

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2023 – Sweden

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With 2023 now in hindsight, it is time to take stock of what happened in the Swedish competition law arena last year. To sum up, while the number of dawn raids remains low, the Swedish Competition Authority ('the SCA') has been active during 2023, carrying out a sector inquiry into the food industry and pursuing several investigations against companies suspected of competition law infringements. The authority appears to be zooming in on vertical restraints as three of the cases reported below concern anti-competitive clauses imposed by suppliers. Two of these deal with the conditions for online sales. Whereas one was closed after commitments, the other ended with record fines.

Despite the recent downturn in the Swedish economy, the number of concentrations notified to the SCA has remained high, perhaps even too high. In November 2023, the SCA had to clear a concentration despite competition concerns, declaring that the time bar had prevented it from carrying out further investigative measures to complete the investigation.

Despite a heavy workload, the SCA is eager to take on new challenges. In October 2022 it expressed the desire to receive new weapons against structural market inefficiencies. The authority now appears to be one step closer to attaining such powers, as the Swedish government recently commissioned an inquiry to investigate the need for new and expanded tools. The inquiry shall present its findings in February 2025.

Below are some highlights from 2023.

The SCA Imposes Record Fine for Resale Price Maintenance

On 20 December 2023, the SCA issued a [decision](#) against Tapwell, a manufacturer of kitchen and bathroom faucets and showers, for having fixed the prices and terms for the online resale of its products. The fine of MSEK 16.9 (approx. MEUR 1.5) is the highest fine imposed by the SCA since the authority obtained fining powers in March 2021. Furthermore, it is the highest Swedish fine yet for a vertical restraint.

In its decision, the SCA found that Tapwell had implemented a pricing policy where the retail prices of products sold online were not allowed to be more than ten per cent lower than the recommended prices. Tapwell enforced the policy by sending text messages and emails to retailers

that deviated from the policy, indicating that their prices were too low. Furthermore, Tapwell monitored price adjustments through certain price comparison services. Tapwell subscribed to the automatic message service of those price comparison services, and once it received a notification that a retailer was implementing a price cut, it forwarded such notification to the retailer in question requesting the retailer to adjust the pricing level. In its decision, the SCA applied the criteria set by the Court of Justice of the European Union in *Super Bock* and found the restriction to be a by-object restriction.

While there were indications that several retailers had adhered to Tapwell's pricing policy by adjusting their retail prices following instructions from Tapwell, the SCA's investigation only concerned measures taken by two of Tapwell's retailers. In the end, the SCA only fined Tapwell for the infringement.

Tapwell has appealed the decision to the Swedish Patent and Market Court.

Finnair Escapes a Fine after Having Agreed to Amend its Online Sales Policy

Whereas Tapwell received a record fine, the Finnish airline Finnair escaped fines after having agreed to amend its policy for online sales of its tickets.

In 2020, the SCA received a complaint according to which Finnair prevented online travel agencies from freely promoting offers and discounts on the company's airline tickets to customers searching for flights on the internet, usually through price comparison sites. Not only did Finnair, prevent the online travel agencies from promoting offers and discounts, but those agencies that failed to comply with Finnair's requirements were no longer allowed to sell the company's tickets.

During the investigation, the SCA examined whether the agreements with the online travel agencies were agency agreements falling outside the scope of Article 101 TFEU or Chapter 2, Section 1 of the Swedish Competition Act. Finding that the criteria set out in the Commission's guidelines to the Vertical Block Exemption Regulation did not apply, it concluded that the agreements came within the scope of the competition rules and that they were also likely to be restrictive of competition.

Finnair offered commitments both in 2022 and 2023, but these were not accepted by the SCA. After continued discussions, the airline offered new commitments in May 2023. This time the SCA accepted the commitments that Finnair would no longer restrict how online travel agencies market discounts on the airline's prices. The SCA considered that the alleged infringement would thereby cease. The commitments are valid for five years and are subject to a penalty payment of SEK 100 million (approx. EUR 9 million) that a court can impose at the request of the SCA should Finnair fail to comply with the commitments.

The SCA Closes Investigation following Commitments from Breweries

In November 2023, the SCA closed its investigation against the two breweries Carlsberg and Spendrups following commitments from the two beer suppliers in relation to their sales of strong beer to hotels and restaurants. The SCA's preliminary conclusion was that individual volume

commitments and other conditions that encouraged customers to concentrate their purchases with their main supplier collectively had an anticompetitive effect on the Swedish market. According to the SCA, these conditions appeared to lead to a significant portion of customers on the market choosing to limit their purchases from other suppliers to avoid breaching their volume commitment and not to risk sanctions from their main supplier.

The SCA closed the investigation after the two breweries had committed to set customers' individual volume commitments in a way that would allow those customers to turn also to other suppliers without having to fear any sanctions from the two breweries. The commitments also make it easier for customers who borrow draught beer equipment from Carlsberg or Spendrups to sell draught beer from competitors. This means that more breweries can have significantly improved opportunities to supply strong beer to Carlsberg's and Spendrups' customers, thereby increasing consumer choice, the SCA concludes in its [decision](#).

The commitments are valid for six years and are associated with a penalty payment of SEK 50 million (approx. EUR 4.4 million) that a court can impose at the request of the SCA should the breweries fail to comply with their commitments.

Fines Imposed on Transport Suppliers for Market Sharing Arrangement

In July 2023, the SCA found that the two suppliers of temperature-controlled transports, Norrmejerier and Frigoscandia, had engaged in a market sharing arrangement and imposed a SEK 7 million (approx. EUR 650 000) fine on Norrmejerier. As Frigoscandia had reported the breach to the SCA in 2021, it was granted immunity from fines.

In 2011, Frigoscandia and Norrmejerier's subsidiary Lincargo entered into a collaboration agreement. As part of the arrangement, the two parties agreed to act as each other's subcontractors on certain transports in the Northern parts of Sweden and to refrain from competing for one another's customers. For a decade, the two companies did not work in parallel with the same customers nor did they cultivate relationships with one another's existing customers. The agreement was in force until 2021 when the parties agreed to amend it and remove the clauses on market sharing. Frigoscandia then decided to report the agreement to the SCA which found it to be contrary to the prohibition against restrictive practices laid down in Chapter 2, Section 1 of the Swedish Competition Act.

While the Commission's leniency programme lost some of its attractiveness – at least for a while – following the launch of the EU private enforcement regime, the SCA appears to have seen an uptick in the number of leniency applications. Unlike the Commission which used to receive a steady flow of leniency applications, the Swedish system has been on the brink of disuse ever since it was first introduced. However, this is the second decision in less than a year where one party escapes a fine following a leniency application.

The [decision](#) to impose fines on Norrmejerier has not been appealed.

The SCA Clears Merger despite Competition Concerns

On 1 November 2023, the SCA unconditionally cleared Remondis Group's acquisition of Delete Group, despite having concerns that the transaction could restrict competition. In its [decision](#), the SCA stated that, due to the statutory deadlines, it did not have enough time to investigate the concentration closely enough to provide sufficient support for an intervention, nor to dismiss the concerns about competition problems. The SCA therefore had to clear the concentration. It is unfortunate that a transaction is cleared due to lack of time, rather than its lack of effect on competition.

Remondis, a provider of recycling, industrial and scaffolding services, notified its acquisition of Delete, a provider of environmental and cleaning services, in June 2023. In its notification, Remondis identified a horizontal overlap regarding industrial cleaning services, but argued that these services were part of the larger relevant product market of cleaning services and that the relevant geographic market was at least national in scope.

After its initial assessment, the SCA declared that it did not agree with the market definitions, finding the markets to be narrower in scope. According to the SCA, the relevant product market should be limited to industrial cleaning services and could possibly be segmented even further. Furthermore, the SCA assessed that the geographic market likely consisted of five regional markets rather than one national. Applying these definitions, Remondis would gain significant market power on some markets following the concentration.

The SCA eventually sent a statement of objections to the parties where it provisionally considered prohibiting the concentration. In its comments on the draft, Remondis criticised the SCA's market definitions, arguing that the competitive conditions did not vary enough between the regions to justify the definitions suggested by the SCA. Remondis also criticised the SCA's estimate of the total size of the market as well as the limitation of the product market to only comprise industrial cleaning services.

In its decision, the SCA concluded that the investigation still contained ambiguities and that it was not sufficiently robust for the SCA to intervene against the concentration. Due to the statutory deadline, the SCA did not have time to undertake further investigative measures to complete the investigation. It therefore cleared the concentration.

The SCA is One Step Closer to Receiving New Powers

Following two sector inquiries, the SCA announced in October 2022 that it considered the existing competition rules to be inadequate and not sufficient to ensure competitive and well-functioning markets in Sweden. It therefore requested new and more flexible tools to remedy problems in markets already suffering from weak competition, but also to prevent competition from being weakened in the first place, including structural and behavioural remedies. The Swedish Government appears to agree that new tools may be required as it has now decided to commission an inquiry to investigate the need for new and expanded tools in this area. The inquiry shall present its findings in February 2025.

More precisely, the inquiry shall investigate:

- the need for a new and broader tool to complement those now available to the SCA under the Swedish Competition Act, and

- whether companies should be required to inform the SCA of transactions that are not notifiable under the Competition Act.

Depending on the outcome of such investigation, the inquiry shall also propose new legislation to meet any needs identified. That said, we may expect a more aggressive approach from the SCA already now, not due to amended rules, but to a significant increase in the authority's budget.

Sector Inquiry into the Food Industry

The SCA is currently carrying out a sector inquiry into the food industry, examining potential competition problems within the industry. Within the current work of examining the food industry market the SCA is pursuing several parallel subprojects. The authority seeks to increase its understanding of the connection between efficient competition and the establishment of new retail stores, and the possibilities for specialist wholesalers to expand in the market. It has also declared that it examines the flow of money in selected product groups to enable us to identify unjustified price increases. The inquiry is expected to be finalised this spring.

Reflections on the Year that has Passed

After a number of years where the SCA has kept a rather low profile, its enforcement activity appears to be picking up speed and visibility. With a significantly increased budget, we expect the authority to become even more active in the coming years. Worth noting is that the SCA is one of the strongest proponents to the Commission's new approach towards Article 22 of the EU Merger Regulation which allows the Commission to review mergers below both EU and national thresholds. In two of the three referrals made to the Commission so far, the SCA has been one of the national competition authorities requesting the Commission to examine the transaction.

Companies active in Sweden should thus not only fear the prohibitions against abuse of dominance and restrictive practices but should also carefully assess any mergers affecting the Swedish market also where the thresholds for review are not met.

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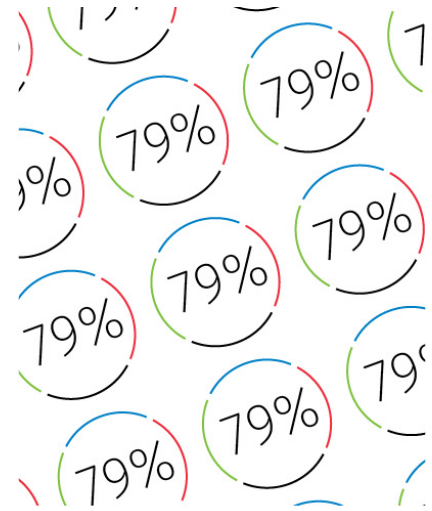
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