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Optimal Design, Organisation and Powers of Competition Authorities – Note by Sweden

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More documents related to this discussion can be found at
<https://www.oecd.org/competition/optimal-design-organisation-and-powers-of-competition-authorities.htm>.

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1. Introduction

1. This paper begins by outlining the structures and mechanisms that the Swedish Competition Authority (SCA) has established to enhance its capacity to effectively identify and respond to emerging challenges. It then describes a number of contemporary challenges that have been addressed by the authority in its operational planning in the form of strategic focus areas. The paper continues by focusing on the question of digitalisation, which has proven to be of significant and ongoing importance for the internal organisation and operations of the SCA. Following the structure of the call for contributions, the paper first looks at the question of resources, followed by investigative tools and process and lastly enforcement powers.

2. Mechanisms to identify and respond to contemporary challenges

2. The SCA has a number of mechanisms and structures in place to ensure that it is well placed to identify and respond to emerging challenges.

2.1. Identifying challenges

3. The authority's enforcement work is key to understanding competition issues of broader relevance for the authority's operations. Among other things, a centralised team for handling tip-offs and complaints ensures that such matters can be dealt with in a systematic and coherent way, and that trends in alleged competition problems can more easily be identified and tracked. The same team has the responsibility for the external monitoring of media and other channels.

4. The competition authority's advocacy and research work also feed into identifying future challenges. The authority has a dedicated budget for funding legal and economic research into competition and procurement matters, and additionally arranges an annual competition economics conference which aims to address cutting-edge questions of relevance to the authority.

5. Regional and international cooperation is also an important means to stay up-to-date about contemporary issues. Among other things, the Nordic cooperation and the European Competition Network ensure that relevant staff are kept informed of emerging enforcement issues and market behaviours. The OECD Competition Committee is also often at the leading edge when it comes to future substantive focus areas.

6. The SCA has furthermore established an effective cooperation with national authorities. In the context of digitalisation, the SCA has worked with the Swedish Authority for Privacy Protection and the Swedish Consumer Agency to deepen the authority's understanding about how data can affect market conditions or firms' incentives. The three authorities have held joint seminars and other dialogues on the role of data, the possibilities and challenges that data collection poses in the digital economy, and, how the digital economy changes affect our authorities' tasks and policy approaches.

7. The authority additionally arranges meetings with external legal counsel for exchanges of views about competition enforcement. These are not case-specific meetings, but rather forums for the SCA to provide information on its work and methods, as well as

to gather views on contemporary issues that external counsel have observed. In addition to this, the SCA invites legal counsel and others to submit comments on updates to the authority's enforcement prioritisation policy that take place approximately every second year.

2.2. Responding to challenges

8. The SCA has furthermore put various structures and mechanisms in place to be able to respond effectively to the challenges identified within its remit. In 2019, the role of chief development officer was established, which involves having responsibility for overarching development and methodological questions across the authority.

9. Among other things, the chief development officer has a central role in producing the authority's three-year rolling operational plan. The operational plan identifies goals for the authority and strategic focus areas that guide the direction of its work.¹ These focus areas often reflect broader contemporary challenges that require concerted, strategic efforts to address them. Some of the contemporary challenges that have been identified as strategic focus areas in recent years include IT-forensics and digital tools, the sharing economy, sustainable development, Covid-19, competition on digital markets, publicly-financed services, and competition in times of crisis.

10. As can be noted from this list, the overarching theme of digitalisation has had a significant and ongoing importance for the strategic focus of the SCA in recent years. The following sections address various developments in terms of agency resources, tools and powers in response to digitalisation.

3. Resources

3.1. Recruitment and integration of digital specialists

11. The SCA has seen a need to diversify the roles within the authority in order to meet newly identified challenges resulting from digitalisation. The authority recruited its first IT forensic expert in 2018 as part of efforts to enhance its capacity during the planning and execution of dawn raids. At present the authority has five IT staff that work both with network infrastructure and support to case teams in terms of IT forensics.

12. The SCA furthermore began recruiting data scientists in 2021 in response to increased needs to handle and analyse data effectively in different areas of the organisation. At present the authority has three data scientists whose tasks involve data gathering, processing and analysis. The authority came to the view that it is not entirely possible to train the required skills solely within existing traditional roles at the authority.

13. Formally, the SCA's data scientists form part of the Chief Economist's Unit, while IT staff belong to a different unit. Integration of these roles within the broader work of the authority is facilitated by the fact that investigations and studies are largely project-based, with cooperation between staff from different units being the norm for most larger cases.

¹ See for example the Swedish Competition Authority's operational plan for 2023-2025, available at https://www.konkurrensverket.se/globalassets/dokument/om-oss/konkurrensverkets-verksamhetsplan_20232025.pdf

3.2. Knowledge-sharing and continuous learning

14. Beyond the question of recruitment of digital and technological experts, digitalisation also places demands on the SCA to ensure that staff in traditional lawyer and economist roles acquire and maintain the necessary expertise to be able to understand complex markets with novel business models and technologies, and effectively enforce the competition rules on these markets. This can, for example, involve developing an understanding of theories of harm and market power on digital platform markets, or how to understand the legal requisites related to anticompetitive agreements in the context of algorithmic price-setting.

15. Knowledge-sharing and continuous learning about digital markets can be acquired through training or through cooperation in the manner discussed above. However, an important source of knowledge is the enforcement work and market studies carried out by the authority. For example, the SCA completed a sector inquiry into digital platform markets in 2021.² In this study, the authority analysed five selected markets to assess whether there were obstacles to effective competition on digital platforms, and whether it was possible to exercise effective enforcement, or if there is a need for regulatory reforms or complementary regulation. The inquiry involving various staff from the authority's market abuse and chief economist's units. The SCA has also pursued various cases involving digital markets over the last 10 years, including online hotel booking, food delivery platforms, car advertising platforms, mobile payment solutions for parking, and fitness aggregators.

3.3. Organising and allocating resources to ensure efficient enforcement

16. The SCA has recognised the need to be able to respond swiftly to market developments and allocate resources where they are most needed. This may, for example, be necessary when a case involving interim measures arises that requires prompt action. To enable this kind of reallocation and re-prioritisation, it is necessary to have a proper overview of resource allocation at any given time. The authority has therefore introduced more control points during its investigations, and developed digital tools to track the resources used in each ongoing case.

4. Investigative tools and processes

17. In addition to supporting case teams with analytical expertise, the authority's data scientists also have a role to develop tools that can assist in investigations. A key challenge of competition enforcement in the digital era is the increasing volume of materials that need to be searched through in the course of dawn raids. The development of tools to assist in the speedy and accurate finding and screening of documents is therefore a priority.

18. One example of work that is currently under development involves word searching capabilities. During investigations, the authority receives numerous documents and files. The documents are read by investigators in a time-consuming process, which can be decreased by flexible filtering. The goal of the tool is to enable word and concept searching between files and folders.

19. A second development that may compliment word searching capabilities is increased optical character recognition (OCR) tools. Without effective OCR tools, files are

² Konkurrensverket (2021) Konkurrensen på digitala plattformsmarknader i Sverige, rapport 2021:1

not machine-readable and cannot be accessed in other programs. A simple OCR tool is being developed by the SCA, relying on open-source pre-trained models, improving the accessibility of documents in current and past investigations. The tool has a graphic user interface and requires no programming skills.

20. A challenge that the SCA has encountered is that data protection rules limit the extent to which cloud-based services can be used. The SCA has therefore had to build certain tools from scratch that might otherwise have been available off the shelf, sometimes for free. For the same reason, many pre-existing generative AI tools cannot not be utilized by the authority.

5. Enforcement powers

5.1. New competition tools

21. The competition rules have historically been shown to be flexible and capable of addressing new business models, technological developments and market conditions. Examples from the SCA's enforcement work demonstrate that traditional competition law prohibitions are often capable of addressing conducts that give rise to competition concerns, including on digital markets.

22. At the same time, the SCA's work on digital platform markets, as well as other non-digital markets, has led the authority to conclude that the competition rules are not always sufficient to deal with particular structural or systemic issues, and when markets are fast-moving.

23. The EU's Digital Markets Act (DMA) is an important addition to the European toolbox for ensuring well-functioning digital markets. However, its scope is limited to large digital platforms ("gatekeepers") in their actions in core platform services.³ The SCA has identified the need on a national level to introduce a new flexible tool that can complement the current competition rules and correct structural competition problems that concern entire markets or sectors. The SCA's view, based on its studies into different sectors, is that it would be beneficial for these tools not to be limited solely to digital markets. The Swedish government has recently appointed an inquiry to look into the question of possible new competition tools, which will report back at the start of 2025.

5.2. Interim measures

24. Interim measures can also be an important tool to respond to competition problems in fast-moving markets, including those prone to tipping. While this is not a new tool for the SCA, it has been used with greater frequency in recent years. One such case with a digital dimension involved a so-called fitness aggregator, a company that offered customers access via an app to various fitness studios with which the company has concluded agreements.⁴ The agreements that the company had entered into were concluded in such a way that they prevented fitness studios from signing agreements with other fitness aggregators. The SCA imposed interim measures prohibiting the company from applying these agreements while the SCA's investigation was ongoing. The investigation was

³ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

⁴ Case 572/2019.

ultimately concluded after the company offered commitments to stop applying the agreements in question.

25. Other recent cases where the SCA has imposed interim measures include *Nasdaq Stockholm Aktiebolag*, which concerned the secondary listing of shares listed on a rival's SME growth market without obtaining the issuers' consent,⁵ and *Svensk Mäklarstatistik*, which involved the termination of an agreement to supply data on the property market to another company.⁶

5.3. Merger control

26. The Swedish merger control regime provides for the possibility for the SCA to request the notification of a merger where the total turnover threshold is met but not the individual turnover threshold, if there are particular grounds to do so. Undertakings may also choose to voluntarily notify a transaction that meet this residual turnover threshold. Examples of what may constitute "particular grounds" include situations where an already strong undertaking acquires small competitors one by one, or when a strong undertaking in a concentrated market acquires a newly established undertaking that could possibly challenge the position of the acquirer in the future. This power has been used by the SCA in certain cases with a digital dimension,⁷ but it is not exclusively designed for this purpose.

27. The SCA also takes note of the guidance from the European Commission regarding the power for national competition authorities in the EU to refer mergers to the Commission that fall below the national thresholds under certain circumstances,⁸ and the judgment of the General Court of the EU confirming this possibility.⁹ This has the potential to be a useful tool when it comes to addressing killer acquisitions, which is one concern often raised in the context of mergers on digital markets. The SCA has made referral requests regarding two mergers which were not notifiable to the Commission or the individual Member States. One of these had a digital dimension, involving suppliers of technology that is important for the deployment of self-driving vehicles.¹⁰

28. Furthermore, pursuant to the DMA, gatekeepers have an obligation to inform the European Commission of intended mergers that involve core platform services or other digital services, or enable the collection of data. On a national level in Sweden, the government-commissioned inquiry mentioned above will also look into the question of whether new duties should be imposed on companies to disclose mergers that fall below the mandatory thresholds. The inquiry will also report its conclusions on this matter by early 2025.

⁵ Case 366/2022. The investigation was closed in October 2022, after the undertaking announced that it would not offer the shares in question without the issuers' explicit consent.

⁶ Cases 348/2021 and 475/2021. The interim decision was upheld in court. The SCA ultimately closed the investigation without taking further action, meaning that the interim decision no longer applied.

⁷ Easypark AB and Inteleon Holding AB, case 698/2019

⁸ Communication from the Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases 2021/C 113/01

⁹ Judgment of the General Court in Case T-227/21, *Illumina v Commission*. The case has been appealed to the Court of Justice of the EU.

¹⁰ Case M.11212, *Qualcomm / Autotalks*