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REGULATORY REFORM IN SWEDEN

THE ROLE OF COMPETITION POLICY IN REGULATORY REFORM

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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AND DEVELOPMENT

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FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on The Role of Competition Policy in Regulatory Reform analyses the institutional set-up and use of policy instruments in Sweden. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Sweden* published in 2007. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 23 member countries as part of its Regulatory Reform programme. The programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses, drawing on the 2005 *Guiding Principles for Regulatory Quality and Performance,* which brings the recommendations in the 1997 *OECD Report on Regulatory Reform* up to date, and also builds on the 1995 *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation.*

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness and on specific issues, such as multi-level regulatory governance and environmental policy for Sweden. These are presented in the light of the domestic macro-economic context.

This report was prepared by Michael Wise in the Directorate for Financial and Fiscal Affairs of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Sweden. The report was peer reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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Summary

In the early 1990's Sweden made an impressive change in the direction of its competition law and policy. A wave of product market liberalisation was supplemented by a new Competition Act and a new Competition Authority, superseding a model that had been applied for almost 40 years. Where enforcement action earlier had relied chiefly on information, influence and negotiation, the new competition regime was based on clear rules and vigorous intervention against infringements, inspired by the approach of the European Communities.

Swedish competition law rests upon the three cornerstones prohibition of restrictive agreements, prohibition of abuse of dominance and control of concentrations. Both primary and secondary legislation are largely copied from EC provisions. Special exemptions from the prohibition of restrictive agreements apply in two sectors: agriculture (including forestry and gardening) and taxi transport. Otherwise the wide coverage of the Competition Act is notable, largely avoiding sectoral exemptions and special regimes.

The institutional setup includes the Competition Authority and two courts, the Stockholm City Court and the Market Court. The Market Court is last instance for competition cases, and its rulings cannot be reviewed by Government. The Competition Authority has a staff of approximately 100, which is neither exceptionally high nor low for a country of Sweden's size, and it allocates two thirds of its resources to law enforcement and the remaining third to competition advocacy.

In recent years the pace of change has decelerated. Nonetheless, important recent developments include the introduction of a leniency programme and implementing procedural changes following from the EC modernisation program. Opportunities for further improvement remain in many areas where pro-competitive reform could enhance market efficiency. Factual and analytical input to this process has been provided by many sources like Governmental Committees, government agencies – including the Competition Authority – and independent research institutes, academia and think tanks. Some possible reforms have been discussed at length, dealing with areas such as public procurement, bodies of government making business in competitive markets, fine-tuning of earlier regulatory reform and continued liberalisation of regulated or monopolised markets.

The Swedish Competition Authority is a robust public agency, well matching the size of the economy and with a clear identity, nationally as well as in the Nordic, European and international arena. Its approach to competition policy is broad, including not only law enforcement but also advocacy for pro-competitive reform, action to strengthen the competition culture and an active dialogue with and support to academic research. But there are also aspects of Sweden's competition policy work that should be examined. Reliance on informal resolution of cases may save resources, but it also reduces transparency. Courts have appeared sceptical of the SCA's cases, and competition cases take a long time between initiation and final resolution. Yet in the end, sanctions are not sufficient to deter. The balance of resource allocation between advocacy and enforcement may need adjustment. Broad studies, although informative, may be less useful than focused ones in promoting reform. Advocacy results are mixed. The Competition Authority's resources have been cut down in recent years – even in nominal terms. The Competition Authority needs stronger legal and economic capacities. The terms of appointment for the Head of the Competition Authority and the President of the Market Court may raise concerns about their perceived independence. The Competition Authority has limited powers in law enforcement.

After 15 years with a fundamentally reformed competition regime, the system may now be ripe for a next step. The Competition Act and Authority launched in 1992-1993 marked a decisive shift towards a more judicial and rules-based approach. But some traits from the earlier model seem to remain. Issues relating to powers, independence, sanctions and impact of advocacy may be addressed by the following policy options:

- Confer powers to decide fines to the competition agency.
- Strengthen the independence of the competition agency and the Market Court.

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– Strengthen sanctions for serious violations by introducing administrative fines for individuals.

– Strengthen compulsory consultation about trade-offs between competition and other policy interests.

A competition agency with new and enhanced powers would not necessarily be best organised like the present Competition Authority. Several countries have competition agencies that incorporate some kind of collective decision-making council in order to meet high standards of legal certainty and separation of adjudication from investigation.

1. Foundations

The foundations of competition policy in Sweden date back to 1925 and a first law on the inquiry into monopolistic enterprises and associations. As no enforcement agency was established, and powers were limited, this law never became an effective tool against restrictive behaviour. In 1946 a new law on monitoring competitive restraints in the business sector superseded previous legislation. The purpose was to prevent harmful effects of restrictive practices by registering anti-competitive agreements in a cartel register and through special inquiries. As supervisory agency, a new division within the National Board of Trade was established.

After World War II Sweden was at the crossroads on what economic-political direction to follow. An intense debate confronted the planning and control system of the wartime economy with an open market economy mainly relying upon competition. Several Governmental Committees reviewed the regulation of prices and competition, and in the end the 'competition line' prevailed as regulatory principle in 'normal' circumstances – albeit with an option for price control retained should developments raise serious concerns. This explicit stand in favour of an open market economy provided the necessary foundations for a more active competition regime from 1953.

1.1 History

1.1.1 Competition law and policy 1953-1992

The first effective competition law, the 1953 Restrictive Trade Practices Act, was based on what was recognised as the 'abuse principle'. Instead of prohibiting restrictive behaviour, this principle called for action aiming at the elimination of the harmful effects of such practices. Transparency was also seen as an important tool for encouraging competition, mainly through the public cartel register and the publication of inquiries. Two kinds of behaviour were prohibited *per se* and subject to criminal sanctions: resale price maintenance and collusive tendering.

Two institutions were established for applying the new competition legislation, the Ombudsman for Free Trade[1] and the Council for Free Trade.[2] Where the Ombudsman found that business practices harmed competition he could report the case to the Council, which would try to eliminate those harmful effects by means of negotiation. The ultimate incentive for companies to modify their behaviour was supposed to be their interest in avoiding stricter legislation.

In 1956 the Restrictive Trade Practices Act was supplemented by two new laws; the Compulsory Notifications Act empowered the relevant agency to request information from companies on prices and competition, and the General Price Control Act provided an option to introduce a price freeze and other kinds of price control when the general price level was at risk. These two laws were to be applied by a new agency, the Price and Cartel Office (PCO).[3] The reasoning behind these reforms saw the final abolition of remaining permanent price controls as possible on three conditions: (i) a permanent price monitoring in order to assess whether competition would be sufficiently effective as price regulator, (ii) information on prices in order to strengthen consumers' knowledge and awareness, and (iii) enhanced powers to act against restrictive business practices.

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This Swedish model for competition policy would last for nearly 40 years before it was replaced by a model inspired by the EC competition regime in 1992-93. Institutionally it was based on three bodies: the PCO, the Ombudsman and the Council that later became a Market Court. However, the two criminalised prohibitions were enforced by public prosecutor and the general court system. Among the three competition institutions, the PCO provided the knowledge base: the permanent monitoring of prices and competition as well as research and inquiries into specific sectors offered information to consumers on current market conditions. And such inquiries, together with the cartel register, also served the purpose of enhanced market transparency, which according to the 'publicity principle' was seen as an important remedy against restrictive practices.

The Ombudsman had a role similar to that of a prosecutor. He could request the PCO to investigate alleged restrictions of competition, and bring the case to the Market Court for formal action. However, the Swedish model favoured a 'negotiation principle' meaning that harmful restrictive practices primarily should be eliminated by means of negotiations with companies and organisations concerned (Bernitz, 1993). Those negotiations were therefore in practice mostly carried out by the Ombudsman rather than the Market Court. The criteria for harmfulness included (i) affecting the formation of prices, (ii) hampering efficiency in trade and industry, and (iii) restraining or obstructing someone's business activities.

The Price Control Act was applied for the first time in autumn 1970. In response to an international inflationary shock the Government introduced a price freeze, first on agricultural products and later on all goods and services. The price freeze, administered by the PCO, was gradually lifted in 1971 and then re-introduced in the food sector from the beginning of 1973. This was the start of a period of price controls that did not end until 1990. Selective price controls in the form of price freeze, ceiling prices or compulsory notification of price increases were used as the main instrument to fight inflation. In sectors and periods when pricing was free, the PCO carried out an 'intensified price monitoring' that included negotiations with enterprises and their associations in order to 'influence pricing in a direction favourable to consumers'. Monthly reports on price increases were published and special reports to the Government on price movements exceeding cost increases triggered regulatory measures. The PCO's negotiations on prices, together with the Ombudsman's negotiations on restrictive practices and a general centre of gravity on industrial policies, have been characterised as expressions of the 'negotiation economy' of this period. The PCO continued to serve the Ombudsman with investigations on restrictive practices, but was more seen as a price monitoring agency than a competition authority.

In 1983 the Restrictive Trade Practices Act was replaced by a new Competition Act (CA). The new law was based on the same principles as the previous one. The main novelties were the introduction of merger control and enhanced powers to impose prohibitions and injunctions. Decisions like prohibiting a merger or ordering the termination of restrictive behaviour could be taken by the Market Court on application by the Competition Ombudsman. There was no general obligation to notify mergers in advance, but the Ombudsman could order a company to make such notifications for a period of up to one year. Before taking decisions on prohibitions or injunctions related to restrictive practices or mergers, the Market Court should attempt to eliminate the harmful effects of the action by negotiations. A decision by the Market Court on a prohibition or injunction related to a merger had to be submitted to Government for final confirmation. Like its predecessor, the 1982 Competition Act did not include any provisions on *ex post* sanctions for restrictive practices, with the exception of the criminalised prohibitions of resale price maintenance and collusive tendering.

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1.1.2 A new competition policy approach

In 1992-93 Sweden introduced a major shift in its competition policy. A move away from economic policies dominated by price controls and the 'negotiation principle' had been under way for some time. Already in 1981 a Governmental Committee had proposed that the policies based on price controls and negotiations in order directly to influence enterprises' decisions on prices should be abolished (SOU, 1981). After 1990 price controls were no longer part of the anti-inflation toolbox. And regulatory reform aiming at liberalising sectors of the economy was gaining pace. Some liberalisations had already been done in the past, such as business opening hours in the early 1970's and the financial markets in the 1980's. The taxi market was liberalised in 1990, to be followed by domestic air transport in 1992, postal and telecommunications services in 1993, and electricity in 1996.

In the field of competition law, a Governmental Committee had proposed amendments to the CA that would mainly retain the basic principles of existing legislation, but add provisions on a *per se* prohibition of price and market sharing cartels (SOU, 1991). The Government rejected the Committee's proposal and instead proposed in its Bill to Parliament a radical change in Swedish competition legislation, with a new law that has been described as a blueprint of EC competition rules (GOS, 1992). This harmonisation with EC rules was not linked to Sweden's future membership in the EU, which would not take place until three years later. At the time, Sweden as an EFTA member was preparing for the entry into force of the Agreement on the European Economic Area (EEA), which implied no call for harmonisation of competition rules.[4] The motives behind the shift should rather be found in domestic needs. In its Bill to Parliament the Government states that competition is decisive for dynamic and growth in the Swedish economy. Competition in vital sectors of the economy was seen as insufficient and competitive pressures needed strengthening. Deregulation, enhanced competition in the public sector, clear and stable rules for market actors and an efficient competition regime were identified as important elements of a pro-active competition policy (GOS, 1992).

The legislative reform was accompanied by an equally radical institutional change. In July 1992 the Ombudsman's Office and the PCO were closed down and a new agency, the Swedish Competition Authority (SCA), was set up for the purposes of the new law that was to enter into force six months later. The new authority took over part of the staff from its predecessors but also recruited new staff in order to raise the share of lawyers in the organisation. The Market Court (MC) remained in the new system, but the number of members was reduced from twelve to seven.

The regulatory, legislative and institutional changes in the early 1990's took Sweden a huge step forward towards embracing competition as an organising principle for economic policies. In the 15 years that followed, several modifications and improvements were introduced. These reforms were however more limited in scope and in general the reform agenda lost momentum.

The 1993 Competition Act is still in force (CA, 2005). Changes have been introduced since it was first implemented, some of which were merely of a technical nature aiming at strengthening and speeding up the process. The following more important amendments in the CA have an impact on either procedures or substance:

- 1994: Associations of primary producers in the agriculture, horticulture and forestry sectors are exempted from the prohibition against restrictive agreements in Article 6.

- 1995: Sweden becomes member of the EU.

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- 1997: A new threshold is added to the rules on notification of mergers in Article 37.[5] Mergers where the acquired company's turnover in the preceding financial year was less than SEK 100 million (€ 11 million) are exempted from the obligation to notify.

- 1998: The first instance of the judicial appeals system – the Stockholm City Court (SCC) – is removed for SCA decisions on negative clearance, individual exemption and injunction. The system with two court instances – the SCC and the MC – is retained for other issues like fines and mergers. Several other changes are made in order to render enforcement procedures more efficient. An amendment in the Secrecy Act strengthens the protection of materials in court cases.

- 2000: Provisions on merger control are harmonised with EC rules, replacing 'acquisition' by 'concentration'. Notifications thresholds are changed again: In addition to the global turnover criterion, only when two or more of the companies concerned each have a turnover exceeding SEK 100 million in Sweden the merger has to be notified.[6]

- 2001: The SCA is empowered also to apply the EC competition rules, by requiring an undertaking to terminate an infringement of the prohibitions laid down in Articles 81 or 82 of the EC Treaty. A new exemption is introduced for co-operation between taxi companies or between a central booking service and taxi companies if the agreement covers no more than 40 vehicles. The exemption for the agricultural sector is widened. A new provision on setting the amount of fines makes it possible to take into account whether a company that has infringed a prohibition of the CA substantially facilitates the investigation. This offers an opening for the first, limited leniency program of the SCA.

- 2002: More detailed rules on leniency are added to the CA. Criteria for full amnesty include (i) first to notify, (ii) full co-operation, and (iii) not having a leading role. The new provisions also allow for a reduction of fines for companies facilitating the investigation of not only the company's own infringement but also other participants' part in the conspiracy. A new rule gives the SCA a right to assist competition agencies of other countries in gathering information and performing inspections.

- 2003: The Parliament ratifies the Nordic agreement on co-operation between competition agencies, whereby Sweden joins the co-operation between Denmark, Iceland and Norway launched in 2001.

- 2004: The CA is harmonised with the new approach of the modernisation of EC competition rules. Negative clearance and individual exemption are removed also from the Swedish law, and the criteria for individual exemption are transformed into a general and permanent exemption. As a consequence the system with application/notification under the prohibition rules is discontinued. A new provision enables the SCA to accept commitments to put an end to alleged infringements of the CA.[7]

- 2005: The circle of parties entitled to damages under CA rules is widened also to include parties other than enterprises and the parties to an agreement, for instance consumers. The SCA is empowered to perform inspections also in homes and other premises belonging to board members and employees of a company under investigation.

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In 2005 Sweden implemented the EC Transparency Directive 80/723/EEC.[8] This had no implications for the CA, but through other legislation the SCA was given the role as supervisory agency. A new law on public control of certain financial links[9] requires open accounting for public funds transferred to economic activities performed by public agencies or companies under the control of a government agency. Companies performing activities both in a competitive market and under monopoly or other special or exclusive rights are obliged to report costs and revenues for the two sectors separately. The SCA monitors the reporting requirements and may request information from companies to be forwarded to the European Commission.

Recent developments that may have a future impact on Swedish competition policy include the report from the Regulatory Reform Commission (SOU, 2005) evaluating long term effects of regulatory reform in the sectors that were liberalised since early 1990's. The committee presents a large number of detailed proposals in order to improve the regulation of the liberalised markets, among them assignments to the SCA to monitor the State Railways and the authorities in charge of the national railways and electricity infrastructures. The committee also proposes that the independence of sector regulatory agencies and the SCA should be strengthened by more secure employment terms for the heads of these authorities.

Prospects for near-term change are related to a Governmental Committee reviewing various aspects of the Competition Act in order to enhance the efficiency of enforcement. The Government's directives to this committee include the review of issues like the general structure of the CA, the court instances order and the rules on merger control,[10] the introduction of criminal sanctions against infringements of the prohibition rules of the CA, and the option of widening the right of appeal against decisions by the SCA to parties other than enterprises. Additional directives in April 2006 call for stronger administrative sanctions for serious infringements of the CA. The committee shall report its findings and conclusions before November 2006.

1.2 Policy goals

1.2.1 Competition law

Article 1 of the Competition Act states that the purpose of the Act is to eliminate and counteract obstacles to effective competition in the field of production of and trade in goods, services and other products. The Government's Bill to Parliament from 1992, proposing the new legislation, further elaborates on the goal in the special motives for Article 1: Effective competition could in principle be considered to prevail in a market where the number of sellers is not too limited, where products supplied are not too differentiated, where companies do not act in collusion and where there are no major impediments to the establishment of new enterprises (GOS, 1992).

The goals were later discussed in a Government's Bill to Parliament in 2000 on the general direction and priorities of competition policy in the 21st century (GOS, 2000). In this Bill, the Government states that an active competition policy, with clear rules and effective enforcement, is necessary to protect competition and enhance the efficiency of markets. Important objectives of competition policy include (i) promoting renewal in economic activities, (ii) clearing the way for openness and diversity, and (iii) above all safeguarding consumers' power over production and distribution. In its introduction to the Bill, the Government also states that the main objective of competition policy is to contribute to modernisation and development of society through efficient and open markets. Such markets allow new ideas, new enterprises and new people to come forth. Threats of an inflationary development of costs and prices undermining welfare will be counteracted and efficient competition will contribute to a positive employment trend. The Bill also states that competition policy should be based on a consumer perspective.

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The Government's annual regulatory letter for the SCA identifies the goal for competition policy as 'working for effective competition to the benefit of consumers'. And the sub-goal set for the action field *Law enforcement*[11] is 'actively prevent serious restraints of competition, in particular in sectors with oligopoly or weak competition'. These goals for the SCA are subordinate to the over-arching goal of industry policy, which is to 'promote sustainable growth and increased employment through work for enhanced competitiveness and more and growing enterprises'.

The SCA's vision, as expressed in the authority's official Web site,[12] is 'economic welfare through effective markets' whereas the objective is 'to promote effective competition in the private and the public sector for the benefit of consumers'.

The competition legislation from 1953 could possibly be seen as including some policy goals that now are considered to be outside the area of core competition principles. In particular one of the criteria for harmfulness - restraining or obstructing someone's business activities – may have contained an element of protecting competitors rather than competition. On the other hand, a general prerequisite for taking action against restrictive behaviour targeted only practices that were 'unwarranted from a general point of view'.[13]

Current competition legislation, on the other hand, seems to be based on policy goals fully compatible with core competition principles. Market efficiency and consumer surplus are at the centre of gravity of policy statements. An interesting feature is the focus on dynamic effects expressed in the Government's competition policy Bill from 2000. And the structure of the Government's goals hierarchy places competition policy among activities to promote growth.

1.2.2 Regulatory reform

Competition policy in a broader sense also includes regulatory and structural reform aiming at the liberalisation of markets. In the 1980's and 90's, Swedish market regulation was reformed in a large number of sectors, opening them up to competition. Liberalised sectors include the financial markets, postal and telecommunications services, the electricity market, domestic air transport, the taxi business and parts of bus and railway transportation. In these areas, Sweden was in the forefront among EU countries. In such new markets, the role of structures and regulations is to support the efficiency of competition.

Exclusions and exemptions may set limits to competition policy as organising principle for broad-based regulatory reform. The need to eliminate sectoral gaps in the coverage of competition law depends upon the extent and justification of general exemptions or special treatment for certain categories of enterprises or actions, often subject to other regulatory controls.

In the competition policy Bill from 2000, the Government stated that the share of the total economy that is exposed to competition should increase (GOS, 2000). In spite of moral support for competitive markets, the Swedish Government has after the turn of the millennium not taken any major regulatory reform initiative comparable to those of preceding decades.

Like competition agencies in many OECD countries, the SCA has been assigned a special role to identify and promote measures to make markets more competitive. The annual regulatory letter for the SCA sets out four action fields of which two - *Measures to improve competition* and *Knowledge dissemination* – cover activities often characterised as competition advocacy. However, priorities set by the Government state that the centre of gravity of the SCA's activities shall rest in the first of the SCA's action fields, *Law enforcement*, and in particular on taking action against cartels and abuse of dominance.

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Box 1. Competition Policy's Role in Regulatory Reform

In addition to the threshold, general issue, which is whether regulatory policy is **consistent** with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

- Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations.

- Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise that had supported regulation, namely that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.

- Regulation can **reproduce** competition policy. Regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that policies which had appeared similar may have led to different outcomes.

- Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

2. Substantive issues: content of the competition law

The Swedish Competition Act is largely harmonised with the EC competition rules, as explicitly intended from the outset in 1992. Over time deviations have occurred as a result of the reform of EC law, while the CA lagged behind for some period of time. Currently the most important difference is in the area of merger control, and a Governmental Committee is evaluating how this gap could be filled. Not only the language of the Swedish law is often copied on EC rules, also the interpretation of the rules is to be guided by EC jurisprudence (GOS, 1992). And procedural rules of the CA, such as conferring powers to the SCA to require an undertaking to terminate an infringement of prohibitions, make reference not only to substantive rules of the CA itself but also to Articles 81 and 82 in the EC Treaty (Article 23(1)).

The three cornerstones of EC competition rules are found in the CA: the prohibitions against restrictive agreements and abuse of a dominant position, and merger control. In the EC, rules on state aid are seen as a fourth cornerstone of competition policy. Such rules are seldom found in the national laws of EU Member States. However, the recent implementation of the Transparency Directive includes rules on financial transfers from government agencies to certain categories of enterprises and gives a monitoring role to the SCA.

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Box 2. The EC Transparency Directive

The EC Directive on the transparency of financial relations between Member States and public enterprises requires separate accounting for private and public undertakings active in both the reserved sector and the competitive sector. The Directive aims at facilitating the European Commission's analysis of state subsidies that might distort competition. Information that has to be available may be required by the Commission through a competent authority of the Member State.

1.2 Foundation and framework

The purpose of the CA is to eliminate and counteract obstacles to effective competition in the field of production of and trade in goods, services and other products (Article 1). The Act does not apply to agreements between employers and employees relating to wages and other conditions of employment (Article 2). Article 3 sets forth some basic definitions. An *undertaking*[14] is defined as a natural or legal person engaged in activities of an economic or commercial nature. To the extent that such activities involve the exercise of authority they do not fall within the scope of the definition. The term undertaking also includes associations of undertakings. The provisions relating to agreements apply also to decisions by an association of undertakings and concerted practices of undertakings.

Box 3. The Competition Policy Toolkit

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: "horizontal" agreements among firms that do the same things, and "vertical" agreements among firms at different stages of production or distribution. The second category is termed "**monopolisation**" in some laws, and "**abuse of dominant position**" in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called "**mergers**" or "**concentrations**," usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

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Abuse of dominance or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

Merger control tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

2.2 General rules about restrictive agreements

All agreements between undertakings are prohibited if they have as their object or effect the prevention, restriction or distortion of competition in the market to an appreciable extent. This prohibition applies in particular to agreements that (i) directly or indirectly fix purchase or selling prices or any other trading conditions, (ii) limit or control production, markets, technical development, or investment, (iii) share markets or sources of supply, (iv) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or (v) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial usage have no connection with the subject of such contracts (Article 6). Agreements or provisions included in prohibited agreements are null and void (Article 7).

Article 8 provides for a general exemption for agreements that (i) contribute to improving the production or distribution or to promoting technical or economic progress, (ii) allow consumers a fair share of the resulting benefit, (iii) only impose on the undertakings concerned restrictions that are indispensable to the improvement of production or distribution, and (iv) do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the utilities in question. Block exemptions may be issued by the Government[15] for categories of agreements that satisfy these conditions and the SCA may revoke the applicability of a block exemption to an individual agreement (Article 8a).

Initially, the CA included provisions on the notification of agreements for individual exemption, and application for negative clearance. These rules were abolished in 2004, aligning Swedish procedures to the approach taken by the EC modernisation scheme. Consequently, it is now up to the companies' discretion to assess whether an agreement meets the standards of the general exemption or falls outside the prohibited area.

2.3 Horizontal agreements

The prohibition against restrictive agreements matches that of Article 81(1) of the EC Treaty with the exception of two points. Firstly, the CA has for natural reasons no provision on affecting trade between Member States. Secondly, the prohibition in Article 6 also includes the explicit condition that the agreement must have as its object or effect the prevention, restriction or distortion in the market *to an appreciable extent*. The SCA has issued general guidelines concerning agreements of minor importance defining the term 'appreciable extent'. The notice is without prejudice to any interpretation of the concept

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that may be given by the courts and makes reference to the relevant Commission notice.[16] Co-operation is not perceived to affect competition to an appreciable extent if companies concerned have a joint market share of not more than 10% of the relevant market for horizontal agreements or 15% for vertical agreements. As regards co-operation between small enterprises each having an annual turnover of less than SEK 30 million (€ 3.2 million), an aggregate market share of 15% is accepted. Some categories of agreements like horizontal price-fixing or market sharing agreements will always be considered to have an appreciable effect.[17]

There are no other presumptive rules. Each agreement is assessed under the provisions of Article 6 of the CA (and Article 81 of the EC Treaty). Thus, if the object of an agreement is found to restrain competition, Swedish law like EC case law does not require that also a restrictive effect be demonstrated.

The application of the prohibition against restrictive agreements does not allow other policy interests to be considered as it is based solely upon the criteria set forth in the CA. Also the general institutional and procedural setup prevents undue influence. The SCA and the courts apply the Competition Act without any involvement of the Government and the Swedish Instrument of Government (Chapter 11, Article 7) stipulates that no public authority, including Parliament and the decision-making bodies of local government, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority *vis-à-vis* a private subject or a local authority, or relating to the application of law.

Although the coverage of the CA does not have any structural gaps, other than the special exemptions for certain agreements in the taxi and agricultural sectors, the prohibition of horizontal agreements has not provided any major support to regulatory reform. In fact, the competition problems in the liberalised markets (domestic air transport, postal services, electricity, telecommunications, and rail transport) were seldom related to horizontal agreements; more frequently the incumbent controlling infrastructure abused its dominant position both in vertical and horizontal relations.

2.4 Vertical agreements

The provisions on restrictive agreements of the CA (Articles 6, 7, 8 and 8a) apply equally to horizontal and vertical agreements. However, the guidelines on agreements of minor importance are more liberal for vertical agreements, the market share threshold being 15% (10 for horizontal agreements). Also some categories of vertical agreements will always be considered to have an appreciable effect, like certain forms of resale price maintenance or territorial restrictions.[18]

The Government has issued a block exemption regulation for vertical restraints[19] that applies to the same practices as the EC block exemption for vertical agreements.[20] The Swedish block exemption is applicable where the supplier has a market share of up to 35%, whereas the corresponding threshold in the EC block exemption is 30%. In its motives for the regulation the Government stated that a higher threshold in Sweden is motivated by the effects on services in sparsely populated areas and that it intends to align the provisions to EC rules when the ordinance expires in the end of 2005. However, the block exemption regulation has since been extended until the end of 2006 without any changes in substance.

The coverage of the CA has no structural gaps in the area of vertical restraints other than the special exemption for certain agreements between a central booking service and taxi companies. The prohibition of vertical agreements has not provided any major support to regulatory reform as competition problems in the liberalised markets mainly dealt with cases of abuse of the dominant position of an incumbent that controls infrastructure.

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2.5 Block exemptions

The Government has issued seven block exemptions, three of which are sectoral and the other four applying to categories of agreements in all sectors. Six of the block exemptions are based on EC regulations, whereas one has no parallel in EC law. One of the Swedish block exemptions based on EC regulations has modified the substantive provisions, whereas the other five only have technical modifications.

A block exemption for co-operation agreements in the taxi sector extends a legal exclusion contained in Article 18 e of the CA. The need for a block exemption with no parallel in EC rules has been explained by special characteristics of the Swedish taxi market. Unlike most EU Member States Sweden has liberalised this sector, which calls for different rules in support of effective competition. And in large parts of Sweden that are scarcely populated, there is a need for special measures to maintain taxi traffic. In such regions private demand for taxi services is very low and taxis mainly perform transport services funded by local government.

The block exemption for vertical agreements is based upon a similar EC Regulation, but allows for higher market shares. The Swedish exemption is applicable where the joint market share of participating companies does not exceed 35%, whereas the corresponding EC threshold stays at 30%.

The five remaining Swedish block exemptions align in substance to the EC Regulations exempting agreements (i) for the transfer of technology, (ii) on specialisation, (iii) on research and development, (iv) in the motor vehicle sector, and (v) in the insurance sector.

2.6 Abuse of dominance

Article 19 of the CA states that any abuse by one or more undertakings of a dominant position in the market shall be prohibited. Such abuse may, in particular, consist in (i) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions, (ii) limiting production, markets or technical development to the prejudice of consumers, (iii) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or (iv) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial usage have no connection with the subject of such contracts. These provisions correspond to Article 82 of the EC Treaty with one exception: trade between Member States does not have to be affected for the Swedish prohibition to apply. EC case law serves as guiding principle for the application of the national competition rules and like other areas of CA enforcement, no other policy interests outside the competition area will be considered when applying the rules on abuse of dominance.

The enforcement of competition law in regulated and liberalised network industries has often dealt with the exploitation of strong customer bases through customer lock-ins in a broad sense, achieved by practices like fidelity rebates, tying or predatory pricing. Consequently, a relatively large share of the cases in liberalised industries[21] concerned abuse of dominance. In the period 1993 to 2004, the SCA handled 18 abuse of dominance cases regarding liberalised industries, as shown in table 1.

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Table 1. Number of Abuse Cases in Liberalised Industries 1993-2004

	No. of abuse of dominance cases
Post	6
Telecommunications	5
Civil aviation	2
Rail	2
Electricity[22]	2
Taxi	1

Source: Swedish Competition Authority.

The CA provisions on abuse of dominance apply to all sectors of the economy, and have frequently been applied to liberalised markets. In that sense there is no gap in the law. One conclusion from these cases is that the main contribution of competition law enforcement has been to prevent customer lock-in, rather than enforcing access to bottlenecks. Another one is that the CA in itself is not sufficiently effective for dealing with all problems that arise in liberalised markets. While the CA has successfully tackled dominant firms' practices to prevent small rivals from taking over customers, competition law has been less effective in enforcing access to bottleneck infrastructure. Dealing with such behaviour has instead been the task for sector specific legislation for the liberalised industries.

Box 4. Abuse of dominance in liberalised sectors

In the *Eurobonus* case the SCA alleged that SAS had abused its dominant position by running fidelity rebate systems on domestic routes where the incumbent operator met competition. The final ruling by the Market Court in 2001 supported the SCA's petition on most points. An evaluation of effects of frequent flyer programmes made by the SCA concludes that the Court's ruling limited the scope for SAS fidelity rebates.[23] As a result the competitive restraints imposed by the programme in the domestic air transport market have been reduced. This in turn has facilitated entry of new airlines. The example demonstrates how competition law enforcement may help strengthening new and fragile competition in a liberalised sector.

Other cases on access to infrastructure in the railway, postal and telecom sectors have approached issues like predatory pricing, price discrimination and margin squeeze.

2.7 Mergers

The CA stipulates that a concentration shall be prohibited 'if it creates or strengthens a dominant position which significantly impedes, or is liable to significantly impede the existence or development of effective competition in the country as a whole, or a substantial part thereof' (Article 34a). A second condition for prohibition is that it 'can be issued without significantly setting aside national security or essential supply interests'. This means that the merger rules include some criteria that are related to other policy interests than competition, unlike the CA rules on agreements and abuse of dominance. The criterion 'national security or essential supply interests' was introduced into the CA in 2000, together with other amendments that brought the merger control rules closer to the EC model of the time, and replacing the previous more general language of a merger being 'harmful from a general point of view'.[24] The latter criterion had been found not to be in line with EC rules. On the other hand the EC merger regulation[25] recognised Member States' right to take appropriate measures to protect the legitimate interests of public security, plurality of the media, and prudential rules. The national security and essential supply criteria were considered to be more in line with the EC approach, but were never elaborated in detail in the Government's Bill on the amendments. No SCA decision or court ruling so far has balanced competition principles against these other policy interests.

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The CA defines a concentration as an action where (i) two or more previously independent undertakings merge, or (ii) either one or more persons, already controlling at least one undertaking, or one or more undertakings acquire whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more undertakings. Also the creation of a joint venture which on a lasting basis fulfils all the functions of an autonomous economic entity constitutes a concentration (Article 34).

A concentration shall be notified to the SCA by the merging parties (or the party or parties acquiring control) if the combined aggregate worldwide turnover of the companies concerned in the preceding financial year exceeds SEK 4 billion (€ 425 million), and at least two of them each had a turnover in Sweden that exceeds SEK 100 million (€ 11 million). If the SEK 4 billion turnover requirement is fulfilled, but no or only one company's turnover in Sweden exceeded SEK 100 million, the SCA may request the concentration to be notified where there are special reasons. Concentrations may always be notified on a voluntarily basis by either acquiring or acquired parties provided that the 4 billion turnover requirement is met.

From the date of receipt of a complete notification, the SCA has 25 working days to decide either that there are no grounds for action or that the authority will initiate a special investigation. During this initial period no action may be taken to put the concentration into effect. This stand-still period may exceptionally be lifted by an SCA decision. After deciding to carry out a special investigation, the SCA has another three months to take legal action against the concentration before the Stockholm City Court (SCC). The three-month period may be extended by the SCC on the condition of notifying parties' consent or special reasons.

The SCC may at the request of the SCA prohibit a concentration that is subject to compulsory notification or has been voluntarily notified. The SCC's ruling may be appealed to the Market Court, which is last instance. An interesting feature is that - unlike the situation in several OECD countries - merger cases cannot be reviewed by the Government, which means that any assessment of non-competition criteria for prohibiting a concentration will only be done in the judicial system.

Instead of prohibiting a concentration, the SCC may order a party to divest a company fully or partially, or to take some other measure favourably affecting competition, if such action be sufficient to eliminate the adverse effects of the concentration. Parties to a concentration may also make voluntary commitments to the SCA subject to the penalty of a fine. Such fines are imposed by the SCC at the request of the SCA.

A decision by the SCA not to take action against a concentration shall also cover restrictions directly related and necessary to the implementation of the concentration – so-called ancillary restrictions. Joint ventures constituting a concentration that has the object or effect of co-ordinating the competitive behaviour of the companies remaining independent is assessed under the CA rules on restrictive agreements in Articles 6 and 8.

Most concentrations notified to the SCA have been found to raise no competition problems. As shown in Table 2, the annual number of notifications in the last five years ranged between 65 and 88, and only in one of these years the share subject to special investigation exceeded 2%. Two cases were brought to court in the period. In 2001 the SCA opposed the acquisition of Postgirot Bank, a subsidiary of the Swedish Post, by Svenska Girot. After parties had announced that they would not carry through the concentration, the SCA recalled the application to the court. The second merger case opposed by the SCA, in 2005, dealt with a merger between SF Bio and Sandrews, the two leading cinema enterprises in Sweden. Also in this case the parties called off the acquisition and the case was withdrawn.

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Table 2. Notified Concentrations and Special Investigations

	Number of notified concentrations	Number of special investigations	Number of special investigations (%)	Number of concentrations brought to court
2001	84	2	2 %	1
2002	71	0	0 %	0
2003	65	0	0 %	0
2004	75	4	5 %	0
2005	90	1	1 %	1

Source: Swedish Competition Authority.

Since the entry into force of the CA in 1993, the SCA has appealed to the court for prohibition of five mergers. Three of these cases were rejected by the court,[26] in one case the parties recalled the notification after the SCA's application, and one case was cancelled as a result of the target company being sold to another buyer. 17 notified concentrations have been approved by the SCA after voluntary commitments by the parties.

While notifications remain at a fairly stable level, very few mergers have raised serious concerns in recent years. The Market Court has in practice played no role in merger review after it rejected the SCA's claim in the Optiroc case in 1998. The tendency seems to be solving competition issues related to mergers by other means than formal orders and prohibitions. From an efficiency perspective, this may require much less resources and time than a court proceeding, which is an obvious interest of both the SCA and the parties concerned. On the other hand the approach of closing merger cases at the agency level does not offer the transparency of a court proceeding, which serves as guidance to both the agency and market actors.[27] And short of systematic evaluation of the outcome of voluntarily modified mergers, there is no way to tell whether the SCA's interventions in the end had positive or negative effects on competition.

The current CA rules on merger control have been designed largely to harmonise with the previous EC Merger Regulation from 1989. When EC rules were amended in 2004, the gap between Swedish and EC merger control rules was widened. A Governmental Committee is working since 2004 on the need for reform of the CA in order to enhance its efficiency.[28] The inquiry will also review the rules on acquisitions and other concentrations in the light of the new EC rules on merger control[29] and propose necessary changes in the Swedish system. In particular, the Committee will analyse the rules on the substance test,[30] how ancillary restrictions are treated, the notification of concentrations, and Swedish authorities' assistance to the European Commission with inspections on Swedish territory. The Committee is to submit its final report before November 2006.

Box 5. Mergers in Liberalised Infra-structure Sectors

The SCA examined the acquisition by the Danish undertaking, Dong Naturgas, of the Swedish natural gas trading undertaking, Nova Supply (case number 556/2004). The examination by the SCA showed that the acquisition would lead to competition problems. Since Dong committed to offer all Nova Supply customers the option of discontinuing their agreements with Nova Supply beforehand, the competition problem was eliminated. The commitment was imposed subject to the penalty of a fine of SEK 30 million (€ 3.2 million). As result of this commitment an important part of Swedish natural gas consumption is exposed to competition. The commitment also provides for access to large volumes of natural gas that are exposed to competition as well as facilitated market entry for potential competitors. The liberalisation of the Swedish natural gas market started in 2000 and the directive was implemented in 2005. The market will become fully liberalised in 2007 when private consumers will be able to choose supplier.

Another example of a merger in a liberalised industry is the acquisition of the Swedish energy producer Graninge AB by the E.O.N group from Electricité de France, EDF. This merger was vetted by the European Commission in co-operation with the SCA. The merger was cleared by the European Commission.

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2.8 Related policies

2.8.1 State aid

The control of State aid is regulated at the Community level, by Articles 87-89 of the EC Treaty. All kinds of subsidies, including indirect ones, offered by all levels of government are prohibited if they are liable to distort competition and there is an effect upon trade between Member States. The prohibition is not absolute, but leaves room for general and individual exemptions. The power to enforce the State aid rules rests with the Commission, and Sweden like other Member States is obliged to notify State aid above certain thresholds. To this end, public subsidies are to be reported to the Government for subsequent notification to the Commission. Each Ministry handles subsidies in its respective area and the Ministry of Industry has a co-ordinating role for all sectors but agriculture and fishing industry.

The SCA's new assignment as supervisory agency under the 2005 Transparency Act gives the Authority a role related to certain aspects of State aid. The Act, and the underlying EC Transparency Directive, is based on the rules of Article 86 of the EC Treaty on public enterprises and enterprises that governments have granted special or exclusive rights. The purpose of the new rules is to facilitate the Commission's control of certain financial transactions like cross-subsidisation of a public enterprise's economic activities in competitive markets using profits from activities protected by monopoly rights. The SCA monitors the observance of Transparency Act requirements on accounting, and has powers to request information from companies on behalf of the European Commission.

State aid below certain thresholds and subsidies that do not affect trade between Member States are not touched by EC rules. Still, such activities may seriously distort competition in the domestic market, in particular at the local level and to the detriment of small business. The SCA and the Agency for Public Management have for long observed these problems in their advocacy work and proposed measures to create a more level playing field between public and private actors in competitive markets. In a report in 2004[31] the SCA proposed the creation of a national regulation of State aid, complementary to the EC rules.

2.8.2 Procurement

Public procurement above certain thresholds is regulated by EU law, enforced by the European Commission. On the domestic level below EC thresholds, two Swedish laws apply: the Public Procurement Act (PPA)[32] and the Act on Action against Undue Behaviour in Public Procurement.[33] The latter Act empowers the SCA to take action against a central, regional or local body of government on grounds of discrimination against a tendering company. This Act has in practice been found to be inoperative.

The PPA regulates the organisation of public procurement aiming at equal treatment of competing suppliers and efficient use of public funds. The Board for Public Procurement supervises the observance of procurement rules and disseminates information and advice on the interpretation of PPA provisions. Companies participating in public procurement are subject also to competition rules, like the prohibition on restrictive agreements.

A major problem in the public procurement area, observed by several Governmental Committees and public agencies including the SCA, is the absence of effective sanctions against violations of procurement rules, mainly illegal direct awards. A system based on administrative fines was proposed already in 1999. A Governmental Committee has recently reviewed a number of issues related to public procurement, including the implementation of two EC Directives and the procedure for appeals against procurement decisions. The issue of possible sanctions is expected to be addressed by the Government after the current review of the EC Remedies Directive in the public procurement area has been concluded. The government is planning to transfer the surveillance of public procurement to the SCA.

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Additional problems in the procurement area relate to conflict between the judiciary and local government. The Competition Commission, an NGO studying cases of competitive distortion,[34] has reported a number of cases where municipal contracting authorities have refused to abide by court injunctions. The Commission concludes that there is no regulation in place allowing a supplier to enforce a court ruling under the PPA in his favour.

2.8.3 Unfair competition

The CA prohibits anti-competitive co-operation between companies and the abuse of a dominant position. Although sales below cost under certain circumstances could imply an abuse of dominance, rules on unfair competition are not included in the CA and the SCA does not apply such rules. Rules on false advertising and unfair commercial practices are instead to be found in the Marketing Act.[35] The Consumer Ombudsman has powers to enforce the Marketing Act and if necessary bring a case before the Market Court. Trademark abuse is regulated in the Swedish Trademark Law and deception is regulated in the Criminal Act. Sweden has no specific rules on abuse of economic dependence or sales below cost.

The Consumer Ombudsman has a dual function, also being head of the Consumer Agency. This reflects the Swedish approach of including unfair competition in consumer policy. Competition policy and consumer policy are seen as complementary tools for ensuring that markets function to the benefit of consumers, offering different tools to safeguard consumers' freedom of choice.

Swedish legislation aiming at the protection of consumers is based upon the notion of an inherent imbalance between businesses and consumers in the market-place. These laws address problems that arise when businessmen use their superior bargaining power *vis-à-vis* the consumer in an unfair way. Only when business practices are sound, advertising is honest, consumer products are safe and contract terms are fair, consumers will be able to play the powerful role that is a prerequisite for an efficient market economy.

Consumer protection against business malpractice is largely a product of the early 1970's. At that time the first Swedish Marketing Act was launched, along with the setting up of the Consumer Ombudsman and a special court to adjudicate cases under the new law. The core of the Act was a provision prohibiting unfair marketing, in very general terms. In 1975 this general provision was transferred to a new Marketing Act and supplemented by two new provisions; one on the duty to include important consumer information in advertising, and the other one on product safety.

The current Marketing Act dates from 1996 and includes the same basic rules on unfair marketing and consumer information. A general clause prohibits a businessman from continuing unfair marketing and establishes a general requirement to apply good marketing practice. Violations of this clause are subject to default fines. The Act also includes stronger sanctions and a catalogue of rules with restrictions applicable to certain marketing measures. The Stockholm City Court is the first court instance for cases on a market disruption fee[36] and for imposing a default fine. The City Court's rulings may be appealed to the Market Court. For all other cases under the Marketing Act the Market Court is the first and final instance. The Consumer Ombudsman enforces the law and, if necessary, brings a case before the court.

In Sweden, unfair marketing is understood as more far-reaching than merely 'misleading' advertising. Marketing methods that may be prohibited include those that are unethical, like advertising that is over-obtrusive or aggressive or that exploits fear. The burden of proof that advertising is not misleading or unfair in any other respect rests with the business enterprise. The Marketing Act explicitly refers to good marketing practice, as expressed by instances like the International Chamber of Commerce (ICC) in its advertising rules, or in rulings by the Market Court. As a consequence, violations of such established practices will in many cases be unlawful under the Marketing Act. The general clause of the Marketing Act states that marketing must include sufficient information on issues of particular importance from the

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consumer's perspective, like facts about product properties, prices, the condition of used cars or the fuel consumption of new private cars. The enforcement of the Marketing Act based on a general clause has opened for a dynamic approach in the practical application over time.

Legislation against unfair contract terms - the Consumer Contract Terms Act of 1995 - is adapted to the EC directive on unfair contract terms. Unfair contract terms used by sellers in consumer contracts may be prohibited. A contract term is typically unfair if it gives the seller an exclusive benefit at the expense of the consumer. The Consumer Ombudsman may apply to the Market Court for the prohibition of an unfair contract term.

In 2004 a new Product Safety Act was passed, replacing a previous act from 1989. The Consumer Agency has powers to take action against industry under the Product Safety Act.[37] Hazardous goods and services may be prohibited. The seller must supply the information needed to prevent injury. In certain cases a company may be ordered to recall a dangerous product and refund payment to the consumers concerned. In the product safety area the Consumer Agency also enforces related EU legislation on food imitations, safe toys and personal protective equipment.

Civil law protects consumers on issues like purchases of goods and services, door-to-door sales, consumer credit and consumer insurance. Consumers' access to justice is provided through a special Consumer Complaints Board, which resolves disputes by means of issuing recommendations. The Board issues about 4 000 recommendations each year covering most product areas. The Consumer Ombudsman may apply to the Consumer Complaints Board on behalf of a group of consumers having similar claims on the same grounds (class action). Parliament has enacted a law empowering the Consumer Ombudsman to represent individual consumers before civil courts in cases concerning financial services, for a trial period of five years, starting on 1 December 1997. The trial period has been prolonged twice and is currently foreseen to run out by the end of 2006.

2.8.4 Consumer protection

The dividing line between competition policy, unfair competition and consumer protection is often a matter of tools rather than goals. Thus, Swedish competition policy aims at well functioning markets and effective competition to the benefit of consumers and the vision of the SCA is 'economic welfare through effective markets'. The general consumer policy goals are (i) to strengthen the position and influence of consumers in the market, (ii) to help households make the best possible use of their money and other resources, (iii) to strengthen the protection of consumer health and safety, (iv) to promote patterns of production and consumption that contribute to long-term sustainable development, and (v) to increase consumer access to good advice and assistance, information and education. The Consumer Agency and the Consumer Ombudsman are national agencies in charge of consumer affairs and the co-ordination between them is upheld by joining the functions of head of the Consumer Agency and Consumer Ombudsman in one person.

The SCA and the Consumer Agency co-operate both formally and informally. The website *www.vagahandla.se*[38] provides an example of formal co-operation between the two authorities. Here young consumers can learn about consumer rights and how to make a choice between alternative suppliers of a product. For several years in the past the Consumer Agency had a government assignment to study the effects for consumers of newly deregulated markets in consultation with the SCA. In the study for 2005 the two authorities looked into the need for enhanced consumer information in sectors that have recently been deregulated. From 2006 there is no longer any explicit obligation for the two authorities to co-operate or consult with each other.[39] The informal co-operation is upheld through regular meetings between competition and consumer officials. In 2006 the Consumer Agency and Consumer Ombudsman will be relocated to Karlstad, some 300 kilometres west of Stockholm.

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3. Institutional issues: enforcement structure and practices

3.1 Competition policy institutions

The Swedish Competition Authority has powers to apply the Competition Act, Articles 81 and 82 of the EC Treaty, the Law against Undue Behaviour in Public Procurement and the Transparency Act. In addition to law enforcement, the SCA advocates for pro-competitive reform by proposing changed rules and other measures aiming at the elimination of obstacles to effective competition. Advocacy activities also include building and disseminating knowledge on competition issues. A fourth task assigned to the SCA is supporting legal and economic research on competition issues.

Two court instances make part of the institutional setup for enforcing the CA. The Stockholm City Court is first instance for cases on inspections, fines and mergers brought to the court by the SCA. SCC rulings on such cases may be appealed to the Market Court, which is last instance. Decisions by the SCA ordering the termination of an infringement are appealed to the MC as only and final court instance. SCA demands for penalties may be imposed by the SCC or any other general first instance court and appeals follow the general order through county courts and the Supreme Court.

The County Administrative Boards have a role as promoters of efficient competition and shall co-operate with the SCA.[40] Their tasks include the dissemination of information on competition rules in the region and notifying the SCA of suspected infringements of the Competition Act. County Administrative Boards have no mandate to apply competition law.

Several other government agencies share responsibility for developing and applying competition policy, working for well functioning markets and efficient competition. Many economic sectors have sector specific authorities that apply sector specific legislation, but no other agency than the SCA has competence to apply the Competition Act.

The SCA has an important role in administrative or legislative processes for reviewing and approving proposed laws, regulations, and government actions that affect competition. This is a role that the SCA shares with all government agencies, although further specified in the Government's standing and annual instructions to the SCA. When the Government proposes a new law or reviews a law that may affect competition, the relevant Ministry sends the proposal to the SCA for comments. The Swedish Constitution stipulates that necessary information and opinions shall be obtained from the public authorities concerned when Government matters are prepared.[41] Organisations and citizens shall be afforded an opportunity to express an opinion as necessary. Before adopting a decision the Government therefore collects comments from several authorities and organisations, as well as from companies of the industry concerned, and takes the views expressed into account. The assessment whether a Government matter has any relevance for competition is at the Ministry's discretion. However, the SCA is always entitled to submit its opinion to the Government, also in the absence of a formal request to provide comments.

New or reviewed legislation is normally prepared by Governmental Committees making the inquiries and analyses needed for the elaboration of reform proposals. The major part of the SCA's official consultation statements relate to reports from such Committees. And when competition issues are a salient element of a Committee's assignment, the SCA is often represented by a staff member in an expert's role.

The SCA co-operates on a regular basis with several other authorities such as the Swedish National Post and Telecom Agency, the Swedish Financial Supervisory Authority, the Swedish Rail Agency, the Swedish Civil Aviation Authority, and the Energy Markets Inspectorate within the Swedish Energy Agency. The SCA carries out inquiries in co-operation with sector agencies and studies made by such authorities may include consultation with the SCA. The obligation to consult with the SCA on matters

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having an impact on competition is mostly expressed in the Government's annual regulatory letter to these agencies. The depth, scope and timing of such consultation is not regulated, and the SCA's opportunity to influence competition related issues handled by other agencies or bodies of Government depends in practice much upon the informal arrangements established between the agencies.

The institutional arrangements in the competition policy area give to the SCA largely the same independence in enforcement action and access for policy deliberation as Swedish government agencies at large. Thus, the SCA is an authority under the Government, which means that formal instructions to the authority may not be given by an individual Minster or Ministry but only by the Government collectively. The Government decides the annual budget of the SCA and the authority's focus and tasks. Those tasks are stated in the Government's annual regulatory letter. The Government has no legal right to interfere when the SCA exercises its authority like adopting a decision in an individual case. The Director-General of the Competition Authority is responsible for the Authority and its decisions.

The Director-General has absolute power to adopt formal decisions in the name of the SCA and may delegate that power to another official. Like heads of most Swedish agencies, the Director General is appointed by the Government for a period of six years with a possibility for a prolongation of three years. The same employment terms apply to the President of the Market Court, who consequently does not benefit from terms normally accorded to judges. The nomination process is not transparent. All other officials of the SCA are recruited through an open procedure and employment decisions, as well as the appointment of heads of departments, are taken by the Director-General. Heads of Swedish public agencies may only in exceptional circumstances be dismissed during the period of office. Existing appointments as head of agency are not affected by the outcome of general elections.

The recent Regulatory Reform Commission suggested in its report (SOU, 2005) that the independence of heads of sector regulatory and competition agencies should be enhanced and that their employment security should be strengthened. The option for prolongation of an appointment after the first six years period may in the Committee's view lead to a dependence *vis-à-vis* the deciding body. The Commission proposes that the agency heads concerned should be appointed for a fixed period of 10 years with no option for prolongation.

3.2 Enforcement processes and powers

3.2.1 Basic proceedings and initiation

Since the SCA's powers to grant individual exemption and give negative clearance were abolished in 2004, the enforcement of rules prohibiting restrictive agreements and abuse of dominance focuses on orders to terminate infringements and applications to the SCC to impose fines. All such cases could be seen as *ex officio* cases, given that the SCA has the discretionary power to act upon a complaint or not. The other main enforcement area is merger control, which is initiated by notification. In practice, the SCA's enforcement of the CA is seldom concluded through formal order or sanction.

3.2.2 Investigative powers

The CA, Articles 47-53 b, empowers the SCA to carry out on-site inspections – dawn raids - of companies in order to secure evidence of practices violating the prohibitions in Articles 6 and 19 of the CA and Articles 81 and 82 of the EC treaty. Authorisation to carry out a dawn raid is given by the SCC on application by the SCA and such inspections may be made in a company's premises or in homes and other premises used by members of the board and employees. If needed, the SCA may request assistance from the Enforcement Service.[42] When performing a dawn raid, the SCA is empowered to examine the books and other business records, take copies of or extracts from the books and business records, and ask for oral

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explanations on the spot. Dawn raids are normally made without previous warning. The SCA may also carry out inspections at the request of the European Commission and assist when the Commission makes inspections in Sweden. And as provided for in EC Regulation 1/2003, national competition authorities have the right to request dawn raids to be carried out in other parts of the EU.

General rules on investigating powers are contained in CA Articles 45-46. When needed for the enforcement of the CA the SCA may require companies or other parties to supply information, documents or other material. Municipalities and County Councils that are engaged in commercial activities may also be requested to account for costs and revenues relating to such activities. Persons who could provide relevant information may be summoned by the SCA to appear at a hearing at the time and place decided by the Authority. These investigative powers also apply when the SCA carries out fact finding measures requested by the competition authority of another EU Member State.

The protection of confidential information is regulated by the Secrecy Act[43] and relevant EC rules.[44] Secrecy applies to business information if a disclosure is liable to harm the individual or jeopardise the purpose of the investigation. Information relating to international co-operation may be protected if the request from a foreign competition authority was based on a presumption of confidentiality. Where no explicit confidentiality provision applies, acts received by, established in, or sent from public bodies fall under the right of public access to official documents. This principle dating from 1766 is in Sweden a fundamental instrument for public control of all levels of government, seen as a cornerstone of democracy. As a consequence, the trade-off between transparency and protecting the integrity of individuals may result in a less strict confidentiality protection in Sweden as compared to other countries.

3.2.3 Decision

The SCA has powers under the CA to decide on the following issues:

- To order the termination of an infringement of Article 6 or 19, or Article 81 or 82 of the EC Treaty (Article 23 (1)). A decision by the SCA not to order the termination of an infringement in a specific case gives a company affected by the practice the right to request such a decision by the Market Court (Article 23 (2)).[45]

- To accept a voluntary commitment from a company to take measures that bring an infringement to and end (Article 23 a (1)).

- Upon application by a company notifying an infringement of a prohibition, to state whether the conditions for immunity from fines are fulfilled (Article 28 c (1)).

- To order a company to notify a merger where the SEK 4 billion aggregate turnover threshold is reached but not the SEK 100 million domestic turnover threshold for at least two parties to the concentration (Article 37 (2)).

- To carry out a special investigation of a notified concentration (Article 38 (1)) or decide not to take such action (Article 34 b (2)).

- To grant an exemption from the stand-still obligation for notified mergers (Article 38 (3)) and to issue a prohibition or obligation to ensure compliance with the stand-still obligation (Article 38 (4)).

- To require information from companies, individuals and regional and local bodies of government (Article 45 (1)).

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– To withdraw the benefit of a block exemption (Article 8 a (3)).

Decisions ordering the termination of infringements, on measures to ensure compliance with merger stand-still obligations, and requiring information may be made under penalty of a fine. The imposition of such fines is decided by a City or District Court upon application by the SCA.

In cases of suspected breach of prohibition rules, a company may agree to take measures that in the SCA's view will put an end to the infringement (Article 23 a). A decision to accept such a commitment may specify the period in which the SCA may not adopt a cease-and-desist order. The European Commission has questioned whether the wording of this provision - modelled upon a similar EC rule - could make it comparable to a negative clearance decision.[46] A Governmental Committee reviewing the efficiency of the competition regime will assess whether this provision will have to be modified in order to avoid a possible conflict with the modernisation of EC competition law enforcement and the subsequent co-operation within the European Competition Network.

Unlike competition authorities in a majority of EC Member States, the SCA does not have powers to decide on fines for infringements of the prohibition rules or to impose a fine for breach of a decision adopted under the penalty of a fine. Nor does the SCA have competence to prohibit a merger. On these issues the SCA takes the role of a prosecutor, bringing the matter to the SCC for decision in the first instance. Decisions to carry out dawn raids are subject to court approval in most jurisdictions, and this is the case also in Sweden where the SCC authorises inspections on a company's premises on application by the SCA (Article 47 (1)).

Appeals against decisions adopted by the SCA or the SCC may be lodged with the Market Court, which is last instance in cases under the CA. However, appeals against a decision by the SCC or any other city or district court to impose a penalty decided by the SCA follow the general court instances order.

As demonstrated by Table 8, few formal decisions ordering the termination of an infringement or seeking a sanction have been taken in the last five years. In practice the major part of competition law enforcement in Sweden is done by decisions to close a case as a result of the – possibly restrictive - practice being discontinued. Occasionally the decision includes the acceptance of a commitment. The importance of this softer variety of law enforcement is difficult to assess, both in quantitative and qualitative terms, as there are no statistics available and in most cases no reasoned decisions where the state of law or the facts of the case are elaborated in depth.

3.2.4 Sanctions and remedies

The SCA can order the termination of infringements of the prohibitions of the CA with or without the penalty of a fine. If particular grounds exist, the SCA may issue an interim order, which will apply until a final decision is adopted. The SCA – or the company in the case of subsidiary suit - may bring action for the imposition of a penalty before a district court.

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Table 3. Fines claimed and imposed in major competition cases

	Petitioned to the Stockholm City Court by the SCA	Fine claimed by the SCA (SEK 000s)	Fine decided by the Stockholm City Court (SEK 000s)	Fine decided by the Market Court (SEK 000s)
State Railways (abuse of dominance)	Jan 1996	30 000	8 000	8 000
Scandinavian Airlines Systems (abuse of dominance)	Oct 1996	10 000	1 000	1 000
Nitro Nobel (abuse of dominance)	Mar 1997	5 000	200	400
AGA Gas AB (abuse of dominance)	Apr 1999	3 000	600	0
Uponor and other plastic pipe manufacturers (cartel)	Aug 1999	17 500	10 600	10 600
Petrol companies (cartel)	Jun 2000	651 000	52 000	112 000
Asphalt companies (cartel)	Mar 2003	1 242 640	Pending	
Ventilation companies (cartel)	Jul 2003	23 000	150	
Car dealers (cartel)	Mar 2004	71 300	Pending	
Car rescue companies (cartel)	Oct 2004	1 020	Pending	
Petroleum companies, bitumen (cartel)	Dec 2004	394 000	Pending	
TeliaSonera, broadband (abuse of dominance)	Dec 2004	144 000	Pending	
TeliaSonera, fixed line telecom (abuse of dominance)	Oct 2005	44 000	Pending	

Source: Swedish Competition Authority.

Any agreements or provisions included in agreements that are prohibited under Article 6 of the CA are automatically null and void without any need for a decision or court ruling to that end.

Sanctions against violations of the prohibitions of the CA in the form of administrative fines are imposed by the SCC on the petition of the SCA. Articles 26-32 of the CA contain rules for the calculation of administrative fines. Such fines may range from SEK 5 000 to 5 million (€ 532-532 000) or a higher amount that does not exceed 10% of the annual turnover of the company in the preceding financial year.

To date only cases from 2000 and before have passed the final instance. These cases demonstrate a clear tendency of courts reducing the amount of fines claimed by the SCA. This may be an effect of courts taking a less serious view on competition law infringements than the SCA does. Another explanation put forward is that the SCA was not successful in corroborating all alleged infringements and that fines were reduced in proportion. And a third argument is that courts may set higher fines if the SCA would demonstrate companies' gains from infringements. There is a clear trend of the SCA claiming substantially higher fines from 2000 and onwards. Whether courts will align to this trend remains to be seen. With a possible exception for the petrol case, fines imposed so far do not represent any serious disincentive to anti-competitive practices. The Governmental Committee currently reviewing the CA will propose measures to raise fines for serious infringements.

The SCC may prohibit a concentration between companies on the petition of the SCA. Alternatively the Court can decide on other less extensive measures to prevent the harmful effects of a concentration.

A company that intentionally or negligently infringes any of the prohibitions against restrictive practices and abuse of dominance in the CA or the EC Treaty is liable to compensate the damage incurred. Claims for damages may be filed with the SCC or any other district court.

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Breach of the CA is not subject to criminal sanctions. A Governmental Committee commissioned to draw up a concrete model for criminal sanctions in the competition area presented its report in December 2004. Many leading consultation bodies criticized the proposal and claimed that a dual system including both administrative fines and criminal sanctions would be inefficient. The SCA's opinion underscored that bringing competition offences into the criminalised area would make the leniency programme inoperative and could jeopardise Swedish participation in the European Competition Network.[47] These concerns were shared by the European Commission's DG COMP in a letter to the SCA on possible consequences of the Committee's proposal. Another Committee, currently studying a variety of measures to render CA enforcement more effective, received an additional assignment from the Government to reassess the issue of criminalisation, and will present its findings in November 2006.

3.2.5 Leniency

Leniency rules are contained in Articles 28 a-c of the CA. Companies may fully or partially be exempted from administrative fines if they disclose their participation in an illegal cartel and meet the following conditions.

- The company must be the first to notify the SCA of the cartel.
- Notification must be made before the SCA has information from other sources sufficient to intervene against the cartel.
- The company must submit all information concerning the illegal cartel and co-operate fully with the SCA.
- The company must immediately cease to be a member of the cartel.
- The company must not have played a leading role in the cartel that would render immunity unreasonable.

The discretionary power to decide whether conditions for full immunity from fines are met rests with the SCA. Also in cases where fines may be reduced, the amount of the 'rebate' is primarily decided by the Authority. In order to enhance transparency and predictability of the leniency program, the SCA issued in March 2006 a new notice with detailed guidelines for immunity and the reduction of fines.[48]

As administrative fines are imposed by the SCC on the petition of the SCA, the claim made by the SCA sets the upper limit for the amount of fines. Although the Court cannot exceed that level, it is free to impose a fine lower than the claim.

3.2.6 Process efficiency

The procedural framework for all administrative authorities and courts, including the SCA, is regulated by the Administrative Procedure Act.[49] This Act includes detailed requirements for the administrative procedure related to issues like the following.

- Authorities shall provide information, guidance and advice to all persons concerning matters falling within the scope of its functions.
- Each matter shall be handled as simply, rapidly and economically as possible without jeopardising legal security.

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- Applicants, appellants and third parties shall be afforded an opportunity to make an oral statement.

- Information obtained otherwise than from a document shall be recorded.

- Applicants, appellants and third parties are entitled to have access to the material that has been brought into the matter, subject to restrictions prescribed by the Secrecy Act.

- Applicants, appellants and other parties are to be informed on all facts brought into a matter by others, and to respond to such information, before the matter is concluded.

- An authority's decision on a matter shall be reasoned.

- Decisions affecting a party adversely shall include information on how to appeal.

- Appeals shall be made in writing and delivered to the authority that made the decision within three weeks.

The Administrative Procedure Act regulates the handling of cases under the CA. In addition to the general obligation to handle matters simply, rapidly and economically, the CA sets special time frames for the handling of concentrations. The SCA meets the requirement to provide information on its work by publishing all law enforcement decisions since 1998, all publications and all press releases in full text in the SCA web site *www.kkv.se*. Also, the SCA's official register is fully accessible on the Internet.

The SCA has established internal time limits for the handling of competition matters and formal cases. Complaints and tip-offs are normally to be dealt with within 30 days from notification. Within this deadline the SCA shall decide whether an investigation will be initiated or not, and notify the complainant. If the SCA decides to proceed with an investigation a project group will be appointed to deal with the case. The Director-General sets the timetable for the investigation and any deviation must be reported without delay. Ex-officio investigations not handled by a project group are to be finalised within 3 months.

In 2004 the SCA gave an assignment to an independent researcher to evaluate the outcome of the Authority's court proceedings since the entry into force of the CA (Simonsson, 2005). The study found that the SCA won 45% of its court proceedings, had partial success in 14% and lost 42%. When proceedings only dealing with procedural issues are excluded, the success rate goes down to 38% won cases, 16% partial success, and loss in 46% of the proceedings.[50] Considering the SCA's powers to investigate and prioritise cases, the Authority's high degree of specialisation in competition law and access to EC case law, and the limited number of court cases, the report concludes that the SCA's success rate should have reached a level close to that of the European Commission's, which is full or partial success in 75-85% of court proceedings.[51]

The study identifies three main reasons for the low success rate: (i) failure to correctly assess the state of law,[52] (ii) the SCA's investigation of facts not reaching the level requested by courts, and (iii) failures in SCA litigation. An interesting observation is that the success rate is higher in cases against state owned enterprises – 79% full or partial success – which according to the study could be related to private companies and their legal advice intervening in the process.

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3.3 Judicial review

3.3.1 Institutions

The Stockholm City Court is first instance in CA cases on fines for breach of prohibition rules, prohibition of mergers, and authorisation to carry out a dawn raid. Together with other City and District Courts the SCC is also competent to impose penalties set by an SCA injunction. Judges of the SCC have regular judges' appointment that is not limited in time.

The SCC is perceived to have insufficient resources for competition cases and cases pending at the court may have to wait for their turn. Competition cases brought to the SCC are allocated to three judges - out of a total of approximately 100 judges – who are specialised in competition law but also handle civil cases. Each case is normally handled by two judges and two economists. The internal allocation of resources to different categories of cases is decided by the Chief Judge. An upcoming reorganisation of the Court will cut the total number of judges in half, but the number of competition judges will be kept at three. An expected outcome of the reorganisation is the creation of a special chamber for market law.

The Market Court is a specialised last instance court handling cases under the Competition Act, the Act on Action against Undue Behaviour in Public Procurement and four laws in the area of unfair competition and consumer protection.[53] Competition cases brought to the MC include appeals against rulings by the SCC and decisions ordering the termination of an infringement taken by the SCA. Companies affected by restrictive practices may bring an action at the MC, subject to an SCA decision releasing the subsidiary right of suit.

The MC consists of a President, a Vice President and five Special Members. The President, the Vice President and one of the Special Members must be lawyers and experienced judges. The other Special Members are economic experts. Members and their deputies are appointed by the Government. The President is a full time employee of the Court, whereas the role as MC Member for the other six is a part time assignment in parallel with another occupation. General rules on disqualification of judges on grounds of interest also apply to the Members of the MC. Members of the MC do not have employment terms comparable to judges of general courts, but are appointed for a fixed period. Thus, the position of the President is comparable to that of the head of a regulatory agency, including the SCA, being nominated in a non-transparent procedure by the Government for a period of six years and renewable for a second period of three years.

3.3.2 Processes

The centre of gravity in the MC's rulings is on cases under the Marketing Act (Table 4). More than 80% are Marketing Act cases, whereas the Competition Act's share stays at the level of 10-15%. In the period 2002-2004 the MC ruled on two cases brought by a private party under the rules of subsidiary right of suit, and one more such case was adjudicated in 2005.

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Table 4. Cases ruled upon by the Market Court 2002-2004

	2002	2003	2004
The Competition Act	8	8	5
The Act on Action against Undue Behaviour in Public Procurement	0	0	0
The Marketing Act	42	46	39
The Product Safety Act	0	2	1
The Consumer Contract Terms Act	1	1	2
The Business Contract Terms Act	0	0	0
Total	51	57	47

Source: The Market Court, Annual Report 2004.

3.3.3 Experiences

The judicial review in the competition area is characterised by few cases and a drawn-out process. Table 5 illustrates the total time span from a practice taking place through the final adjudication in the Market Court. A delay of five years or more may not be seen as exceptional from a procedural point of view, considering limited resources, the complexity of matters, and new input from parties in the course of proceedings. But seeing this process as the major tool for correcting malfunctioning of markets, the time span between an assault on effective competition and the ultimate reaction from the State is unsatisfactory. Measures to streamline and speed up the procedure in competition cases are on the agenda, and will be considered by the Governmental Committee currently reviewing the efficiency of competition law enforcement.

Table 5. Major competition cases ruled upon by the Market Court (merger cases excluded)

	Practice taking place	Initiated at the SCA	Petitioned to the Stockholm City Court by the SCA	Stockholm City Court's first instance ruling	Market Court's last instance ruling
State Railways (fine, abuse of dominance)	Autumn 1993	Dec 1993	Jan 1996	Dec 1998	Feb 2000
AGA Gas AB (fine, abuse of dominance)	1994 - 1997	Nov 1994	Apr 1999	Dec 2000	Sep 2002
Nitro Nobel (fine, abuse of dominance)	Jul 1993 - Dec 1995	Dec 1994	Mar 1997	Jun 1998	Sep 1999
Uponor Sverige and others (fines, cartel)	Jul 1993 - Dec 1995	Jun 1997	Aug 1999	Dec 2001	Jan 2003
Petrol companies	Autumn 1999	Nov 1999	Jun 2000	Apr 2003	Feb 2005
Asphalt companies	Jul 1993 - Oct 2001	2001	Mar 2003	still pending in 2006	

Source: Swedish Competition Authority.

3.4 Other means of applying competition law

3.4.1 Complaints

The SCA's handling of cases is only partly regulated by the CA and complaints are not explicitly identified in this law. Where the CA does not regulate an issue the Administrative Procedure Act is applicable.

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Table 6. Complaints and tip-offs in 2005

	Agreements	Abuse of dominance	Other competition	Not competition related	*Total*
Construction, housing	45	13	6	1	65
Services	20	24	12	3	59
Trade	107	70	26	6	209
Public services	5	22	61	9	97
Finance, insurance	9	9	8	3	29
Media, telecom, post	17	92	33	10	152
Transport	19	18	12	3	52
Energy, chemicals	23	27	13	2	65
Other	10	11	9	8	38
Total	255	286	180	45	766

Source: Swedish Competition Authority.

The SCA receives annually many hundreds of complaints, tip-offs and enquiries from the public, many of them being irrelevant from a competition perspective. Any person who addresses the Authority is entitled to a response, but the SCA has no obligation to investigate all claims. Only those complaints that are considered relevant under the CA are handled as a formal matter. If such a matter is found to call for further investigation, considering its importance and seriousness, available resources or strength of evidence, the matter is closed and the SCA opens an *ex officio* case. The complainant does not have the position of a party to the *ex officio* case.

Complaints that are not prioritised are closed by a simple decision that is not reasoned and cannot be appealed. Such a decision by the SCA not to require the termination of an infringement of CA prohibitions releases the 'subsidiary right of action' allowing a party affected by the practice to bring suit to the Market Court.

3.4.2 Private actions

The SCA may by decision order a company to terminate an infringement of the prohibitions against restrictive practices or abuse of dominance (CA, Article 23). If the Authority in a particular case adopts a decision not to impose such an obligation, the Market Court may do so at the request of a company that is affected by the infringement.[54] This 'subsidiary' right for complainants to take action before the MC does not apply to cases under Article 81 or 82 of the EC Treaty when the matter is already handled by the competition authority of another EU Member State.[55]

The Market Court has to date ruled on a total of ten cases brought by private parties under the rules on subsidiary right of action. Twelve cases have been withdrawn by the parties, in most cases probably as a result of private settlement. Four cases are pending in March 2006.

Any agreements or provisions included in agreements that are prohibited under Article 6 of the CA are automatically null and void without any need for a decision or court ruling to that end.

A provision on damages is contained in the CA, Article 33, saying that any company that intentionally or negligently infringes any of the prohibitions of Article 6 or 19, or Article 81 or 82 of the EC Treaty, shall compensate the damage incurred. The provision was amended in 2005 in order to clarify that persons other than companies or contracting parties are also entitled to compensation for losses suffered through an infringement of the prohibitions rules. Claims for damages are adjudicated by city or district courts and appeals follow the general court system. A party may also bring suit in a city or district court for the invalidity of an agreement violating Article 6 of the CA.

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There are no comprehensive statistics available on the importance of private enforcement under CA or EC competition rules. However, two surveys have been made on relevant cases brought before a national court or a court of arbitration during the period 1995-2004.

The first survey, presented by the National Courts Administration, aimed at identifying cases of private enforcement (action for damages) before national courts for breach of EC or national competition law. The result of this survey indicates that action for damages has been brought before national courts in 33 cases during the period 1995-2004.

The second survey, presented by the Swedish Bar Association, identified disputes concerning damages for breach of EC or national competition law where the dispute had been referred to a court of arbitration. According to the Swedish Bar Association the total number of arbitration agreements can be estimated to 300-400 a year. The result of the survey indicates that during the period 1995-2004 only some 15 disputes concerned action for damages for breach of EC or national competition law.

Disputes concerning restrictive practices may more often be solved by private settlements, although no statistics are available to verify or falsify this hypothesis. From a competition policy perspective such settlements have limited interest, as they most likely would focus on the possible harm to a competitor or a business connection, rather than harm to the competitive process.

The overall picture is that private action does not play a major role in Swedish competition policy. Explanations often cited include the small size of the economy (making it difficult to avoid doing business with an adversary in court), low damages, and the consensus culture. The option for Sweden to encourage more private action in competition cases would be changing the risk/gains balance for companies that may consider suing an alleged violator of competition law.

3.5 International issues

3.5.1 Extraterritorial effects

The prohibitions in Articles 6 and 19 of the CA apply to practices that have an effect 'in the market'. The current wording dates from an amendment in the CA in 1998, replacing the previous 'in the Swedish market'. The Government Bill proposing this amendment to Parliament explains that 'the market' here should be understood as the relevant market in an economic-legal sense, and that the issue whether the companies concerned are inside or outside the territory of Sweden has no importance.[56] On the other hand, an extraterritorial application of Swedish competition law may have its limits due to practical concerns and international law.

Investigations or actions involving foreign firms and products may raise difficulties related to information gathering. The SCA is part of the ECN network, encompassing all competition authorities of the European Union. This network offers a frame for the co-operation between the national competition authorities and the European Commission and for the effective allocation of cases under Articles 81 and 82.[57]

The SCA also participates in the network of European Competition Authorities (ECA). Information on mergers to be notified under more than one European jurisdiction is distributed through the ECA network. This facilitates the handling of cases that may be referred to the European Commission in accordance with Article 22 of the EC Merger Regulation. And cases handled at the national level also benefit from co-operation in the ECA network.

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The SCA and other national competition authorities in the EU may assist each other by carrying out inspections or other fact finding measures. Such investigatory assistance is done under national law on behalf of another EU competition authority in order to establish whether there has been an infringement of Article 81 or 82 of the Treaty. Also the European Commission may request a national competition authority to undertake an investigation.

Another vehicle for international co-operation is offered by the OECD's notification procedure allowing the SCA to share or receive information on companies that are objects of an investigation of restrictive practices.[58]

3.5.2 Market openness,

The SCA applies the EC notice on the definition of relevant markets when defining relevant markets in its investigations.[59] The notice gives guidance on how market openness, foreign supply and likelihood of entry should be assessed. Market openness is of relevance both in assessing the geographic market and when assessing the effects of a case, especially in merger cases. The fact that a market is subject to regulatory reform could have a bearing on the definition of the relevant market; a former national market may over time change to become part of a wider geographical market. Market openness is also relevant when assessing competitive effects. The existence of foreign supply indicates that the geographic scope of the market goes beyond national borders. Potential competition is taken into account at the assessment stage of competition analysis.

3.5.3 Trade law issues

The SCA is member of the WTO preparatory group in the international trade policy section of the Ministry for Foreign Affairs.

Since EU-membership in 1995 Sweden has not on its own performed any anti-dumping investigations. The SCA has not on a regular basis been involved in the consultation process between Sweden and the European Commission on anti-dumping matters. However, the Swedish Board of Trade[60] informs the SCA on a regular basis of pending anti-dumping measures and investigations at the European Commission. The Board has also consulted the SCA on competition policy aspects of changes to the EC anti-dumping regulatory framework.

3.5.4 Treatment of foreign parties

The SCA has established a special unit for receiving and handling tip-offs and complaints regarding potential breaches of the competition rules. Domestic and foreign companies, as well as individuals, have access to this service by telephone, e-mail and the SCA web site, as well as by regular mail. No difference is made between domestic or foreign firms and there are no indications of discriminatory treatment.

3.5.5 Co-operation

Already before the EC modernisation programme, the European Commission investigated its cases in close and constant liaison with Member States' competition authorities. New rules in Council Regulation 1/2003 allowed the establishment of the ECN network between all national competition authorities and the Commission. Article 81 and 82 cases are allocated within the network to the country where it is best handled. When the Commission has initiated proceedings in an Article 81 or 82 case, Member States are no longer competent to apply those Articles. However, if a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority. These new rules have made it possible for the competition authorities of the EU to co-operate and assist each other with inspections and other fact finding measures.

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Sweden has since long been an active partner in the informal co-operation between Nordic competition agencies. In 2003 Sweden also joined the formal co-operation agreement, previously established by Denmark, Norway and Iceland. The agreement makes it possible for the national competition authorities to exchange confidential information for the enforcement of the competition rules, including on concentrations.[61]

3.6 Resources and priorities

3.6.1 Resource levels and trends

The SCA has about 100 staff,[62] which for a country of Sweden's size is neither remarkably high nor low. Staffing has over the years remained fairly stable, although the original target of 125 set in the preparations for the authority in 1992 was never reached.

More than 80% of staff has an academic degree; more than 40 are lawyers and close to 40 are economists. Almost half the number of lawyers have court experience, and one fourth of the economists have an advanced degree. Gender distribution is balanced with 56% women and 44% men. Staff mobility was 10% in 2005; that was lower than in previous years.

The SCA's budget has in recent years been reduced in nominal terms from SEK 91 million (€ 9.7 million) in 2002 to SEK 83 million (€ 8.8 million) in 2005. In its budget proposal to the Government for the years 2007-2009 the Authority expresses a need for a budget increase with 10% for each of the years if activities are to remain at current level. The SCA also presents an alternative budget that would enable enhanced capacity to disclose and take action against serious infringements of the CA. The annual increase under the alternative budget would amount to 13%.

Table 7. Trends in Competition Policy Resources

	Person-years[63]	Budget (million SEK))
2005	**97**	**83**
Whereof law enforcement	*67*	
Advocacy	*28*	
2004	**99**	**89**
Whereof law enforcement	*64*	
Advocacy	*32*	
2003	**93**	**86**
Whereof law enforcement	*59*	
Advocacy	*33*	
2002	**96**	**91**
Whereof law enforcement	*58*	
Advocacy	*36*	
2001	**93**	**79**
Whereof law enforcement	*68*	
Advocacy	*24*	

Source: Swedish Competition Authority.

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3.6.2 Organisation issues

The successive budget cuts were more important in real terms than nominally. As a result, staff resources have suffered. Table 7 does not display any reduction in the number of person-years corresponding to the cut in resources. But the notably low rate of success in court may indicate that resource problems are more qualitative than quantitative. In the budget proposal for 2007-2009 the SCA states that the current budget level and needs to raise staff competencies will make it difficult to retain the present number of staff. The Authority concludes that new staff will have to be recruited, with other skills and experiences.

The study performed in 2004 evaluating the outcome of the SCA's court proceedings (Simonsson, 2005) found three explanations to the low rate of success in courts: (i) failure to correctly assess the state of law, (ii) the investigation of facts not reaching the level requested by courts, and (iii) failures in litigation. This may indicate a need to raise the SCA's capacity, in particular on the legal side.

Like most competition authorities, the SCA is losing staff to private law firms and finds it difficult to offer employment terms that are attractive to highly qualified lawyers. The alternative to engage lawyers temporarily for complex cases has so far not been used to any appreciable extent.

3.6.3 Priorities by sector and substantive provision

Table 7 illustrates how available staff time has been allocated to the SCA's two principal activities, law enforcement and advocacy.[64] The overall picture is that two thirds of the Authority's resources are devoted to law enforcement and one third to advocacy. As compared to competition authorities in other countries, the SCA uses a high share of its staff resources to competition advocacy. To some extent, shares would vary depending on how advocacy is defined. In Sweden's comparatively small government organisation, SCA may have a larger role to play.

Action in law enforcement is shown in Table 8. The number of matters opened includes complaints submitted to the SCA. Most of these complaints deal with matters that have little if any impact on competition and the SCA has no other obligation to investigate them than the general requirement of the Administrative Procedure Act to respond to questions from the public. Complaints are not regulated in the CA and as a consequence the number of complaints widely exceeds the number of actual in-depth investigations.

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Table 8. Trends in Competition Policy Actions

	horizontal and vertical agreements	abuse of dominance	mergers
2005			
matters opened	53	73	90
sanctions or orders sought	-	1	1
Orders or sanctions imposed	1	-	-
total sanctions imposed (million SEK)	112	-	-
2004			
matters opened	42	73	75
sanctions or orders sought	4	1	-
orders or sanctions imposed	-	-	-
total sanctions imposed (million SEK)	-	-	-
2003			
matters opened	31	44	65
sanctions or orders sought	2	-	-
orders or sanctions imposed	2	-	-
total sanctions imposed (million SEK)	62.6	-	-
2002			
matters opened	30	79	71
sanctions or orders sought	-	-	-
orders or sanctions imposed	-	-	-
total sanctions imposed (million SEK)	-	-	-
2001			
matters opened	48	142	84
sanctions or orders sought	-	-	1
orders or sanctions imposed	1	-	-
total sanctions imposed (million SEK)	950	.	.

Source: Swedish Competition Authority.

The number of cases under the CA that have led to a formal order or sanction has in the last five years been limited.[65] An attempt to deduce priorities as to industrial sector or substantive provision based on these statistics would not be meaningful.

In the SCA annual regulatory letter for 2006 the Government states the Authority's work shall have its centre of gravity in law enforcement and prioritise fight against cartels and action against private and public market actors abusing a dominant position. The SCA's annual work plan identifies the following priorities for law enforcement.

- Cases on serious infringements of the prohibition rules.
- Fixed time frames for case screening and prioritisation.
- Concentration on the core infringements of a case.
- Focus on the financial and construction markets and associations of industry.

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4. Limits of competition policy: exclusions and sectoral regimes

The reach of competition policy has been limited through 'exclusions' removing a subject from the CA, as well as 'exemptions', including special rules or treatment, under the competition law itself.

4.1 Official authorisation

The Government Bill proposing the Competition Act to Parliament clarifies that no other general interest than competition shall be considered when applying the prohibition rules of the law (GOS, 1992). However, when Parliament by law has decided on public regulation with anti-competitive effects, a situation may arise where companies are legally obliged to act in a certain way. Such practices are not an expression of the parties' discretion, but a direct and intentional consequence of other legislation, and cannot be hit by enforcement of the CA. No other official authorisation than public regulation decided by Parliament excludes application of the prohibitions in competition law.

4.2 Government entities and operations

Like EU competition rules the CA applies to all enterprises whether private or public, irrespective of legal or organisational status, and non-profit as well as profit-making bodies. The notion of enterprise in the Swedish law has been designed to correspond to 'undertaking' in EU law. Thus, the provisions of the CA also cover commercial or economic activities carried out by entities of government. State owned companies are not excluded from enforcement of the CA and some past cases have involved companies like the telecoms incumbent Telia and Scandinavian Airline Systems. And in a pending case a subsidiary of the National Road Administration has even been charged with participation in a hard core cartel in the construction business.

The CA has in practice been found to be less effective when applied to public bodies acting in the market, in particular at the level of local government. The Government has recognised that competition problems can arise when private and public entities operate in the same market and alternative ways to deal with these problems have for several years been discussed by Governmental Committees, Ministerial working groups and authorities like the Agency for Public Management and the SCA. The issue is obviously perceived to be sensitive, being at the crossroads of conflicting public and private sector interests and also bringing the identification of public sector core tasks to a head. The Swedish Parliament has in June 2005 requested that the Government propose measures to solve the problems related to competition between public and private sectors[66] and the Government has announced its intention to set up a Governmental Committee to this end.

4.3 De minimis and other small-business exclusion

The prohibition rules of Article 6 of the CA and Article 81 of the EC Treaty apply only where competition is restricted to an appreciable extent. "Appreciable extent" is defined in the SCA Notice KKVFS 2004:1 which, with some modification, consists of a referral to the EC Notice on Agreements of Minor Importance.[67] In the notice, the SCA declares that it will not take any initiative to investigate practices that according to the notice do not fall under the scope of Art. 6 of the CA.

Based on market share thresholds, the notice distinguishes agreements between firms that are competitors from agreements between firms that are not competitors. Agreements between competitors do not appreciably restrict competition where the aggregate market share held by the parties does not exceed 10 per cent, whereas agreements between non-competitors are accepted if the market share held by each of the parties does not exceed 51%.

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These exceptions do not apply to agreements containing hard core restrictions. Hard core horizontal restrictions are defined as price-fixing, output limitations and allocations of markets and customers. Vertical agreements are defined as hard core when there are restriction of the buyer's ability to determine its sale price, restrictions of territory, restrictions on active or passive sales, restrictions of cross-supplies between distributors, and restrictions on suppliers' sales of components to other service providers not entrusted by the buyer with the repair or servicing of its goods. The SCA notice also states that an agreement does not fall under the scope of Article 6 of the CA if the annual turnover of each undertaking, including the turnover of connected undertakings, does not exceed SEK 30 million (€ 320 thousand) and the aggregated market share does not exceed 15%. The latter provision has no counterpart in the EC *de minimis* notice.

The *de minimis* provisions are general and apply to all sectors and activities. There are no other rules that specially address small and medium sized enterprises. However, the rules on special treatment of primary agricultural associations and taxi undertakings described below apply largely to small business. Also those exemptions apply only where there are no hard core restrictions inherent in the agreement.

4.4 Common general exclusions

The CA is not applicable to agreements between employers and employees on wages and other conditions of employment (Article 2). This labour market exemption is generally perceived to be in line with EC case law, given that employees are not included in the EC concept of undertakings.

4.5 Sectoral issues and special regimes

Exemptions from the application of Article 6 of the CA exist in two sectors, agriculture and transport (taxi). In the media sector, the CA is not applicable in cases of conflict with legislation securing the freedom of press. In the postal and telecommunications sectors special regimes have an impact on competition policy.

Only the SCA and the courts have competence to enforce the CA. Specific legislation in the telecommunications area is enforced by the Swedish Post and Telecom Agency, the SCA being involved in certain procedures under that law. In addition to the compulsory consultation between these two agencies, a number of other sectoral regulators like the Swedish Civil Aviation Authority and the Swedish Rail Agency have an obligation to consult the SCA regarding competition matters in their respective sectors. Also Governmental Committees are often obliged to confer with the SCA on competition matters. No other specific measures have been taken to ensure co-ordination and consistency between competition law enforcement and sector regulation. For instance, the Financial Supervisory Authority applies the prudential rules of the relevant sectoral regulation in parallel with the SCA's enforcement of competition rules. The two agencies co-operate informally and reportedly there have been no conflicting decisions.

In its Bill to Parliament on damages under the Competition Act in March 2005,[68] the Government found no need to level out existing divergences between the CA and EC rules. The divergences mentioned were those applying to labour law, freedom of the press, agriculture and taxis.

4.6 Agriculture

Articles 18 a-c of the CA contain exemptions from Article 6 for enterprises in the agriculture, gardening and forestry sectors. The exemptions apply primarily to co-operation within primary agricultural associations between individual farmers and other producers of raw materials. Also forestry, which is not included in the common agriculture policy of the EU, benefits from the Swedish agricultural exemption. The rationale for including forestry lies in the close links between agriculture and forestry in Sweden. Like agriculture, Swedish forestry is a widespread biological production, and the individual members of the agricultural associations are often small owners of forest.

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4.7 Transport

The Swedish taxi market has been deregulated since 1990. Article 18 e of the CA exempts agreements between taxi companies or between a central booking service and taxi companies from the prohibition in Article 6, subject to certain conditions. There is also a block exemption regulation for co-operation in the taxi sector.[69] The special regime in the taxi sector has been motivated by an ambition to balance the interest of competition against the need for taxi services also in sparsely populated areas.

A block exemption for co-operation agreements in the taxi sector extends the legal exclusion contained in Article 18 e of the CA. Under the block exemption taxi companies and a joint booking service may co-operate on issues like joint purchasing, protection of business secrets and joint marketing. Taxi companies may also be obliged to carry out transport assignments, make cars available, not compete with the booking central, and to transfer business contacts and the right to fix prices to the central. The need for a block exemption with no parallel in EC rules has been explained by special characteristics of the Swedish taxi market. Unlike most EU Member States Sweden has liberalised this sector, which calls for different rules in support of effective competition. And in large parts of Sweden that are scarcely populated, there is a need for special measures to maintain taxi traffic. In such regions private demand for taxi services is very low and taxis mainly perform transport services funded by local government.

4.8 Media

Practices protected by the Freedom of the Press Act cannot be attacked by enforcing the CA. An example is provided by a MC ruling on a newspaper's refusal to publish an advertisement.[70]

4.9 Postal services

The Postal Services Act,[71] Article 5 d, includes a special provision for the promotion of competition.[72] Following the abolishment of the postal monopoly in 1993, the adoption of this rule aimed at providing a clear and neutral regulation of access to the postal infrastructure. Sweden was first among EU Members to liberalise postal services and there is so far no corresponding regulation in EC law. The prohibitions of the CA apply in parallel with the competition rule in the Postal Services Act, and Article 17 c of the latter Act contains a provision to prevent double sanctions. Although the CA fully applies also to the postal sector, the special regulation in the Postal Services Act is motivated by an ambition to create equal conditions for market actors and build long-term market confidence in access to essential infrastructure.

4.10 Telecommunications

Recent regulation of the telecommunications market is largely based on the EC's new system of rules for electronic communication. The Electronic Communications Act from 2003,[73] replacing the Telecommunications Act and the Radio Communications Act, reflects the rights and obligations required under the EC regulation and may not extend beyond those limits.

The Electronic Communications Act is perceived as a supplement, co-existing with competition law. Preventive measures to promote competition will be implemented under this Act without prejudice of an intervention under the CA. The Post and Telecom Agency is to consult the SCA before defining the relevant product and service markets that may be liable to obligations under the Electronic Communications Act. Should a conflict occur between the two regulatory systems, the enforcement agencies are expected to find a balanced solution through dialogue. In addition, the Electronic Communications Act stipulates that a penalty cannot be imposed if fines or penalties under the CA have been imposed for the same practice.

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4.11 Legal monopolies

The borderline between services that are seen as the prerogative and responsibility of government, and those that may be provided in a market with competing suppliers is not a sharp one: it varies from one country to another and in particular it varies over time. Sweden has three trade monopolies that are less common in other market economies – pharmaceuticals and alcohol retailing, and gambling. They have all three been motivated by the care for public health. Other common characteristics are uncertainty about their compatibility with EC law, and increasing risks of being undermined by globalisation, in particular through E-commerce.

4.12 Pharmaceuticals retailing

The Swedish pharmaceutical retail monopoly was established in 1970. The aim of the reform was to safeguard future supply of pharmaceuticals, ensure safe and efficient distribution and keep prices down. The company Apoteket AB, fully State owned since 1998,[74] is entrusted the monopoly for retail trade of pharmaceuticals through an agreement with the State. Pharmaceuticals retailing is carried out by some 900 subsidiary pharmacies, supplemented by close to 1 000 pharmacy agents in rural areas. Apoteket also sells non-prescription drugs over the Internet and by telephone. Prices for subsidised pharmaceutical products are set by the Pharmaceutical Benefits Board. Most but not all prescription drugs are subsidised. Prices for other drugs are decided by Apoteket. A core element of Swedish pharmaceuticals policy is ensuring that prices for drugs are the same in all parts of the country.

In 2001 the pharmaceuticals monopoly was challenged by a private retailer who started selling non-prescription Nicorette patches and chewing gum in his store and as a result was prosecuted for breach of the Law on Trade with Pharmaceuticals. In his defence he claimed that the Swedish State monopoly is incompatible with the EC Treaty, which led the court to request a preliminary ruling from the European Court of Justice. The ECJ's ruling in May 2005 stated that although EC case law does not require the total abolition of State monopolies of a commercial character, such monopolies are to be adjusted in such a way that there is no discrimination. The Court specified a number of points where the existing sales regime did not meet requirements for non-discrimination.

In order to eliminate the shortcomings identified by the ECJ and further eliminate any risk of discrimination, a number of changes were made in the agreement between the State and Apoteket. Also an independent supervisory agency was set up.

As the ECJ ruling was limited to the questions submitted by the Swedish court, there remains some uncertainty on the Swedish pharmaceutical monopoly's overall compatibility with EC rules and whether there is a need for further adjustments. A Governmental Committee recently proposed free sales of non-prescription drugs containing nicotine. The Committee's continued work will include an in-depth analysis of the ECJ ruling, the inclusion of certain herbal products in the monopolised area, the State's governance of Apoteket, and other questions relating to the organisation of Apoteket's commercial activities. The Committee is to present its final report by the end of 2007.

4.13 Alcohol retailing

The primary goal of Swedish alcohol policy is to reduce harms caused by alcohol consumption and to limit total consumption of alcohol. A major tool to this end is regulating retail sales of alcoholic beverages.[75] The State owned company Systembolaget has the legal monopoly to sell alcohol directly to consumers. Access to alcohol is limited by regulating the establishment of outlets and opening hours, and through selling rules. The total number of retail outlets is 420, supplemented by 580 retail agents in scarcely populated areas.

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Systembolaget's share of total consumption, measured in pure alcohol, was 48% in 2005 (46% in 2004). The other main sources of supply were import by travellers (22% in 2005, 26% in 2004), smuggling and home brew (13% in 2005, 12% in 2004), and restaurant sales (10% both in 2005 and 2004). Smuggling and legal imports increased from 2003 to 2004 with 28 and 19%, respectively. The retail monopoly has a lower share of total consumption for strong liquor – reportedly about one third - than it has for wine and beer.

The Swedish retail monopoly for alcohol was one of the crucial issues in the negotiations on Sweden's accession to the European Union and the Commission specified terms for a non-discriminatory functioning of the monopoly. As agreed between the Commission and the Swedish Government, the SCA monitors the functioning of the monopoly since January 1995 and submits reports to the Commission twice a year.

A ruling by the European Court of Justice in 1997[76] found the Swedish alcohol monopoly to be compatible with the EC rules on the free movement of goods and on state monopolies of a commercial character. Two other cases dealing with the alcohol monopoly are currently pending in the ECJ.[77] The first one was initiated by the Swedish Supreme Court, requesting a preliminary ruling on a case concerning private imports of wine over the Internet, where the products were brought into the Swedish territory by lorry transport without the buyer being physically present. In the other case, initiated by the European Commission, the Commission claims that Sweden has violated Article 28 of the EC Treaty by obstructing the private import of alcoholic beverages by independent agents or commercial carriers.

4.14 Gambling

Gambling and lotteries are regulated by the Lottery Act,[78] in order to protect society from criminality and citizens from economic and social problems. The market regulation of gambling and lotteries does not prescribe a strict monopoly, but gives exclusive rights to three categories of organisers, (i) the State, (ii) the horse racing community, and (iii) the popular movement.[79] The largest market actor is Svenska Spel, a State owned company controlling 56% of commercial gambling in Sweden. Trav och Galopp (ATG), with a market share of 29%, is owned by the central organisations for horse racing. Lotteries require special permit in each case, and the promotion of foreign lotteries is prohibited.

The gambling market is growing rapidly, not least through Internet based betting, roulette and poker offered by foreign suppliers. Svenska Spel has in various ways tried to meet the challenge from foreign gambling enterprises, and in November 2005 the Government authorised the State owned incumbent to organise poker game on the Internet.

The European Commission has initiated a proceeding in order to assess whether the Swedish gambling monopoly is compatible with EU law. The Governmental Lotteries Committee presented its final report[80] in January 2006 with an evaluation of existing legislation in relation to developments in the gambling market and EC case law. The Committee questions the compatibility of the gambling monopoly with Community law, especially after the widening of Svenska Spel's activities to include Internet poker. And in the Committee's view it is not feasible to prevent competition from foreign actors by legislation.

5. Competition advocacy and policy studies

Pro-competitive regulatory reform in Sweden is currently in a phase of reflection. The Government evaluates the situation in a large number of markets that were liberalised in the 1990's. Factual and analytical input to this process has been provided by many sources like Governmental Committees, government agencies – including the SCA – and independent research institutes, academia and think tanks. The report from the Regulatory Reform Commission has suggested measures to further enhance competition in the liberalised markets (SOU, 2005). The Committee has also highlighted important experiences from past liberalisation of markets.

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5.1 Foundations

5.1.1 Legislative authorisation, scope

The Government's standing instructions to the SCA[81] identify the following tasks related to competition advocacy.

- Propose measures aiming at deregulation.
- Observe impediments to efficient competition in the public sector and propose measures to eliminate such impediments.
- Evaluate such measures that have been implemented.
- Consult with public agencies that are affected by proposals made by the SCA.
- Disseminate information on the implementation of the CA and EC competition rules, and in general promote pro-competitive attitudes.

The Government's annual regulatory letter for 2006 to the SCA provides further detail on advocacy work. Four branches of action are identified, (i) law enforcement, (ii) measures to improve competition, (iii) knowledge dissemination, and (iv) knowledge building. The second and third of these tasks largely correspond to what is commonly referred to as competition advocacy. The fourth task does not refer to knowledge building carried out by the SCA itself through studies or inquiries, but to support to academic research, mainly through financial support to research projects dealing with competition issues.

The following goals have been set by the Government for the second and third branch of action.

- **Measures to improve competition**

  The SCA shall contribute to efficient competition by proposing changes to rules and other measures aiming at the elimination of impediments to competition. This work shall be carried out in a manner that takes account of Government and Parliament decisions relating to competition in the public sector.

- **Knowledge dissemination**

  The SCA shall promote pro-competitive attitudes and in general work for enhanced knowledge of the importance of efficient competition. At least two thirds of the most important stakeholders shall have good knowledge of the Competition Act and its basic contents.

The annual regulatory letter includes a special assignment to the SCA to present a report giving a broad overview of the state of competition in the Swedish market. The report shall in particular focus on sectors of economic importance to consumers. A similar report was presented in 2005 (SCA, 2005).

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5.1.2 Processes

The SCA's advocacy activities take many forms, the most important being (i) consultation statements, (ii) reports based on studies and inquiries carried out by the Authority, and (iii) informal consultations with other government agencies and the civil society. Officials of the SCA also express the Authority's views by participating in the public debate through speeches and presentations at conferences, interviews in media, or newspaper articles.

In 2005 the SCA submitted 163 official consultation statements to the Government, mainly on reports from Governmental Committees proposing reforms with competition relevance.[82] The following examples illustrate the variety of issues dealt with.

- Supporting many of the reform proposals from the Regulatory Reform Commission, and confirming the conclusion that regulatory reform has contributed to economic efficiency and more competitive markets.
- Rejecting a proposal to criminalise infringements of the CA prohibitions.
- Rejecting a proposal on the calculation of administrative fines for breach of CA rules due to the proposal's technical flaws.
- Suggesting increased resources to the Consumer Ombudsman in order to facilitate more court rulings under the Marketing Act.
- Rejecting a proposal for the implementation of the EC Directive on occupational pensions and suggesting that a more competition neutral solution be sought.
- Rejecting a proposal to introduce price control for consumer credits.
- Rejecting a proposal to monopolise transports of certain waste products at the municipal level.
- Suggesting more use of economic incentives in the environment area.

In 2005 the SCA published a total of 11 reports.[83] Some of these reports were made in co-operation with competition authorities of other countries, some were made by researchers commissioned by the SCA, and still others were based on studies made by the SCA itself. The titles illustrate the focus of these reports and the number of pages (within brackets) indicates the quantitative importance of this side of the SCA's advocacy work.

- Reports to the European Commission on the Swedish Retail Monopoly for Alcohol, July and December (29 and 27 pages, respectively).
- Competition in Sweden 2005 (176 pages).
- Papers on Internationalisation and Competition (89 pages).
- Nordic Food Markets – A Taste for Competition (137 pages).
- Loyalty Programmes in Civil Aviation (32 pages).

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- The Pros and Cons of Price Discrimination (176 pages).
- Market Dominance and Market Power in Electric Power Markets – A Competition Policy Perspective (128 pages).
- The SCA's Court Proceedings – An Evaluation (180 pages).
- Comparative Study of Competition in Retail Banking and Payment Systems Markets (80 pages).
- Pharmaceuticals Distribution in Finland, Norway and Sweden – An Analysis of the Retail Level (32 pages).

Proposals from the SCA on pro-competitive reform are often based on findings in reports like the ones quoted. Competition advocacy is a work that takes patience and a long perspective, and an 'advocacy case' is often based on successive reports and a combination of actions. Advocacy activities in one year often rely on reports from previous years. In 2005 the most comprehensive advocacy initiative was the report Competition in Sweden, which presents conclusions and policy options for the Government relating to a large number of markets (SCA, 2005).

This report describes competition in some ten economic sectors of particular importance to consumers. Basic aspects of competition and competition policy are discussed, such as the nature and importance of competition, the regulation of competition, and how to evaluate competition. The report also explains horizontal exchange of information, coordinative behaviour, and price discrimination, as well as the importance of globalisation and changed consumption patterns. Competition in several markets are described in more detail, such as state monopolies, construction, food retailing, liberalised infrastructure sectors, the financial sector, and health care. Each of these descriptions is concluded by the SCA's general comments on the state of competition and possible improvements. Finally, the report summarises more than 20 observations on issues that could contribute to more efficient competition.

In addition to reports, consultation statements and special submissions to the Government the SCA is actively disseminating the competition message through conferences and seminars. Some of these are organised by the Authority, like the conference 'Competition in Sweden – Is there a Need to Boost Competitive Pressure?' held in April 2005. In November the SCA organised an international conference on 'The Pros and Cons of Price Discrimination'. Officials of the SCA often speak at conferences organised by others like business associations, local government or universities. In 2005 about 60 such appearances took place. And media is an important vehicle for disseminating the SCA's advocacy messages. In 2005 the Authority issued 16 press releases, held 7 press conferences, and had three debate articles published in newspapers or magazines.

5.1.3 Capacity

As shown in Table 7, 28 person-years – or close to 30% – out of the total of 97 person-years were allocated to competition advocacy in 2005.

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5.2 Experience

Effects of competition advocacy often manifest themselves only long time after the original initiative. It is therefore difficult to assess the impact of a competition authority's action, as compared to other influences on reform. The SCA's advocacy efforts in quantitative terms are impressive, whereas pro-competitive reform in Sweden since 2000 has less momentum than in the preceding decade. Still, competition advocacy is not only about spectacular reform of entire sectors. Persistent scrutiny of regulatory details may be equally important to the efficiency of markets and regulatory systems.

The following examples describe situations or issues where the SCA's advocacy work had a particular impact, as well as less successful advocacy efforts:

- The SCA successfully advocated for the introduction of a method to estimate the customers' energy consumption in order to make the liberalisation of the electricity market fully effective. The Authority had noticed that the obligation to buy a special device for measuring the energy consumption prevented customers from switching energy supplier. After a method of estimated calculation was introduced, customers began to switch suppliers more frequently.

- In the 1990´s the SCA successfully advocated that buses should be allowed to compete with the railway on long-distance passenger routes. This market has grown rapidly and there are now several long distance bus routes in Sweden.

- The SCA successfully advocated for the abolishment of the monopoly regarding chimney sweeping services.

- Directives to a Governmental Commission on a new dental care system for adults demonstrate that proposals in an SCA report from 2004[84] were taken into account.

- A new regulation of plastic bottles and metal cans recycling introduced by the Government in 2005 builds largely on proposals put forward by the SCA in 2003.[85]

- The SCA has advocated that effects on competition should be a criterion for decisions by municipalities on the location of retail outlets. Such a criterion was contained in the relevant rules for some years, then removed, and has to date not been re-introduced.

- The SCA has advocated that the monopoly for long-distance railway passenger routes deemed profitable should be abolished. The State owned operator SJ still remains the sole service provider on these routes.

Competition advocacy sometimes involves a delicate balancing act, where proposals for technical solutions aiming at enhanced efficiency by some may be perceived as expressions of political values. In general, the SCA's advocacy efforts often seem to have been successful when suggesting concrete regulatory solutions in non-controversial areas. And conversely, comprehensive advocacy work in sensitive areas like public procurement, commercial activities of local government, state monopolies, or health care has not met the same response and appreciation.

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6. Conclusions and policy options

Sweden has twice since World War II made impressive changes in the direction of competition policy, the most recent one now dating back 15 years. Recognising the importance of these reform initiatives, nonetheless there is room for further improvement. Other OECD reviews, the recent Regulatory Reform Commission, and reports from Government committees and agencies have identified shortcomings and suggested ways to deal with them. After a period when the pace of reform has appeared to slow down, Sweden has the opportunity to renew the reform agenda.

In the beginning of the 1950's Sweden was at the cross-roads between a model based on regulatory control of business activities and a more liberal model where competition was seen as the main warranty for market conditions beneficial to consumers. The 'competition line' came out on top and Sweden's first operative competition regime was installed, with laws on restrictive business practices, obligations to provide information on costs and prices, and an option for price control.[86] The institutional set up included the Ombudsman, the investigatory authority, and a council that later developed into a specialised tribunal. Although modifications were made both in substantive provisions and powers of the competition institutions, the model established in 1953-1956 was to last for nearly 40 years.

The second major shift came in the beginning of the 1990's. Liberalisation of product markets had started already in the 1980's with the financial sector, but from 1990 the opening of markets to competition gained momentum, starting with taxis and followed by domestic air transport, post and telecommunications, electricity and parts of the railways sector. Comprehensive regulatory reform initiatives were accompanied by a reform of the competition regime. A new Competition Act and a new Competition Authority marked a fundamental change in the attitude to competitive restraints and how to fight them.

The reorganisation of competition policy that took place in 1992-1993 has been perceived as abandoning the 'Swedish model' and adopting a 'European model'. However, the 'Swedish model' had much in common with the direction of competition policy in many other countries at the time, and the 'European model' took much of its stricter view on hard core restrictions from across the Atlantic. But from a legal-technical view it is obvious that Sweden's new approach to competition policy in the beginning of the 1990's took advantage of the substantive and procedural model that had developed in the European Communities.

Competition policy in Sweden in the period 1953-1992 was characterised by pragmatism, an empirical approach and the abuse principle.[87] With the reform of competition policy in 1992-1993 the focus shifted towards stronger theoretical foundations, a legal approach and the principle of prohibition of serious restraints. Where enforcement earlier had relied chiefly on information, influence and negotiation, the new competition regime was based on clear rules and vigorous intervention against infringements. With the reform of economic policies came a reform of the institutions, to reduce the influence of stakeholders on enforcement. The corporatist representation on the board of the Price and Cartel Office and in the Market Court was eliminated. The new approach instead highlights the need for independent, autonomous enforcement institutions.

The recent Regulatory Reform Commission had two tasks, to evaluate long-term effects of regulatory reform of infrastructure sectors, and to propose measures to enhance positive effects of implemented regulatory reforms (SOU, 2005). The Commission found positive effects, such as lower prices – but also higher prices where consumers, when free to choose, chose higher quality – increased productivity, improved market structure and increased efficiency. The Commission also identified several transition problems and regulatory shortcomings and proposed measures to deal with such problems.

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Box 6. OECD Annual Review of Sweden 2004

The OECD's Annual Review of Sweden 2004 concluded that new competition legislation and monitoring institutions together with the deregulation of a number of sectors had arguably increased the overall performance of the economy (OECD, 2004). Notwithstanding the efforts in the 1990s, the OECD report found the picture of the overall stance of competition to be mixed when looking at various individual indicators. The overall price level seemed to be relatively high in Sweden, and while prices on certain deregulated markets had been reduced, the OECD found indications of some effects from weak competition due to static inefficiency in general.

The competition policy recommendations suggested by the 2004 OECD review included (i) enhancing the SCA's capacity to break down hard core cartels, (ii) shortening the time for cases to reach a final ruling through the courts, and (iii) providing scope to penalise the individuals within companies for their anti-competitive actions, without resorting to criminal sanctions. The OECD proposed further action in a number of economic sectors[88] in order to ensure that effective competition occurs, even though considerable progress towards liberalisation had already taken place in some instances. And policy recommendations relating to the public sector addressed issues of (i) public companies competing in markets where other suppliers also operate, (ii) the scope for competition in public procurement, and (iii) state agencies diversifying into commercial activities.

The reform policies of the 1990's have no doubt resulted in significant contributions to the efficiency of the Swedish economy. Although an overall assessment of the impact may not be feasible, there are many indications of enhanced efficiency, better adaptation to consumer preferences and new entry of products and market actors. But there are also examples of imperfections and shortcomings, not only in the liberalised markets but also relating to competition law enforcement and other action by the competition institutions.

Sweden has twice taken important steps to strengthen its competition policy, the last one some 15 years ago. Important recent developments include the introduction of a leniency programme and implementing procedural changes following from the EC modernisation program. But opportunities for improvement remain. Sweden could now take new important steps to further strengthen its enforcement and advocacy action, aiming at more vigorous competition in product markets and subsequent effects on economic efficiency and growth. The following conclusions and policy options are recommended for consideration.

6.1 Strengths and weaknesses

The SCA is a robust public agency, well matching the size of the economy and with a clear identity - nationally as well as in the Nordic, European and international arenas. Its approach to competition policy is broad, including not only law enforcement but also advocacy for pro-competitive reform, action to strengthen the competition culture and an active dialogue with and support to academic research.

6.1.1 Law enforcement

Reliance on informal resolution of cases reduces transparency. The total number of cases brought to court by the SCA in 2005 was 2 – one merger and one abuse of dominance case (Table 8). There was no decision by the SCA to order the termination of an infringement. The total number of court rulings in competition cases the same year was 1. The number of sanctions or orders sought or imposed was similar in the years 2001-2004 – 2, 0, 4 and 5, respectively. Thus an enforcement system comprising an authority with 100 staff, one first instance court and one specialised last instance court produces an annual average of fewer than 3 formal rulings.

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Most cases are resolved by an SCA decision not to take action, sometimes made after parties have made voluntary commitments. According to the SCA's Annual Report 2005, the total number of decisions under the CA or Articles 81 and 82 of the EC Treaty was 472, including 86 decisions in merger cases. Two of the decisions dealt with accepting a commitment from companies concerned and another 2 decisions were the result of companies having decided not to carry through a notified merger.

Resolving problems through means other than orders and sanctions may save resources. But too few formal decisions and rulings may reduce transparency. One aspect of the new regime introduced in Sweden in the last decades of the 20th century was replacement of negotiation approach and the abuse principle with a more rules-based system. Today the contrast between the old and the new competition regimes has faded. Increasing the share of cases dealt with by orders and sanctions could bolster the rules-based approach.

To be sure, courts have appeared sceptical of the SCA's cases. According to an independent study the SCA loses 42% of its court proceedings, and another 14% are won partially. Excluding procedural rulings reduces the success rate further. Overall, the SCA's record is only about even. An enforcement agency should certainly not expect to win every case – if it did, this would be a sign that is avoiding complex, difficult cases. The independent study suggests a success rate of 75-85% as a reasonable target. That may be too high a standard for an agency like the SCA that acts as a prosecutor, but nonetheless there is room for improvement here.

Competition cases take long time. Judicial consideration of competition cases is usually time-consuming in all jurisdictions. But the Swedish experience is unusual, including several cases where the total time span from the SCA's opening of the case to the last instance ruling is 5 to 8 years. Even considering resource constraints in the judiciary and the general complexity of the cases, a delay of 6-8 years before sanctions can be imposed against a serious conspiracy against the public[89] should not be acceptable.

Sanctions are not sufficient to deter. International experience shows that the effectiveness of leniency programs depend upon the predictability of amnesty rules and the seriousness of sanctions. On the first point, the Swedish system is less predictable due to the discretionary power of the SCA to decide the reduction of, or full amnesty from, fines. As for sanctions, Sweden has not reached levels of fines that exceed the violator's gain from the infringement, as adjusted for the likelihood of detection and sanction. Fines eventually imposed have in most cases fallen far short of levels originally requested in the SCA's petition. Identifying measures that may enable higher levels of fines is one option to consider.[90] The potential gains from hard core price fixing may be so great that fines against firms have not yet reached a truly deterrent level in any jurisdiction. As result, many countries are considering whether fines against companies should be supplemented by sanctions that directly hit the individuals who are accountable. A committee of inquiry has proposed stronger decision making powers, such as direct settlements, for the SCA and more precise rules on the circumstances to be taken into account when determining the size of financial penalties for infringements.

6.1.2 Advocacy

The balance of resource allocation between advocacy and enforcement may need adjustment. The SCA spends nearly one third of its total staff resources on activities in competition advocacy.[91] Most competition agencies engage in advocacy. A survey for the 2003 OECD Global Forum on Competition found that more than 85% of responding competition authorities had competition advocacy as one of their tasks,[92] and that the share of total resources devoted to such work normally ranges from 10-20%. The SCA's focus on advocacy is thus high in international comparison, although its Nordic neighbours also devote considerable resources to advocacy. Possible differences in the methods of measuring resources and

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in defining advocacy need to be kept in mind when comparing resource allocation of different competition authorities. For example, SCA advocacy includes both sectoral studies and enquiries as well as information to the public and research activities. Nonetheless, it may be useful further to consider whether there are specific reasons for retaining this balance between law enforcement and advocacy.

Broad studies, although informative, may be less useful than focused ones in promoting reform. In the five years 2001-2005, the SCA published 66 reports. Some of these studies were done on special assignment from the Government, others in the context of international co-operation and still others by independent researchers funded and commissioned by the SCA. Several reports were based on studies made by SCA staff on the Authority's own initiative.

Published findings of inquiries into specific competition problems may serve as powerful tools in competition advocacy. Reports of a broader and more descriptive nature, which may require disproportionate resource commitment, may be less effective as lever for change. *Competition in Sweden 2005* is the fourth in a series of broad surveys describing competition in a large number of sectors (SCA, 2005), commissioned by the government and including a comprehensive set of concrete policy proposals, and in the annual regulatory letter for 2006 the Government requires the SCA to make another similar study. General information on the functioning of markets was one of the cornerstones of the competition policies of the 1950s through the 1980s, when it was thought that information about problems would lead to their spontaneous correction. Focusing SCA studies and inquiries on issues that may directly serve as basis for initiatives and proposals may help enhance the efficiency of advocacy work.

In spite of the effort and resources spent on advocacy, results are mixed. The government has taken account of SCA proposals when designing some regulatory reform, but in other areas where the SCA for years has strongly advocated change, such as sanctions in public procurement or problems relating to the interface of private and public commercial activities, the SCA's efforts have had no evident impact. In the SCA's relations with other agencies, the competition voice sounds muted. Obligations to consult with the SCA are normally not set by law, but by standing instructions or annual regulatory letters, and the content and timing of the consultations are not defined. The SCA's ability to influence action by other agencies that may affect competition depends more upon the soundness of informal co-operation than upon compulsory consultation procedures.

6.1.3 Institutional

The SCA's budget has been reduced from 2001 in nominal terms and consequently still more in real terms. The effects on staffing are more qualitative than quantitative. The long time span from the initiation of a case until the final court ruling implies that insufficiency of resources is also an issue at the two courts that adjudicate competition cases.

The mix of professional skills available to the SCA may explain aspects of its performance. The 2004 evaluation of the SCA's court proceedings identified three reasons for its rate of success: assessment of the state of law, investigation of the facts, and litigation (Simonsson, 2005). The SCA needs more highly skilled lawyers. The difficulties in presenting facts that meet the courts' requirements may indicate a need to increase economic expertise as well. Like competition authorities in many countries, the SCA struggles with problems of staff leaving for the private sector and of offering sufficiently attractive terms when recruiting. The SCA has also found it difficult to engage legal expertise on a temporary basis for running the most important court cases.

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Swedish authorities under the Government have traditionally been perceived as formally independent. They receive instructions from the Government collectively, not from the Minister in charge, and the Government has no right to interfere in their exercise of authority.[93] *De facto* independence may relate to issues like the nomination of the head and other officials of an authority and how the budget process is organised. In those respects the SCA is no different from other Swedish agencies. Courts are normally perceived to enjoy a higher degree of independence than authorities, since the appointment of judges is not limited in time. Here the Market Court is exceptional, with its President being appointed on the same terms as the Director-General of an authority, with the first appointment for six years and an option for prolongation for another three years.

The Regulatory Reform Commission concluded that 'strong, separate and independent regulatory authorities are often a condition for successful liberalisation' (SOU, 2005). In the Commission's opinion strengthened job security for certain heads of regulatory authorities should be considered. Motives for enhanced independence cited by the Commission include significant responsibility for standard-setting, decisions affecting millions of consumers, major asset values, and in certain cases considerable future investments, and credibility problems as a result of large and strong State interests in industries concerned. The Commission remarks that such interests and the relevant authorities are accountable to the same Ministry. Concrete measures suggested by the Commission for further reflection include fixed-term, non-renewable appointment of the heads of a number of sector regulators and the SCA, and separating ownership and regulatory interests by allocating them to different Ministries.

The SCA has the power to order the termination of a practice that violates the prohibitions of the CA, with or without the penalty of a fine for non-compliance, but not to decide on sanctions for infringements or to impose a penalty for non-compliance with an order. In contrast, a majority of EU competition authorities have such powers. As a consequence the SCA takes the role of a prosecutor when it comes to stiff reactions against anti-competitive behaviour. The court procedure, through two instances, takes considerable time and the resulting sanctions have mostly been lenient compared to the SCA's claim. The obvious tendency to solve competition problems at the SCA's level through settlements or commitments by the parties may be related to the sluggishness of the judicial process.

6.2 Capacities for change

After 15 years with a fundamentally reformed competition regime, the system may now be ripe for a next step. The Competition Act and Authority launched in 1992-1993 marked a decisive shift towards a more judicial and rules-based approach. But some traits from the earlier model seem to remain.

The Swedish Government has already expressed clear support for more efficient competition and in particular for fighting serious restrictive practices like hard core cartels. Parliament has also taken initiatives in support of competition, such as the request that the Government take action on competition problems in the private/public sector interface. Remaining weaknesses might be addressed one by one, on an *ad hoc* basis, or through co-ordinated procedural and organisational changes that together could provide an enhanced impetus to competition policy in Sweden. The following policy options may be considered separately, but several of them are inter-related and mutually supportive.

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6.3 Policy options for consideration

6.3.1 Confer powers to decide fines to the competition agency.

Strengthening competition policy is closely related to strengthening the competition agency. An authority with 'sharper teeth' will have more bite, both in enforcement and advocacy action. Giving the competition agency powers to impose fines could also boost tougher attitudes about serious anti-competitive conduct. Changing attitudes will help overcome tendencies that are reminders of the pre-1993 system, of few orders and sanctions, reliance instead on negotiation and settlement, and lengthy processes. In the international perspective, allowing a competition agency to decide on fines is not exceptional, rather the opposite.

6.3.2 Strengthen the independence of the competition agency and the Market Court.

In addition to powers, an effective competition agency needs real and perceived independence. As noted by the Regulatory Reform Commission, an appointment for a limited term can create a situation of dependence *vis-à-vis* the nominating body, in particular where there is an option for a second term. The current model with appointment for 6 plus 3 years for the President of the Market Court is an example. Employment terms that give more job security should be considered both for that post and for the person or persons that take formal enforcement decisions in the competition agency.

6.3.3 Strengthen sanctions for serious violations of competition law.

The fines that have been applied to date fall short of levels needed to deter serious violations of competition law such as hard core cartels. Measures to raise those levels would be welcome. Many countries have concluded that sanctions against individuals would make deterrence more effective. Sweden has seriously considered criminal sanctions for competition law infringements, but found that such a step would make the leniency system inoperative. Full amnesty from criminal sanctions, like the Anglo-Saxon crown witness model, would be incompatible with the Swedish legal system. Criminalisation of competition offences would also reduce the efficiency of enforcement because of the higher burden of proof and the need to refer competition cases to the general prosecutors.

A different model to consider would be administrative fines for individuals, if they would not fall in the area of criminal law and enforcement. To be sure, companies might find ways to compensate the individuals' pecuniary loss. Still, the disincentive for company officials to engage in anti-competitive practices would be greater than now, if only because of the risk of personal embarrassment.

6.3.4 Strengthen compulsory consultation with the competition agency.

A competition agency may have an important role in preventing public authorities and other bodies of government from adopting or applying rules that distort or eliminate competition in a disproportionate way. The SCA is active in this field through consultation statements and informal co-operation with other agencies. The impact of this work is limited by the power of persuasion and the strength of the SCA's arguments. And when a conflicting interest is at stake, the persuasive voice may not be strong enough or may be heard only at a stage 'when the ink is dry'. Introducing compulsory consultation provisions is one way to strengthen the competition interest in relation to other aspects. This does not imply that competition should have priority before all other policy interests. But clear rules on consultation with the competition agency, organised in a way that does not create an excessive burden on either side, may help finding the most efficient trade-off between competition and other policy interests. Such rules could define issues such as who should consult, matters covered by the obligation, in what stage of the process, what materials to submit, and how to handle dissent.

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6.3.5 Find an organisational structure for the competition agency that matches new and enhanced powers.

A competition agency that has powers to decide on fines (including administrative fines to individuals), which has strong independence, and which is in charge of compulsory consultation procedures, would not necessarily be best organised like the present SCA. With stronger powers, decision-making should be organised in a way that meets high standards of legal certainty. And such an agency must obviously have the resources needed to maintain professional qualities at high level. Appropriate separation of adjudication from investigation would be important. A collective decision-making procedure could be an alternative to the current model where decisions are adopted by the head of the SCA alone. Several countries have competition agencies that incorporate some kind of council in order to meet such requirements.

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Notes

1. Later known as the Anti-trust Ombudsman or the Competition Ombudsman,

2. Later renamed the Market Council and eventually the Market Court.

3. Later renamed the Price and Competition Authority.

4. EU membership was however in the pipe-line. In October 1990 the Government had announced its position that Sweden should strive towards membership and in July 1991 the formal application was submitted. Membership negotiations started in February 1993.

5. The basic rule states that mergers should be notified if companies concerned together have a turnover in the preceding financial year exceeding SEK 4 billion (€ 425 million).

6. Always provided that the SEK 4 billion basic threshold is also achieved.

7. A similar provision on binding commitments by companies is contained in Article 9 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

8. Most recently changed by Directive 2000/52/EC.

9. Lag (2005:590) om insyn i vissa finansiella förbindelser m.m.

10. The EC system for merger control underwent fundamental changes in 2004, whereas the Swedish corresponding rules so far remain unchanged.

11. The annual regulatory letter identifies four fields of action of the SCA: (i) Law enforcement, (ii) Measures to improve competition, (iii) Knowledge dissemination, and (iv) Knowledge building.

12. www.kkv.se/eng/eng_index.shtm

13. The Swedish expression – difficult to translate into English – indicates that the interests of the society as a whole should be considered.

14. The term 'undertaking' in EC legal language has been translated to the Swedish 'företag', which corresponds to 'firm', 'company' or 'enterprise' in common British and American English. These words are used in this report as synonyms of 'undertaking'.

15. The Government may also empower the SCA to issue a block exemption.

16. OJ C 368, 22.12.2001, p. 13.

17. These categories of horizontal agreements are listed in the EC *de minimis* notice.

18. These categories of vertical agreements are listed in the EC *de minimis* notice.

19. Förordning om gruppundantag enligt 8 a § konkurrenslagen (1993:20) för vertikala avtal (SFS 2000:1193) (rev. SFS 2005:883).

20. Commission regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

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21. Taxi, domestic air traffic, post, telecommunications, electricity, banking, insurance and rail.

22. These two cases concerned district heating.

23. See the SCA report 'There Is No Such Thing as a Free Lounge – a report on frequent flyer programmes', SCA 2003:1, available in English at: http://www.konkurrensverket.se/eng/publications/pdf/rap_2003-1_eng.pdf

24. The expression 'from a general point of view' was understood to include effects on Swedish companies' competitiveness in international markets and the interest of individuals' life, health and security.

25. Council Regulation (EEC) 4064/89.

26. Of the three cases rejected by the SCC, the SCA appealed one to the MC, which also rejected the case.

27. In order to enhance transparency, the SCA has recently adopted a policy of making reasoned decisions also when mergers are accepted prior to a special investigation.

28. Committee terms of reference Dir 2004:128 and Dir 2005:75.

29. Council Regulation (EC) 139/2004.

30. The EC Merger Regulation has changed the previous dominance test to a principle that the merger rules are applicable to concentrations that would significantly impede effective competition.

31. Myndigheter och marknader – tydligare gräns mellan offentligt och privat, Konkurrensverkets rapportserie 2004:4.

32. Lag (1992:1528) om offentlig upphandling.

33. Lag (1994:615) om ingripande mot otillbörligt beteende avseende offentlig upphandling.

34. The Competition Commission is an independent expert group that monitors and studies issues relating to competitive distortion, supported by public funds.

35. Marknadsföringslag (1995:450).

36. The market disruption fee is not a criminal sanction but an administrative fine.

37. Before July 1st, 2004, the competence to enforce the Product Safety Act rested with the Consumer Ombudsman.

38. The Swedish expression 'våga handla' is the motto of this initiative, and could be interpreted as either 'dare to shop' or 'dare to act'.

39. A recent Government Bill on Consumer Policy proposes continued consultations with the SCA.

40. The Competition Ordinance 1993:173.

41. The Instrument of Government, Chapter 7, Article 2.

42. The Enforcement Service is a public agency in charge of the enforcement of public as well as private claims.

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43. Sekretesslag (1980:100).

44. Article 28 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

45. This subsidiary right to legal action does not arise if the decision by the SCA is based on Article 13 of Council Regulation (EC) 1/2003.

46. As a result of the EC modernisation programme, negative clearance and individual exemptions have been abolished, both on the Community level and in Swedish national enforcement of competition law.

47. Swedish legal traditions do not accept amnesty from criminal sanctions, like the crown witness model of Anglo-Saxon jurisdictions.

48. General Guidelines of the Swedish Competition Authority, KKVFS 2006:1.

49. Förvaltningslag (1986:223).

50. The SCA has questioned the way full and partial success has been defined by the researcher.

51. This may, on the other hand, be seen as an excessively high standard for an agency - like the SCA – that is limited to taking a prosecutor's role.

52. Although some cases were found where the court had deviated from established EC case law, the study concludes that courts rulings mostly were in line with EC case law and that the faulty assessment must have been on the SCA side.

53. The Marketing Act, the Product Safety Act, the Consumer Contract Terms Act and the Business Contract Terms Act.

54. Before 1998 applications by private parties were to be submitted to the Stockholm City Court and rulings by this court could be appealed to the Market Court.

55. The suspension or termination of proceedings in such cases is regulated in Article 13 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

56. Regeringens proposition 1997/98:130 Ändringar i konkurrenslagen (1993:20), m.m.

57. The co-operation within the ECN is regulated by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

58. OECD 1995 Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade.

59. Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, [1997] OJ C372/5, [1998] 4 CMLR 177

60. The Swedish Board of Trade is the expert agency for anti-dumping and other trade matters under the Ministry for Foreign Affairs.

61. Merger cases are not covered by the ECN co-operation.

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62. Although the number of person-years in the years 2001-2005 ranged between 93 and 99, the average number of employees in these years was higher – from 108 to 120 – as a result of part time work and temporary leave of absence.

63. In addition to staff resources allocated to law enforcement and advocacy, 1-3 person-years were allocated to supporting research in the competition area in each of the years 2001-2005.

64. The second and third SCA fields of action (measures to improve competition and knowledge dissemination) have here been categorised as advocacy, recognising thet there may be different views on what to include in the concept of competition advocacy.

65. As from 2005 the SCA has powers to accept commitments by formal decision. As a consequence, the number of formal decisions is expected to increase in coming years.

66. Parliament Committee on Industry and Trade, Report 2004/05:NU16.

67. OJ C 368 of 22.12.2001.

68. Regeringens proposition 2004/05:117 Skadestånd enligt konkurrenslagen, m.m.

69. Förordning om gruppundantag enligt 8 a § konkurrenslagen (1993:20) för avtal om viss taxisamverkan (SFS 2000:1029) (rev. SFS 2005:884).

70. Market Court case Dagen, MD 1998:18.

71. Postlag (1993:1684).

72. A company having a permission to perform postal services is obliged to provide access to its facilities for mail delivery, such as P.O. Boxes, for letters from other postal operators on terms that are reasonable, competition neutral and non-discriminatory in relation to the company's own activities.

73. Lag (2003:389) om elektronisk kommunikation.

74. Before 1998, ownership of Apoteket was shared between the State and the Pharmacy Pension Fund.

75. Mainly liquor, wine and strong beer.

76. ECJ C-189/95 *Franzén*.

77. Cases C-170/04 and C-186/05.

78. Lotterilagen 1994:1000.

79. The term 'popular movement' refers to non-profit organisations aiming at the public utility.

80. Spel i en föränderlig värld, SOU 2006:11.

81. Förordning (1996:353) med instruktion för Konkurrensverket.

82. The number of statements submitted in 2004, 2003, 2002 and 2001 was 166, 150, 133 and 138, respectively.

83. The number of reports published in 2004, 2003, 2002 and 2001 was 15, 13, 16 and 11, respectively.

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84. Tandvård och konkurrens, Konkurrensverkets rapportserie 2004:1.

85. Pant och retur, Konkurrensverkets rapportserie 2003:3.

86. The option of introducing a price control was seen as an exceptional last resort if competition failed to prevent serious inflationary development.

87. The term 'abuse principle' designates an approach in which an infringement was only found after a case by case assessment determined that a particular business practice was abusive.

88. Those sectors include electricity, air transport, railway transport, construction, rental housing, food retailing, and alcohol retailing.

89. The expression is taken from Adam Smith, The Wealth of Nations.

90. The issue of sufficiently deterrent sanctions is currently studied by a Governmental Committee that will report its findings and conclusions before November 2006.

91. The average for the years 2001-2005, based on figures in Table 7, is 32%.

92. Optimal Design of a Competition Agency, Note by the Secretariat for the OECD Global Forum on Competition, February 2003 [CCNM/GF/COMP(2003)2].

93. A practical impact of this provision from the Swedish Constitution (The Instrument of Government, Chapter 11, Article 7) is that the Government or an individual Minister may not influence, or try to influence, the SCA's decision when applying the Competition Act. On the other hand, the Government collectively is entitled and expected to give instructions and guidelines for the direction and priorities of the SCA's work.

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BIBLIOGRAPHY

Bernitz, Ulf (1993), *Den nya konkurrenslagen*, Juristförlaget, Stockholm, pp. 15-16.

Government of Sweden (GOS) (1992), Regeringens proposition *Ny konkurrenslagstiftning* Prop. 1992/93:56, Stockholm.

Government of Sweden (GOS) (2000), Regeringens proposition *Konkurrenspolitik för förnyelse och mångfald* Prop. 1999/2000:140, Stockholm.

OECD Economics Department, Economic and Development Review Committee (2004), *2004 Annual Review – Sweden*, Paris [ECO/EDR(2004)1].

Simonsson, Ingeborg (2005), *Konkurrensverkets domstolsprocesser 1993-2004, En utvärdering*, Konkurrensverkets uppdragsforskningsserie 2005:2, Stockholm.

Statens offentliga utredningar (SOU) (1981), *Prisreglering mot Inflation?* Slutbetänkande av prisregleringskommittén SOU 1981:40, 41 and 42, Stockholm.

Statens offentliga utredningar (SOU) (1991), *Konkurrens för ökad välfärd*. Slutbetänkande av konkurrenskommittén SOU 1991:59, Stockholm.

Statens offentliga utredningar (SOU) (2005), *Liberalisering, regler och marknader*. Betänkande av regelutredningen SOU 2005:4, Stockholm.

Swedish Competition Authority (SCA) (2005), *Konkurrensen i Sverige 2005*, Konkurrensverkets rapportserie 2005:1, Stockholm.

The Swedish Competition Act (CA) (2005), unofficial English translation, *www.kkv.se/eng/competition/competition_act_fulltext.shtm*.