Kluwer Competition Law Blog

Change in the air in Sweden and beyond: does your competition law compliance need a Spring clean?

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Major amendments to competition legislation are expected to add more bite to the bark of Sweden's antitrust watchdog.

On 1 March 2021, the Swedish Competition Authority (SCA) gained a number of new powers and introduced some related changes to its routines. Specific to Sweden but with broader resonance in real terms, this is a good moment to take stock of your organisation's existing competition law compliance framework: is a refresh needed to remain fit for purpose?

The main thrust of the changes is to broaden and deepen the SCA's enforcement and sanctioning toolbox in its work against anti-competitive agreements and abuse of a dominant position in order to improve alignment throughout Europe. The merger control rules are unaffected, with transactions impacted only insofar as an assessment of risk during due diligence, integration or post-acquisition audits must evolve to keep pace with these developments.

What has changed and how to react?

Based on a number of central themes, we set out below some of the main changes to Sweden's competition legislation and offer our reflections on what to think about in practice:

1	**New powers to conclude an investigation**
Change	**Action**
The SCA no longer needs to go to court to impose a fine on a company for a competition law infringement and instead is now able to do so directly (with rights of appeal to the courts).	There are significant timing and process implications resulting from this change, even if these are more relevant to actual investigations than a compliance context.

The SCA is now able to impose (proportionate) structural and behavioural remedies to bring an infringement effectively to an end, such as divestments or firewalls. This kind of measure may be used, for example, to address distortive market concentration arising from joint ventures (potentially leading to outcomes similar to this Dutch case in the concrete sector).	Consider adjusting the list of potential investigation consequences (often found in the primary competition law compliance policy) to cover this outcome. Training materials may also need to be updated. More generally, it is important to remember that structural ownership, for example in a joint venture context, is not a safe harbour from SCA intervention if it creates competition concerns.

2 New powers to respond to a failure to cooperate during investigations

Change	Action
The SCA has gained the power to levy a new form of fine for failure to cooperate during an investigation (*Sw: utredningsskadeavgift* or 'investigation fine'). For example, the fine can be imposed for: • intentionally or negligently providing incorrect, incomplete or misleading information during an investigation; • failing to provide information requested by the SCA by the deadline stipulated; and • failing to appear for an interview. See also Theme 4 below for further examples of investigation fines in the context of dawn raids.	Review compliance documents, internal processes and training materials to ensure that employees understand the new consequences of failure to cooperate with the SCA. The legal maximum for this kind of penalty is one percent of an undertaking's turnover in the previous financial year.

3 Consequences for trade associations and members

Change	Action
Where a trade association is fined for an infringement relating to the activities of its members, the maximum fine can now be calculated by reference to the members themselves, i.e. 10% of the combined worldwide turnover of the members operating on the market affected by the infringement. Where a trade association is unable to pay a fine imposed by the SCA, relevant members may be required to contribute (up to the standard 10% turnover cap). A member will not be fined in this way where it can demonstrate to the SCA that it did not implement the infringing decision of the trade association and was either unaware of it, or distanced itself from the behaviour prior to the SCA's involvement.	We recommend: • reviewing the trade associations part of your main competition law compliance policy, as well as any supporting documents and systems on interactions with competitors more generally; • training for trade association participants, increasing awareness of healthy meeting discipline, sensitive information exchange and need for public distancing; • introducing a robust trade association vetting process to weed out any organisations failing to live up to appropriate standards. The new rules trigger a need actively to engage in this audit process and break ties with trade associations that do not provide the necessary comfort. Note that public distancing requires rather specific actions. Remaining involved in suspicious behaviour for fear of being impolite, or failing to request that your company be removed from an invite list does not meet the standards required!

4 Consequences for dawn raids management

Change	Action

Subject to court approval and in addition to existing powers, the SCA is now also able to carry out a dawn raid relating to: • suspected violations of a decision ordering that an infringement be terminated; • suspected violations of a commitments decision; and • behaviour that might justify imposing an 'investigation fine' (see Theme 2 above).	Check to see if there is a section in your dawn raids guidelines detailing possible 'reasons for raid' and update as required. Dawn raid training materials may also need to be broadened.
It is now no longer necessary for the SCA to secure the consent of a raided company to continue an inspection off-site, for example, back at the SCA's own premises, irrespective of the form of the data (physical, digital, original) or storage medium. It is already standard SCA practice to mirror digital data.	Dawn raids guidelines should be updated to avoid employees inadvertently obstructing an SCA inspection, e.g. by attempting to refuse consent that is no longer required. A company retains the right to have legal counsel present at the SCA to oversee the off-site review process.
The SCA now also has extended powers to: • access any information accessible from the company subject to the inspection, irrespective of its form; • carry out an inspection at the home of a board member, or other employees of a company (previously allowed only in relation to 'serious' infringements); • seal business premises, accounting and business documents where necessary; and • access trade secrets of a technical nature (assuming relevant to the scope of the inspection). Previously, a company could refuse to disclose such information but that protection has been removed.	Some of this is clarification rather than revolution but overly Sweden-centric dawn raids guidelines may have become misleading and require some edits to track the greater freedom now afforded to the SCA. Now more than ever, it is important for companies to have a clear understanding of their digital environment and IT infrastructure – what information is stored where, who has access, what devices are employees using (in particular in a working from home context), what communication methods are used etc? A mapping process, distilled into an internal guidance document, could significantly improve dawn raid management in the event of an inspection, as well as reduce ongoing risks that can arise in an IT context (e.g. policies on multiparty chatrooms with competitors). The increased scope to raid private homes, coupled with the marked rise in working from home, means that companies need to check that their dawn raid guidelines cover how to manage this very specific and stressful event.
The right against self-incrimination is now codified and clarified, which means a party cannot be required by the SCA, as part of a duty to provide information, to admit to an infringement.	This follows European Commission practice and case-law and is a typical benchmark in most dawn raids guidelines. If in doubt about when to cooperate and when to be silent, employees should simply be trained to seek input from legal counsel.
The SCA can now impose 'investigation fines' (see Theme 2 above) for: • obstructing a dawn raid; • breaking a seal affixed during a dawn raid; and • failure to provide an answer – or providing incorrect or misleading information – in response to an appropriately scoped SCA request for a factual explanation during a dawn raid.	These changes put the SCA's powers more on a par with those of the European Commission. An inspection by the SCA should be managed by a company with the same care and respect as a visit from the European Commission. Dawn raid guidelines should be reviewed for consistency.

5 Consequences for leniency

Change	**Action**

Changes have been made to the Swedish system to improve alignment with the EC leniency programme. Immunity (no fine) will now only be available to the first company to meet the relevant standard – either by providing information allowing the SCA to intervene, or helping to show an infringement has occurred in cases where the SCA is already generally aware. This means that immunity is no longer available for other significant contributions, albeit lesser reductions in fines remain possible.	It would be unusual for a compliance policy to contain granular detail on the various forms of leniency available to a company – essentially, a reduction in fines in return for cooperation – but this topic may be touched upon in related contexts, such as dilemma training, or document management guidelines, in which updates may now be necessary.
New protections have been introduced in relation to how leniency and settlement submissions will be treated by the SCA and restrictions on their use in related proceedings, in Sweden and the rest of the EU.	Awareness of these new rules is less relevant to compliance but important for strategy as it concerns leniency and private damages actions.

What has triggered these changes?

Most of these amendments are necessary to implement the so-called ECN+ Directive, which is aimed at increasing harmonisation of enforcement between competition authorities throughout Europe. Depending on the existing baseline in other EU Member States, some of these changes will recently also have been introduced in other parts of Europe too (for example, see this blog post). Keep this in mind when reviewing your compliance readiness – i.e. lift your gaze from Sweden and the Nordics to broader European dust down.

While in spring-cleaning mode, it makes sense also to reflect on whether your compliance framework is robust enough to manage the extra challenges posed by remote working practices, triggered by the Covid-19 pandemic but to some extent here to stay. Reduced staff interaction and the resulting impact on transparency are factors in our new reality and systems need to develop to reflect that (see more here for some interesting in-house perspectives on this angle).

Many organisations already strive to have uniform compliance policies applicable across their geographic footprints. The more high-level and less Sweden- or even EU-specific your organisation's compliance policy documents are, the fewer changes are likely to be necessary as a result of the changes detailed in this bulletin. That said, there are a number of important shifts on the near horizon about which it is important to be aware, not least in terms of compliance training for employees.

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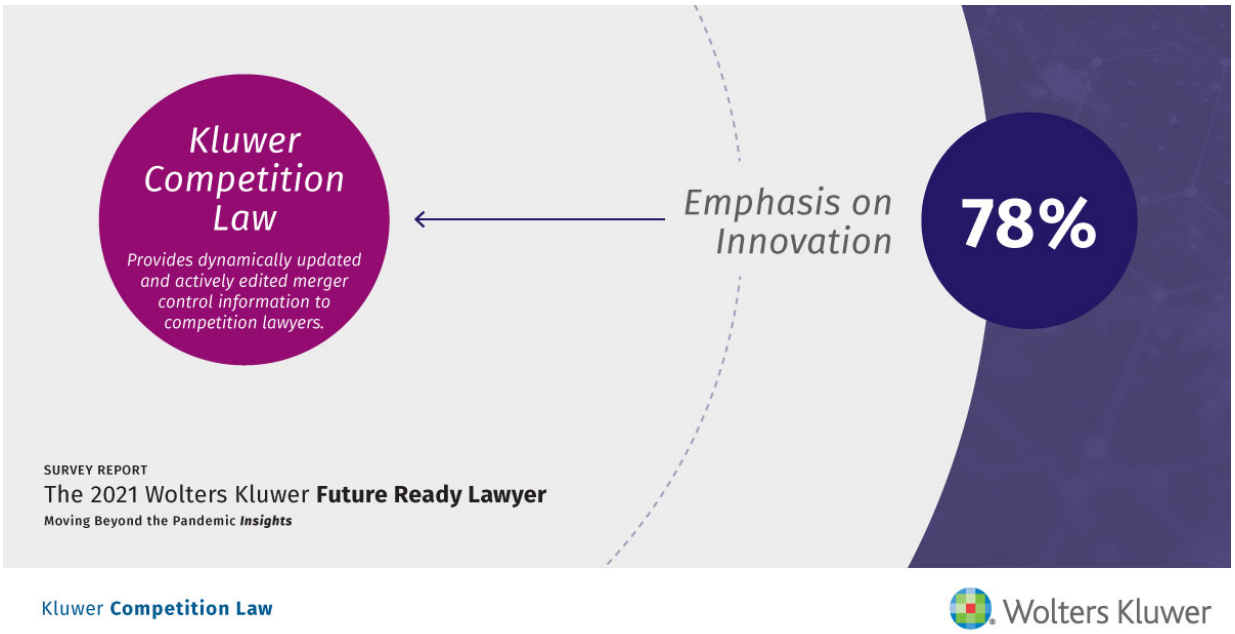

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