

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Implications of E-commerce for Competition Policy - Note by Sweden****6 June 2018**

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1. Introduction

1. Technological advancements have enabled the emergence of websites and platforms for the sale of goods and services. The conditions for the continued growth of e-commerce are good. With e-commerce, price-transparency has increased and price competition has intensified. This is positive for consumers, who can more easily find products that fit their needs at the best price with the help of price-comparison services.
2. Furthermore, services within the sharing economy, facilitated by technological advances, make it possible for unused resources to easily be shared, primarily between private persons. The development of sharing economy business models and companies can therefore improve competition and lead to enhanced consumer welfare.
3. Nevertheless, the development of e-commerce has particular implications for competition authorities in their enforcement work. This contribution considers these implications first by considering the potential effect on relevant market definition based on Swedish case experience. It then considers cases in the sphere of e-commerce generally, and platform markets in particular. Finally, the contribution turns to future implications for competition enforcement and policy which have been identified in the course of recent market studies on digital markets carried out by the Swedish Competition Authority.

2. Relevant market definition¹

4. One potential consequence of e-commerce increasing the number of suppliers that are available to consumers may be the expansion of the relevant market in competition law cases. However, Swedish case experience has demonstrated that the existence of e-commerce does not always result in wider markets.
5. For example, in some cases, online sales and brick-and-mortar sales have not been considered to form part of the same product market. This can in turn have an effect on the scope of the relevant geographic market. Even in cases where online sales are considered to form part of the same product market, and where there is a potential for cross-border trade, certain factors may mean that the relevant geographic market remains national or even narrower in scope.
6. However, given the growth of e-commerce, it should be noted that relevant market definitions may change over time.

¹ Sweden has previously elaborated on geographic market definitions in a note presented OECD Working Party No. 3 on Co-operation and Enforcement, 28-29 November 2016, DAF/COMP/WP3/WD(2016)48. The cases described in this section are short summaries of some of the cases explored in more detail in that submission.

2.1. Premium perfume and cosmetics

7. In a 2009 merger concerning the Swedish department store Åhléns and the retailer Department & Stores², the SCA considered whether the relevant product market comprised all retail sales of premium perfume and cosmetics across distribution channels. One distinction found between physical and online sales was that the selection of products online was typically more limited than in brick-and-mortar shops. The inability to test products, inferior customer service and the perception that returns were more complicated were also disadvantages associated with online sales. The SCA ultimately found that the relevant product market comprised only brick-and-mortar shops, leading to the relevant geographic market being local.

2.2. Bookstore chains

8. In 2012 the SCA investigated the merger between two brick-and-mortar bookstore chains, Akademibokhandeln and Bokia³. The merging parties also sold books online.

9. Part of the SCA's analysis was to consider whether physical sales were constrained by competition from online sales. As part of its investigation, the SCA used exit surveys in various cities, whereby respondents were asked what they would have done if the book they had bought had not been available in the shop. Among the results, the surveys showed that only 15 per cent would have ordered the book online. The notifying parties also carried out a customer survey and submitted the results to the SCA. The results differed in some respects, however the surveys suggested that substitutability was not significant enough to justify a relevant product market comprising brick-and-mortar and online sales.

10. Ultimately, the SCA left open the precise definition of the relevant product and geographic market, as it was not necessary for the final assessment of the case.

2.3. Computer components

11. In a case concerning the merger between two retailers of computer components, the SCA's investigation found that retailers made sales both through online and brick-and-mortar shops. Brick-and-mortar shops were often seen as a complement to online sales. The SCA's findings therefore suggested that the relevant product market comprised both online and physical sales. In considering the relevant geographic market, the investigation demonstrated that Swedish consumers had a preference for Swedish retailers, and that cross-border retail was limited. Among the reasons for this were lower shipping costs and quicker delivery, as well as uncertainty over consumer protection when buying from non-Swedish retailers. The SCA therefore found that the relevant geographic market was national.⁴

² The SCA's decision of 1 October 2009 in case 524/2009 – *Åhléns/Department & Stores*.

³ The SCA's decision of 10 December 2012 in case 452/2012 – *Akademibokhandeln/Bokia*.

⁴ The SCA's decision of 2 August 2013 in case 270/2013 – *Komplett/Webhallen*.

2.4. Car dealers

12. In an investigation into a cartel among car dealers in the south of Sweden between 1998 and 2002, the SCA's investigation showed that car dealers' physical outlets were, at the time of the infringement, a more important marketing channel than the internet, particularly with respect to used cars. The SCA found the relevant geographic market to be limited to Sweden's three southernmost counties. The defendants argued, on the other hand, that as a result of marketing and information being provided on the internet, the relevant geographic market was potentially national.

13. The court sided with the SCA, but noted that online sales may indeed mean that the relevant geographic market was wider, although not national in scope. The court reserved judgement on the definition of the geographic market as it was not necessary to find an appreciable restriction of competition.⁵

2.5. Potential restrictions on cross-border e-commerce

14. Restrictions placed on cross-border e-commerce may have an impact on the expansion of relevant markets. Unjustified attempts to prevent consumers from purchasing goods from other countries furthermore disadvantage consumers, limit the growth of e-commerce, and are in conflict with the concept of the EU's internal market. In its e-commerce sector inquiry⁶, the European Commission identified several obstacles to cross-border trade. Such restrictions can, for example, take the form of preventing consumers' access to websites or refusing to accept payments from consumers outside a certain geographical area.

15. Customer preference may also play a role. The reasons for not purchasing online from retailers in other EU member states include concerns regarding delivery and return possibilities⁷. This picture of consumers' reservations about cross-border trade is confirmed by the Swedish Competition Authority's market study on e-commerce and digitalisation⁸, which involved a survey of consumers. In particular, the Swedish Competition Authority has observed that customers voice concerns over having to return defective products and get a refund or a replacement, which is perceived as more complicated and uncertain with retailers from other countries compared to domestic retailers.

16. These preferences may change with time as consumers become more used to making cross-border transactions. Initiatives from the European Commission as part of its

⁵ See judgment of the Market Court of 10 September 2008, in case MD 2008:12 – *Konkurrensverket v Aktiebolaget Bil-Bengtsson and others*.

⁶ Report from the Commission to the Council and the European Parliament, Final Report on the E-commerce Sector Inquiry, COM(2017) 229 final

⁷ Commission Staff Working Document Accompanying the Document Report from the Commission to the Council and the European Parliament, Final Report on the E-commerce Sector Inquiry, SWD(2017) 154 final, p.15

⁸ *Konkurrens och tillväxt på digitala marknader*, Rapport 2017:2, http://www.konkurrensverket.se/globalassets/publikationer/rapporter/rapport_2017-2.pdf

plan to create a Digital Single Market may also have an impact⁹. Furthermore, new rules have been put in place within the EU which will prevent unjustified geo-blocking, and which aim to facilitate e-commerce within the EU¹⁰. The rules will apply from the end of 2018, and we will hopefully soon be able to observe their effect.

3. Cases in the e-commerce sphere

17. The SCA has experience of a number of cases that can be broadly categorised as falling within the sphere of e-commerce. For example, the SCA has handled a number of investigations that looked at contractual restrictions limiting the ability of online retailers to compete. The majority of complaints the SCA now receives concerning resale price maintenance in one way or another involve issues pertaining to online distribution.

18. Furthermore, the SCA has also handled cases specifically relating to e-commerce platforms. In this contribution, for the purposes of elaborating specific considerations that competition authorities may need to take into account in the context of platform markets, these cases are divided into sections on “e-commerce” and “platform markets” respectively.

3.1. E-commerce

19. E-commerce can present potential competition issues between online and offline channels. Furthermore, within the online environment, different distribution channels have emerged where the intersection between different channels can raise issues for manufacturers trying to find optimal distribution networks for their products. The following case examples exemplify this.

3.1.1. 13:e Protein Import

20. The SCA received an anonymous tip-off which claimed that 13:e Protein Import had infringed the Swedish Competition Act through resale price maintenance in the form of a minimum resale price list for its online retailers.

21. 13:e Protein Import manufactures a wide selection of products in the market for “sport nutrition”. The company’s products are available to Swedish consumers both online and offline. In sum the number of distribution channels offering their products amounted to about 150 retailers, with about 35 channels identified as being online sales channels.

22. The investigation found that the company operated with a low market share (3%) in a very fragmented market. In the subgroup of protein powders more than one hundred different brands were identified and the majority of retailers carried close to ten different brands.

⁹ See for example the European Commission’s press release of 6 May 2015, “A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen”, IP/15/4919.

¹⁰ Regulation (EU) 2018/302 of the European Parliament and of the Council on addressing unjustified geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market.

23. Although the preliminary investigation showed that the conduct could constitute resale price maintenance, which could be considered as a hard core restriction of the EU competition rules, the SCA closed the investigation since the potential harm to competition and consumers was not significant enough to further justify a continued investigation.

24. In its decision, the SCA laid out one set of circumstances under which resale price maintenance does not pose risk of significant harm. In this case, the firm had a small market share, there were a large number of competing manufactures, the retail level was also fragmented, and there were no indications of parallel conduct among other market participants. In this type of situation, the SCA did not see a viable theory of harm that was significant enough to prioritise an in-depth investigation – even considering the relatively large number of economic theories that have been put forward over the years that deal with resale price maintenance.

25. As noted in a previous contribution to the Competition Committee, this case demonstrates that carrying out an initial investigation of market conditions can be used as a first screening tool in order to prioritise conduct with the ability to harm competition and consumers in cases regarding vertical restraints.¹¹

3.1.2. Coty

26. In 2017, the Swedish Government made a submission to the European Court of Justice regarding the preliminary ruling in the case concerning Coty Germany GmbH (hereafter Coty) and Parfümerie Akzente GmbH (Akzente)¹². The case concerned a clause in the contracts between the two parties restricting Akzente from using, in a discernible manner, third-party undertakings to sell Coty's products.

27. Compared to the previous case law of *Pierre Fabre*¹³, the present case did not constitute a limitation of all online sales channels, but only some specific online sales channels considered misaligned with the manufacturer's criteria for selective distribution and how the manufacturer wanted its products and image to be perceived.

28. The case raised questions as to how manufacturers relying on independent retailers can maintain their image in digital markets. Thus, it raised questions as to which restrictions manufacturers that value competition parameters other than price can use in their distribution channels online. Given the high transparency and ease for consumers of switching between different sales channels online, there could be considerable risks of free-riding issues that could limit demand-increasing investments made by both manufacturers and authorized retailers if vertical restraints such as the clause at issue in the case could not be used in selective distribution systems.

29. Sweden's submission to the case was in line with the judgement by the Court, and argued that bans on sales, in a discernible manner, through third-party undertakings can be used in selective distribution systems if the restrictions fulfil the criteria defined for such distribution systems in earlier EU case law. Hence, Sweden argued that third-party

¹¹ Roundtable on Safe Harbours and Legal Presumptions in Competition Law, Competition Committee, 5 December 2017, DAF/COMP/WD(2017)57

¹² Case C-230/16

¹³ Case C-439/09

platform bans can be used in selective distribution systems in order to maintain the manufacturer's brand or product image.

3.2. Platform markets

30. Business models based on digital platforms and the functioning of these platforms are described as multisided markets. Digital platforms are characterised by direct and indirect network effects, which means that the value of the platforms increases with the number of users.

31. Indirect network effects are particularly important from a competition perspective. These arise when the number of users increases on one side of the platform, which leads to the platform becoming more attractive for users on the other side of the platform. In the digitalised economy, the trend is for markets to grow and evolve ever faster. New products can emerge and very quickly create a new relevant market. Network effects often lead to a first mover advantage, meaning that a company can go from start-up to dominant in a relatively short space of time.

32. A platform can choose to apply low prices to its services, or offer them free with the aim of quicker expansion. A large number of users and access to large amounts of data can give platforms significant market power even if they initially have low turnover. This market power can, for example, be reflected in a high market value or a large number of users.

33. Swedish cases with regard to platform markets have essentially focused on three types of behaviour: exclusivity agreements, tying and price-parity clauses.

3.2.1. Exclusivity agreements

34. A complaint reached the Swedish Competition Authority (SCA) in 2015 regarding a potential abuse of dominant position made by the entrant Pizzahero against the incumbent Onlinepizza. Both Onlinepizza and Pizzahero are two-sided platforms operating in a digital market connecting restaurants to consumers mainly for the ordering and delivery of fast food. The complaint stated that Onlinepizza had issued ultimatums of exclusion from the platform for restaurants that chose to affiliate themselves with Pizzahero, essentially excluding the possibility of multi-homing.

35. In Onlinepizza's agreement with restaurants, there was no explicit clause stating that restaurants undertook to be exclusively affiliated to Onlinepizza. However, Onlinepizza did retain the right to terminate an agreement if a restaurant also chose to cooperate with a competitor.

36. The investigation found that there are about 26,500 restaurants in Sweden. Onlinepizza operates in many cities throughout Sweden, with about 1200 restaurants connected to the platform at the time of the investigation. The entrant had only recently been established in one geographical area with, at its peak, 20 restaurants connected to the platform. Of the 450 restaurants located in the geographical area of interest, 26 restaurants were affiliated with the incumbent, Onlinepizza.

37. The potential harm identified by the SCA was related to whether the competitive process was being impaired through the clause limiting restaurants' possibility to multi-home. Given the fact that the incumbent already had an established customer base whereas the entrant did not, it was considered that multi-homing by restaurants could be associated with large losses in revenue should they be excluded from Onlinepizza.

38. Onlinepizza's actions could potentially limit both the restaurants' appeal of adding additional distribution channels to operate on, and impair potential entrants' ability to compete with Onlinepizza, in essence foreclosing one side of the market, on the side of the restaurants. Given the importance of indirect network effects in platforms connecting two different types of users, Onlinepizza actions could potentially also be viewed to have impaired a healthy competitive process.

39. Two important aspects in the case were the swift and significant financial impact of a potential delisting from the most popular platform and the impact on competition between platforms in light of the importance of indirect network effects in these digital markets.

40. Onlinepizza agreed on changing the terms of their agreement with the restaurants, clarifying the restaurants' right to multi-home. With this decision the SCA found no further grounds to investigate the matter further and closed the investigation.¹⁴

3.2.2. Tying

41. The second case concerned online marketplaces for cars, where the leading online marketplace enforced a condition forcing advertisers also to advertise on its sister company's website.

42. Blocket.se is one of the largest digital marketplaces in Sweden and as such is a very attractive platform for vehicle advertisements. A case was initialized through an anonymous complaint to the SCA against Blocket AB (Blocket). The complaint contained claims that Blocket had abused its dominant position through the practice of forcing car dealers to first enter into a subscription agreement to its secondary platform BytBil.se in order to advertise on Blocket.se.

43. Through a survey directed towards car dealers the investigation revealed that more than 95 % advertise on Blocket and BytBil. Many car dealers further claimed that Blocket.se was a necessary platform to be present on. The rationale behind tying the two platforms was to segment the advertising category of cars toward the latter platform.

44. The theory of harm applied to the case was that by forcing car dealers to subscribe first to the BytBil platform, in order to gain access to Blocket.se, the owner of the platforms, Schibstedt, essentially limited the customer base for competing platforms, so called "customer foreclosure." Because of the two-sidedness of the platforms, the customers (car dealers) are an important input for other advertising platforms trying to compete with Blocket.

45. The theory of harm should therefore be seen in light of the importance of indirect network effects of marketplaces online in general. To effectively stay competitive requires a large amount of customers on both sides. Forcing companies to first subscribe to the less popular platform BytBil in order to gain access to the more popular platform, Blocket.se, could have disrupted a normal competitive process and limited the competitive pressure on Blocket.

46. The SCA closed the investigation after Schibstedt altered its business model making the platform BytBil.se an add-on service to advertising on Blocket that could be purchased separately by car dealers.¹⁵

¹⁴ The SCA's decision of 14 April 2016 in case 658/2015 – Onlinepizza

3.2.3. Price-parity clauses

47. The case against Booking was launched due to certain terms in the contracts between Booking.com and Swedish hotels. The terms stated that prices hotels offered through Booking.com must be the same or better than the prices hotels offer or apply in other sales channels, so called “price parity clauses” or “MFN-clauses”.

48. A preliminary assessment of the relevant geographic market arrived at the provision of online travel agency services with respect to hotels located in Sweden. A preliminary assessment of the relevant product market was drawn to include companies offering the range of services of searching, comparing and the ability to book on the platform.

49. The full range of services - searching, comparing and booking - thus excludes players such as metasearch sites and hotels’ own websites. The former lack the booking ability and the latter lack the searching and comparing aspect of the full range of services provided by companies considered to be on the relevant market.

50. Given the nature of the business model applied by Booking.com, a central part of the investigation regarded the potential free-riding by consumers which would be present in a counterfactual scenario without the price parity clauses.

51. The ability to search, compare and book are services highly valued by consumers. Booking.com claimed that free-riding would be widespread without price parity clauses and that the services consumers highly valued would significantly suffer as incentives to invest in these services would diminish vastly, since Booking.com’s revenue would be greatly reduced. Furthermore, no other business model was present on the relevant market than the one Booking.com also applied.

52. The free-riding argument, although also technically viable in off-line markets, has yet never been made in such markets. It is therefore, in essence, a relative novelty in the application of competition law to online markets.

53. Through surveys asking hotels how they would price between channels in a counterfactual scenario without price parity clauses and how consumers would react to price differences between Booking.com and hotels’ own websites, Booking.com was able to demonstrate the necessity of some form of a price parity clause.

54. The investigation came to an end with Booking.com accepting to change its parity clauses to include only sales channels outside the relevant market. This meant keeping parity against hotels’ own websites but not against competing platforms that offer the full range of services of searching, comparing and booking.¹⁶

55. After the ECN’s ex-post evaluation of the online hotel market, the SCA undertook outreach efforts towards hotels in Sweden informing them of the implications of the commitments for their ability to set different prices on different platforms.

¹⁵ The SCA’s decision of 15 June 2017 in case 601/2015 – Blocket

¹⁶ The SCA’s decision of 15 April 2015 in case 596/2013 – Booking.com

4. Future implications for competition law enforcement

56. E-commerce is a sales channel for manufacturers and retailers. The possible competition concerns in this context do not fundamentally differ from those that arise within brick-and-mortar retail, for example those involving selective distribution agreements or price restrictions. The majority of the cases described in this contribution, six out of nine, relate to the relationship between online and brick-and-mortar trade, while only three primarily relate to the relationship between online retailers.

57. The SCA has published a market study on e-commerce and the sharing economy in which it explored the implications for competition law and policy.¹⁷ In it, the SCA observed that existing competition law principles remain fit-for-purpose in the new economy. However, the report acknowledges that digital business models do give rise to several challenges for competition authorities.

4.1. Collusion on digital markets

58. E-commerce can be coordinated and monitored with new methods compared to brick-and-mortar shops. With the help of software and algorithms, companies can monitor and adjust prices. Technology thus lowers monitoring costs and uncertainty about competitors' prices which, in turn, increases the likelihood of sustained coordination and collusion. This applies to both vertical and horizontal coordination.

59. The technical capacity to maintain cartels therefore raises new challenges for competition authorities' investigations. It is also conceivable that the technology is so advanced that the manufacturers and retailers do not reflect over whether these functions infringe the competition rules. There may be reason to consider information campaigns about leniency programmes and general information about the application of the competition rules to e-commerce sites.

4.2. Investigative tools and methods

60. The Swedish Competition Authority's investigative tools and methods must be adapted to tackle the increased pace of change which digitalisation in general, and the emergence of platforms in particular, imply.

61. A clear challenge posed to enforcement efforts into online platforms is the complexity of the market structures that competition authorities must grasp. This is the case, for example, in terms of defining the relevant market and understanding market power. It is also true of identifying robust theories of harm. In light of increased digitalisation, it will also be essential to ensure that case handlers can acquire an in-depth understanding of new technological developments.

62. There will furthermore be an increasing need to invest in forensic IT and other technical equipment and expertise in order to make sure that competition authorities' methods for collecting and handling large amounts of data are efficient and develop in line with technological advances.

¹⁷ *Konkurrens och tillväxt på digitala marknader*, Rapport 2017:2, **Error! Hyperlink reference not valid.**

63. Furthermore, given the likely pan-European or global dimensions of future cases related to e-commerce, there is a pressing need for effective cooperation mechanisms for competition authorities.

4.2.1. Challenges posed by fast-moving markets

64. Timely intervention is of the utmost importance when it comes to e-commerce platforms. It is crucial that when a competition authority intervenes, it does so at the right time so as not to hamper innovation. At the same time competition authorities must not act too late, since network effects may mean that a failure to stop exclusionary behaviour at an early stage can have long-lasting negative effects.

65. The fast-moving nature of digital markets also poses a challenge with respect to the length of investigations. Competition cases often take a long time to investigate, prove and defend in subsequent court proceedings. By the time a final outcome is reached, the market concerned may have been irreparably changed. This is even more acute in cases involving complicated analyses of large data sets or new markets with features such as multi-sidedness or sharing economy aspects.

66. The SCA will always consider if there is room for commitments or other forms of self-correction before going to court. This may particularly be relevant in e-commerce conduct that gives rise to legitimate business concerns, such as the need to reduce free-riding on services, which must be balanced against harmful effects that arise from the same behaviour. By taking this approach, not only can more timely intervention be ensured, it can also mean that scarce resources can be used elsewhere.

4.3. Implications for merger control

67. There is, finally, a risk that mergers between platform companies with a low turnover but strong market power are not caught by existing thresholds for merger notifications, despite the fact that the merger could significantly impede competition on the market. The SCA has in recent years assessed two such mergers which ultimately were not completed.

68. One way to allow the investigation of the effect of certain mergers on competition could be to supplement existing thresholds with thresholds that consider transaction value. These markets are fast-moving and an obvious advantage with a transaction value threshold in merger cases is that it would take account of the expected future development of the company concerned, while turnover is solely historical.