has as its object or effect the prevention, restriction or distortion of competition in the market to an appreciable extent, whereas Chapter 2, Section 7 of the Competition Act sets out the prohibition against abuse of a dominant position. The provisions are modelled on Articles 101 and 102 TFEU.

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i Significant cases

Beer supply – vertical agreements

Since 2019, the SCA has been investigating agreements concerning the supply of beer to the hotels, restaurants and cafe sector in Sweden by two of Sweden's three largest breweries, Carlsberg and Spendrups, on suspicion that the network of agreements may prevent market access. In October 2023, the SCA accepted commitments from the two breweries whereby they agreed to limit the scope and reach of the exclusivity clauses in their respective supply agreements. In brief, the reviewed supply agreements entailed that the customers were obligated to purchase a certain share of their total demand for beer from the brewery in question, and volume targets, whereby the customer was induced to purchase a certain amount of beer each year, as well as other restrictions. If the volume targets were reached, the customer could be granted various benefits and financial incentives, while failing to reach the targets could lead to contractual penalties (such as liquidated damages) as well as the termination or prolongation of the agreement. In its decision, the SCA stated that its preliminary conclusion was that the cumulative effect of the agreements was intended to prevent market entry. The commitments offered by the breweries, which were made binding until 30 November 2029, entail, inter alia, that the breweries will lower the volume targets and that certain contractual penalties for the failure to meet volume targets would be removed from the agreements.^[10]

Electric bikes – collective boycott

In November 2023, the SCA abandoned an investigation of a suspected collective boycott. The SCA's decision was announced after holding meetings with parties, where the involved parties clarified that they would redouble their efforts regarding competition law compliance. The supposed violation consisted in five suppliers of electric bikes allegedly collectively refusing to apply for permits from the City of Stockholm to supply rental bikes in Stockholm. The SCA's investigation showed that the suppliers had been in intensive contact with one another. Although it considered that the cooperation could be likened to bid rigging in certain aspects, the SCA ultimately abandoned the investigation after holding bilateral meetings with the parties, where the parties acknowledged the inappropriateness of large-scale contacts with competitors. The SCA motivated the abandonment with the fact that the parties' statements meant that there were not sufficient reasons to carry on the investigation, which can be interpreted as heralding that the SCA will apply its prioritisation policy more strictly going forward.^[11]

Subscription services for e-books

In December 2023, the SCA abandoned an investigation into whether Storytel, a vertically integrated Swedish publishing company and subscription service for e-books, had abused a dominant position. The investigation concerned a complaint lodged by Nextory, a competing subscription service for e-books, alleging that the pricing terms applied by Storytel for the licensing of its e-books to other subscription services were abusive. Although Storytel would be compensated depending on how many of Nextory's subscribers read a certain book, the complaint considered that the minimum guaranteed licence fee (a fixed sum to be paid irrespective of use of the licence) was unduly high and not based on actual or reasonable costs. The SCA found that the use of a minimum guaranteed licence fee was not in and of itself an issue, but that this could lead to competing services being foreclosed. In the course of November 2023, however, Storytel changed its pricing terms and thus mitigated the SCA's concerns. As such, the SCA abandoned the investigation.^[12]

ii Trends, developments and strategies

The SCA continues to investigate markets and sectors at risk of competition concerns. Certain sectors are scrutinised more closely by the SCA because of previous regulations that have created structural imbalances in the market (such as the pharmacy and telecommunications sectors). As abuse of dominance cases are difficult and resource-intensive (as indicated by the four year-long investigation into beer supply agreements), the SCA has formed a specialist division to deal with anticompetitive behaviour of this kind, the Market Abuse Unit. The SCA has also, as indicated by the electric bikes case, recently taken a more flexible approach to enforcement, and on occasion considered that a less formal intervention may suffice to ensure compliance.

iii Outlook

In Sweden, many sectors have previously been characterised by a monopoly or few companies dominating the market. Many of these markets are now in the process of being, or have recently been, deregulated, which has often resulted in a market with non-existent, or low, competition. Consequently, the SCA has focused its efforts on these markets.

Sectoral competition: market investigations and regulated industries

i Significant cases

New sectoral investigation tool

In October 2023, the government appointed a committee to investigate whether there is a need for new, complementary rules in Swedish competition law, adding on to the existing Competition Act. The government leaves the questions of whether such a tool is needed, and how such a tool may be designed, for the committee to answer. However, the terms of reference consider that there may be a need for a competition tool that allows the SCA to intervene against problematic market structures, rather than solely behavioural breaches of the Competition Act or concentrations caught by the Act's filing obligation. The government states that such a tool may be comparable to the UK market investigation tool, or to the EU Digital Markets Act. The committee has also been tasked with investigating whether a non-suspensory duty to inform the SCA should be implemented for all or some of the concentrations that do not give rise to a filing obligation with the SCA. The committee is to present the results of its investigation in February 2025.

Competition in the foodstuffs sector

As mentioned above, 2023 was characterised by a high degree of scrutiny of the foodstuffs industry. In March 2023, the government tasked the SCA with investigating market structures and intensifying enforcement in sectors where prices increased markedly during the end of 2022, such as the foodstuffs industry. In line with this, in 2023, the SCA conducted three sector studies regarding different parts of the foodstuffs sector, namely primary production (e.g., production of cereals, dairy products, fruits and meats), egg production and sales, and the retail and wholesale sector. Overall, the reports conclude that the largest issues are in the retail and wholesale sector. Here, competition is limited due to high market concentration, and barriers to market entry include municipal zoning requirements (which may not permit a competitor to establish itself in areas where a food business is already established) and difficulties in acquiring existing stores. The importance of a relatively low number of wholesalers with a wide offering was also considered to limit the ability of suppliers and specialised wholesalers to compete for the demand of retailers. The reports also conclude that a new, flexible competition tool could assist in remedying the lack of competition in the sector.^[13]

Regulatory sandboxes' effects on competition

In October 2023, the SCA also published a commission research report on regulatory sandboxes and whether the Competition Act can adequately handle the competition issues such sandboxes may entail. A regulatory sandbox typically refers to a regulatory tool that allows a company in a highly innovative sector (such as AI or information and

communications technology) to market its products with an amount of regulatory relief, while remaining under the supervision of an authority. Such tools have been recognised to benefit innovation, while simultaneously allowing the authority in question to formulate rules for the sector in question. However, the report recognises that sandboxes can also limit competition by allowing the participant companies to create dominant positions and by facilitating anticompetitive collusion. The report concludes that while there are certain competition issues with regard to regulatory sandboxes, it appears premature to implement significant changes in the Competition Act due to these potential issues.^[14]

ii Trends, developments and strategies

The SCA may commence a market study either on its own initiative or following a complaint. The study may result in an additional investigation of a specific undertaking or the provision of guidance to the undertakings concerned so that they can modify their behaviour to avoid an additional investigation. During 2023, the SCA was particularly active in conducting market studies, which may be a result of the increased focus on sectors that have seen significant pricing increases during the past two years. Such investigations are often followed by enforcement action: for example, in 2021 the SCA published a report on competition on digital platforms (focusing on, inter alia, subscription services for e-books), which was explicitly referred to in the above-mentioned decision regarding such services.^[15]

iii Outlook

Much like the European Commission, one of the SCA's priorities concerns the development of the digital economy and the sharing economy, and how the growth of these sectors will affect competition authorities' enforcement function, as well as the risk of anticompetitive conduct. The SCA has recognised that authorities' investigation methods are challenged with the increased digitalisation of the economy, as the competition rules need to be applied to digitalised (rather than offline) market conditions where, inter alia, data constitutes a competitive advantage. It can be expected that the development of the e-economy and the sharing and digital economy will remain one of the SCA's main priorities. As any changes to the legislative framework appear distant – with the investigation of a possible new competition tool not due to be presented until next year – the SCA will most likely have to continue to apply the Competition Act to digital markets for the time being.

State aid

There is no specific national legislation concerning state aid. However, procedural rules on the application of Articles 107–109 TFEU were adopted in 2013. In addition, the Local Government Act^[16] states that giving support and financial aid to individual businesses is prohibited. According to Chapter 2 Article 8 of the Local Government Act, municipalities and counties are allowed to implement measures to promote local business in general but not to target their efforts towards a specific company, similar to the EU state aid rules.

The Swedish Transparency Act^[17] is based on the state aid rules and requires reporting to the European Commission (Commission) of all publicly owned or financed operations reaching certain thresholds.

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i Significant cases

State aid cases are not common in Swedish courts. In particular, cases have concerned the sale of facilities from municipalities to private operators below market price. Sweden has also been under review by the Commission multiple times, as only the Commission can approve targeted state aid.

Damages for a prohibited rejuvenation felling

In 2017, the Swedish Forest Agency prohibited a Swedish company, Hargs Bruk, from conducting rejuvenation felling on a property owned by the company. After unsuccessfully appealing the prohibition decision, the company sued the government, claiming compensation of approximately 3.6 million kronor for economic loss on the grounds that the decision violated the company's right to property. After the two lower instances having ruled in favour of the company, the government appealed to the Supreme Court of Sweden, which issued its judgment in April 2023.^[18] The government, *inter alia* argued that the compensation, if awarded, would constitute state aid in violation of Article 107 TFEU.

The Supreme Court recalled that a measure could only constitute state aid if it strengthened the competitive position of the recipient in comparison to its competitors (i.e., threatened to distort competition). However, the Court considered that in this case, the compensation would only serve to restore the company's position as it would have been if its right to property had not been violated. The compensation was therefore incapable of distorting competition and, as such, did not constitute state aid. The Supreme Court consequently upheld the lower court's judgment and awarded the company the claimed damages.

ii Trends, developments and strategies

The majority of previous state aid cases in Sweden have been related to municipalities selling property at significantly lower prices than market value. There has, however, been a decrease in the number of these cases in recent years.

The SCA has considered it unnecessary to submit a report to the Commission in accordance with the Transparency Act when the state or the municipalities do not control manufacturing undertakings with a turnover exceeding €40 million.

iii Outlook

Certain projects concerning infrastructure facilities in the more remote areas of Sweden are dependent on financial support and state aid. Those projects will depend heavily on authorisation from the Commission.

Merger review

In previous years, the SCA reviewed 70 to 80 mergers a year, of which typically three or four went to Phase II. While no official statistics are as of yet available for 2023, in 2022, a total of 121 concentrations were filed with the SCA, marking a slight decrease from 2021 (135). Two decisions were also issued after a Phase II decision, compared to four in 2021. Noticeably, both were unconditionally approved. The SCA's average handling times remained largely the same: 16 work days for a Phase I review, and 128 calendar days for a Phase II investigation. During 2023, three Phase II investigations were completed, two of which were filed in 2022 (and were highlighted in last years' edition of this chapter).

A concentration meets the applicable merger thresholds and needs to be notified to the SCA if the combined aggregate turnover in Sweden of all undertakings concerned exceeds 1 billion kronor, and each of at least two of the undertakings concerned has a turnover in Sweden exceeding 200 million kronor.

Where the first threshold of 1 billion kronor has been met but the second threshold has not, the SCA may order the concentration to be notified if the SCA finds particular grounds for doing so, or the parties may notify the concentration voluntarily. These grounds may be met when an undertaking already holds a strong market position and acquires a smaller or newly established undertaking. In these circumstances, the acquirer may also submit a voluntary notification. In general, the SCA encourages undertakings to make voluntary notifications of mergers.

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i Significant cases

Industrial sanitation services

In November 2023, the SCA approved Remondis' acquisition of Delete Group after a Phase II investigation. Remondis and Delete are both active in providing industrial sanitation services such as high-power vacuuming, industrial cleaning and sewer work. In its decision, the SCA noted that the parties appeared to be close competitors in several regional markets, and that there was a risk that Remondis could increase prices post-concentration. As such, the SCA's preliminary view was that the concentration could lead to a significant impediment to effective competition. Market entry or expansion were also unlikely to mitigate Remondis' strengthened position in certain markets. Nevertheless, the SCA approved the concentration, stating that the authority was not able to complete the investigation within the regulatory deadline set out in the Competition Act and that there was, as such, no sufficient proof supporting the idea that the concentration would significantly impede effective competition. The decision is noteworthy as it is the first occasion on which the SCA has approved a concentration for lack of time after a Phase II investigation, and as the SCA has the ability to extend the Phase II investigation deadline where there are extraordinary reasons.^[19]

ii Trends, developments and strategies

Over the past couple of years, the number of merger notifications has remained high in Sweden with a significantly increased influx in 2021. The number of notifications can be expected to have lowered this past year, given the increased interest rates and the otherwise volatile conditions in the Swedish economy.

Another topic of interest is that the Swedish merger control regime makes it possible for the SCA to order filing a transaction if there are 'particular grounds' at hand and the parties have a combined turnover of 1 billion kronor. Although such orders remain relatively unusual (the last one was in 2022), the SCA is likely to use this possibility where a concentration below the thresholds in a prima facie review indicates substantive issues. In these circumstances, the acquirer may decide to submit a notification voluntarily to pre-empt a filing order. In recent order decisions, the SCA has found particular grounds based on concerns of customers or competitors and high combined market share, especially in new markets. As noted above, the SCA has also expressed interest in an expansion of its power to order filings, and in particular to be able to order the filing of all acquisitions in a predetermined sector.

iii Outlook

In 2018, the Competition Act was amended to grant the SCA extended decision-making powers in merger control cases. One argument for the reform was to increase conformity with the merger control procedure of the European Commission and in other Member States. However, the reform did not receive a uniformly positive response, and it has been argued that the safeguards surrounding the SCA's decision-making process are not as well developed as, for example, the Commission's. Additional amendments may be on the

horizon as the SCA considers a more flexible application of merger control necessary to address competition issues in certain sectors such as data-driven markets.

Outlook and conclusions

During 2023, the SCA focused on the prohibition on agreements restrictive of competition, and on cartel enforcement in particular. This is indicative of a long-term trend where the SCA has gradually shifted away from pursuing cases where the legal situation was unclear, to enforcement of more clear-cut and evident breaches of competition law. Moreover, this policy change may be a result of the increase in the SCA's own decision-making powers. In terms of sectors, the sharing economy continues to be in the focus of the SCA, alongside other sectors where market structures are considered as limiting competition, most prominently the foodstuffs sector. As in previous years, the SCA also conducted market studies to investigate the competitive situation in various parts of the Swedish economy, and in connection with these requested new and more flexible tools to handle market structures that threaten to restrict competition. The fact that the government has appointed a committee to investigate such a tool indicates that competition law and policy may receive more attention and scrutiny in the coming years. Such a tool, if implemented, is also likely to bring about further changes to the SCA's enforcement policy with regard to the Competition Act.

Endnotes

- 1 Peter Forsberg is a partner, Philip Thorell is a managing associate and Lars Lundgren is an associate at Hannes Snellman Attorneys Ltd. [^ Back to section](#)
- 2 The Swedish Competition Act (2008:579). [^ Back to section](#)
- 3 SCA Prioritisation Policy (6/2022), pp. 2 and 3. [^ Back to section](#)
- 4 SCA, 'The Competition Authority sees a risk of lacking competition and unjustified price increases in the food industry', press release 27 June 2023. [^ Back to section](#)
- 5 Committee terms of reference 2023:136. [^ Back to section](#)
- 6 SCA, decision of 20 December 2023 in Case No. 122/2021. [^ Back to section](#)
- 7 SCA, decision of 5 July 2023 in Case No. 718/2021. [^ Back to section](#)
- 8 During the period 2010–2014. [^ Back to section](#)
- 9 Report series 2018:10. [^ Back to section](#)
- 10 SCA, decisions of 25 October 2023 in Cases Nos. 706/2019 and 248/2020. [^ Back to section](#)

- 11 SCA, decision of 11 December 2023 in Case No. 438/2023. [^ Back to section](#)
- 12 SCA, decision of 20 December 2023 in Case No. 817/2022. [^ Back to section](#)
- 13 Report series 2023:9-11. [^ Back to section](#)
- 14 Commission research report 2023:4. [^ Back to section](#)
- 15 Report series 2021:1; cf. SCA, decision of 20 December 2023 in Case No. 817/2022. [^ Back to section](#)
- 16 The Local Government Act (1991:900). [^ Back to section](#)
- 17 The Swedish Transparency Act (2005:590). [^ Back to section](#)
- 18 Supreme Court of Sweden, judgment of 5 April 2023 in Case T 538-22. [^ Back to section](#)
- 19 SCA, decision of 1 November 2023 in Case No. 392/2023. [^ Back to section](#)

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