

Unclassified

DAF/COMP/WD(2015)29

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

29-May-2015

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WD(2015)29
Unclassified

ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT

-- Note by Sweden --

16-18 June 2015

This document reproduces a written contribution from Sweden submitted for Item 9 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.

More documents related to this discussion can be found at www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm.

JT03377477

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

English - Or. English

SWEDEN

1. Summary

1. When public entities act in competitive markets there is a risk that this may result in the distortion of competition. Market entry by private undertakings may be impeded and those already active in the market may be driven out, particularly small and medium-sized enterprises (SMEs). Most often, the general antitrust prohibitions have limited reach in these cases. In order to address this conflict the Swedish Competition Act (2008:579) includes rules prohibiting anti-competitive sales activities by public entities (the “competitive neutrality rules”).

2. According to the competitive neutrality rules, the Stockholm District Court may, upon a petition by the Swedish Competition Authority (SCA), prohibit a certain *conduct* by the state, a municipality or a county council within a sales activity if the conduct distorts, by object or effect, the conditions for effective competition in the market, or if it impedes, by object or effect, the occurrence or the development of such competition. A local municipality or county council may also be prohibited by the court from carrying out an entire *sales activity* that is incompatible with the law, if that conduct or activity distorts or impedes effective competition in the market. In both cases, the sales activity in question should involve an offer of goods or services according to the definition of an “undertaking” under EU law and the Swedish Competition Act.

3. Since the rules were enacted on 1 January 2010, the SCA has investigated several cases, leading to some court decisions and several self-correction measures by public entities. The following conclusions can be drawn from the SCA’s experiences of applying the rules.

- The competitive neutrality rules have been particularly relevant to the operations of municipalities and county councils.
- The rules give incentives to public entities to themselves correct their certain way of conduct and/or activity which might impede or distort competition. Therefore, clear and simple external communication is essential to make use of the full potential of the rules.
- Implementation of competitive neutrality rules will most likely result in many complaints and tip-offs. Therefore, it is advisable to construct a database where all complaints, tip-offs and cases can be registered. Some sectors are more prevalent in complaints and tip-offs, implying that extensive knowledge in these sectors are useful.
- Investigations under the competitive neutrality rules are often challenging, particularly when it comes to the examining the price-setting methods of municipalities and county councils. The SCA has recommended that clear requirements should be stipulated for public entities to separate competitive activities from non-competitive activities in their financial accounts. This could prevent confusion of costs and revenues; furthermore, it may counteract public entities’ lack of knowledge concerning their production costs.
- Cases often take a significant time to reach a final decision in court, which can result in private competitors exiting the market before the injunction comes into effect.
- Despite the existence of competitive neutrality rules, the number of municipal companies in Sweden is increasing, sales of municipal companies are not declining, and the areas of conflict between public and private companies are set to persist and diversify.

2. Introduction

4. Market developments in Sweden have prompted public entities to become more business-orientated. These developments have created a mixed economy involving markets on which both public and private actors are present.

5. Public entities and private undertakings operate under different market conditions; the former publicly funded through tax subsidies and with a focus on serving the public interest, and the latter profit-driven with a focus on the market and its opportunities. However, in reality, the differences are not clear cut. Behaviour and objectives relating to these two actors have increasingly merged, which can have a detrimental impact on competition and the markets' function.

6. To level the playing field between public and private enterprises and prevent public sales activities from distorting competition, new rules on anti-competitive sales activities were incorporated into the Swedish Competition Act on 1 January 2010 under Chapter 3, Articles 27-32. Since then, the SCA has handled a large number of cases under the new rules.

7. The SCA described the competitive neutrality rules and some of the main competition issues that often arise as a result of public intervention in its submissions to Working Party No. 3 on Cooperation and Enforcement in 2009 and to the Competition Committee policy roundtable in 2004¹.

3. Brief explanation of the rules

8. According to the competitive neutrality rules a certain *conduct* by the state, a municipality or a county council within a sales activity may be prohibited through an injunction if the conduct distorts, by object or effect, the conditions for effective competition in the market, or if it impedes, by object or effect, the occurrence or the development of such competition. A certain *sales activity* carried out by a municipality or a county council may also be prohibited in its entirety. However, a sales activity may not be prohibited if it is compatible with law.

9. The sales activity should involve an offer of goods or services according to the definition of an "undertaking" under EU law and the Swedish Competition Act. The provisions are also applicable to conduct or a sales activity carried out by another legal person than those stated above, if the state, a municipality or a country council, directly or indirectly, has a decisive influence over the legal person through ownership, financial participation, regulations or through any other means.

10. As regards the prerequisite of distortion of the conditions for effective competition, this is aimed at situations where existing competition is not on sufficiently equal terms; for example where a public entity benefits from unjustified advantages as a result of having a role as an authority parallel to its commercial role in the market. Typical instances of distortion include below-cost selling, discrimination and refusal of access to certain infrastructure.

11. Cases concerning injunctions pursuant to the competitive neutrality rules are heard by the Stockholm District Court on petition by the SCA. An injunction by the court may not be imposed on conduct that can be justified by public interest considerations. An injunction shall take effect immediately, unless decided otherwise.

4. The competitive neutrality rules vs. general antitrust prohibitions

12. The competitive neutrality rules are national provisions that have no foundation in the EU treaties. They provide the SCA with a complement to the two general antitrust prohibitions, i.e. Article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and the

¹ See DAF/COMP/WP3/WD(2009)54 and DAF/COMP/ (2004) 36, p. 227 et seq.

corresponding articles in the Swedish Competition Act², and expand the possibilities for the SCA to investigate a public entity's behaviour even if it does not fulfil the prerequisites under the general antitrust prohibitions.

13. Nevertheless, the general antitrust prohibitions remain applicable *vis-à-vis* public entities. In the event a certain conduct or activity which distorts or impedes competition affects the trade between EU Member States, and hence, falls within the scope of Article 101 and/or Article 102 TFEU, those provisions must be applied in accordance with the EC Regulation 1/2003.³

14. The competitive neutrality rules can be applied when it is not possible to demonstrate "dominance", or an abuse thereof, as defined in the case law under Article 102 TFEU and/or the equivalent provisions in the Swedish Competition Act. It may be argued that the unique position and advantages that a public entity has on the market could define it as a dominant market player per se when it competes with private actors, but courts may be reluctant to accept such an interpretation of dominance. In cases where dominance can be established it may still be difficult to establish whether this position has been abused. The public entity does not have profit as a singular motive, which makes it more difficult to prove the occurrence of an abusive behaviour.

15. There is also no requirement to establish an agreement or concerted practice as in Article 101 cases, in order to prohibit the conduct/activity under the competitive neutrality rules.⁴ The rules do not provide any examples of conduct or activities that would be considered as distorting or impeding competition as in 101 TFEU and the corresponding prohibition in the Swedish Competition Act⁵. Each case therefore needs to be assessed individually on its merits.

16. Furthermore, the prerequisite of the conduct or sales activity impeding the occurrence or development of effective competition is potentially wider than the scope of, for example, Article 101 TFEU (i.e. "...*prevention, restriction or distortion of competition...*") and aims at situations where the private alternative exits the market, or does not even enter the market, as a result of the conduct. It also covers instances where the expansion or development of private undertakings is hampered by the conduct. Examples include situations where the mere presence of a public entity makes it more difficult for a private undertaking to expand or creates a barrier to entry; so-called foreclosure effects.

17. The SCA will assess whether the conduct/activity is harmful to the conditions for competition or alters the structure of competition. Since public entities operate in the market under different conditions than private entities, for example being publicly funded and not at risk of being declared bankrupt, their mere presence can be a risk for distortion of competition. The requirement of market impact *to an appreciable extent* is, therefore, absent in the competitive neutrality rules due to the different conditions under which public entities operate. Even though the distortion must be of some significance it is unclear what this means in practice. This will have to be developed through case law. The SCA recently appealed a judgment in which the Stockholm District Court made the assessment that the market impact of the anti-competitive behaviour was too insignificant to issue an injunction⁶. The case is pending in the Market Court (the final instance) and court proceedings took place in May 2015. A final court decision is expected in July.

² Chapter 2, Article 2 and 7, Competition Act.

³ See Article 3, Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1

⁴ Further to Article 3 of regulation 1/2003, the competitive neutrality rules would not be applicable in a case concerning an anti-competitive agreement that affects trade between Member States.

⁵ Chapter 2, Article 1, Swedish Competition Act, SFS 2008:879.

⁶ *Stockholm District Court case T-16810-12.Strömstads badanstalt.*

18. The sanctions available under the general antitrust prohibitions and the competitive neutrality rules also differ. Whereas the general antitrust prohibitions provide the possibility for imposing fines for anti-competitive behaviour, an injunction issued under the competitive neutrality rules is limited to addressing future conduct or activities, i.e. similar to “cease and desist” obligations in cases concerning articles 101 and 102. However, a violation of such a prohibition may be subject to a fine.

19. This implies that self-corrections by the public entity play a more important role than in cases regarding the two general antitrust prohibitions. A self-correction diminishes the need for further investigation and court proceedings since an already corrected conduct cannot be subject for an injunction according to the competitive neutrality rules. However, the SCA has no formal mechanism for ensuring that the public entity has in fact ceased its anti-competitive sales activities or conduct.

5. Statistics on competitive neutrality cases

20. When the competitive neutrality rules came into force the SCA received a large number of complaints regarding public entities’ activities on the market. From 1 January 2010 to 30 June 2013 the SCA received more than 300 tip-offs and complaints regarding competitive neutrality. This made up almost 50 per cent of all tip-offs and complaints. Of these, 70 cases led to further investigation. Since this rather intense start, the influx of competitive neutrality tip-offs and complaints has declined to now make up approximately 25 per cent of the total inflow.⁷

21. The most prevalent sectors in these complaints and tip-offs have been the hotel, restaurant and conference sector and other tourism-related sectors, the waste sector, the sector for healthcare centres, the supply of broadband services, and the supply of consultancy services. Typical complaints often concern public entities’ pricing methods or cases where public entities, accidentally or intentionally, mix activities carried out in the public interest and activities that are subject to competition. Another typical complaint concerns cases where a public entity has sole access to an essential facility which could constitute a monopoly situation than can be abused, or when the public entity refuses access to such facilities where access shall be provided on fair, reasonable and non-discriminatory terms.

22. To date, six cases on competitive neutrality have led to court decisions⁸. Furthermore, the SCA is awaiting the District Court’s decision in one case. In addition, the SCA has two cases pending in the Market Court (the court of final instance), including one case in which the SCA’s application was rejected and one in which the party has appealed⁹.

23. The rather modest number of cases that have made their way to court can be explained by several factors. In some investigations the prerequisites in Chapter 3 Article 27 of the Swedish Competition Act were not met. For example, the preliminary investigation may have shown that the municipality did not have a decisive influence over the activity in question, or that the activity was not considered as a sales activity according to the legal definition. Furthermore, the conduct could also be

⁷ Uppföljning av lagtillämpningsärenden enligt 3 kap. 27-32 §§ konkurrenslagen (2008:579), KL (our ref dnr 617/2013).

⁸ Final decisions in favour of the SCA’s opinion: *Market Court MD 2014:1 Rådningstjänsten Dala Mitt* (our ref, dnr 304/2010), and *Stockholm District Court T 8160-11 Skelleftebuss* (our ref dnr 391/2011). Decision on litigation costs: *Stockholm District Court T 9290-11 Mälarenergi Stadsnät AB* (our ref dnr 438/2011). Pending processes: *Stockholm District Court T-16810-12 Strömstads badanstalt* (our ref dnr 628/2012) and *Stockholm District Court T 911-12 Borås kommuns Servicekontor* (our ref dnr 45/2012). Use of the subsidiary right to litigate: *Stockholm District Court T 9245-12, appealed to Market Court and pending nr A 6/14 ATV-MEDIA AB*.

⁹ *Stockholm District Court case T-16810-12 Strömstads badanstalt* and *Stockholm District Court T 911-12 Borås kommuns Servicekontor* (our ref dnr 45/2012).

found to be justifiable on public interest grounds, which exempts it from the rule. In other cases, the lack of verifiable evidence has led the SCA to terminate the investigation. Moreover, and maybe most importantly, the competitive neutrality rules provide an incentive to the public entity to pursue a self-correction of the questioned activity, leading to a dismissal of the case at hand.

24. The table below sets out the inflow of competitive neutrality cases from 2010 to 2014 in the SCA. From 2010 until June 2013, 15 cases were closed because of an undertaking from the public entity to correct its behaviour. The number of cases closed due to self-corrections since June 2013 has steadily increased. Since last year, the SCA has started to build up a database that compiles statistics from all cases, including information on which cases resulted in a self-correction.

Table 1. Competitive neutrality cases 2010-2014

	2010	2011	2012	2013	2014*
Balance brought forward	0	11	8	3	
Registered	43	19	3	3	13
Concluded	32	21	8	3	9
Balance carried forward	11	9	3	3	
Average processing time for concluded cases, calendar days	137	230	240	463	182

*Other statistics than previous year.

25. In 2014, the SCA initiated a new monitoring routine using business and media intelligence with the aim of more thoroughly scanning the market and not relying solely on tip-offs and complaints. This resulted in four cases being registered on the SCA's own initiative during the same year.

26. One conclusion that can be drawn from the number of cases brought to court and the level of self-correction is that the competitive neutrality rules have a wider influence on the market than reflected merely by the number of cases brought to court.

6. Challenges in applying the competitive neutrality rules

6.1 Long court proceedings

27. As explained above it is the court which processes the SCA's application for an injunction and the public entity is not obliged to stop its anti-sales activity or conduct during court proceedings. In recent cases, the court decisions were issued more than one year after the SCA's petition. For example, in one of the first cases in which the SCA filed a summons application with the Stockholm District Court, the decision, siding with the SCA, was issued more than two years after the case was brought to court¹⁰. After the judgement was rendered there was a six month period before the questioned sales activity was to be brought to an end. Recent cases have had a lead time in the Stockholm District Court of almost two years¹¹.

28. Long lead times can result in private competitors exiting the market before the injunction comes into effect.

29. There is, however, a possibility to make a decision on an inhibition after an injunction is filed in court. This possibility is limited to cases in which the outcome is somewhat clear, and the conduct itself risks causing serious harm in the market. Furthermore, additional conditions for a fast decision on the conduct have to be fulfilled. So far, this possibility has never been used by the SCA since the conditions for making use of this inhibition have not been met.

¹⁰ *Stockholm District Court T 8160-11 Skelleftebuss (our ref dnr 391/2011).*

¹¹ For example, *Stockholm District Court case T-16810-12 Strömstads badanstalt and Stockholm District Court T 911-12 Borås kommuns Servicekontor (our ref dnr 45/2012) and Stockholms District Court (T 7924-11), Räddningstjänsten Dala Mitt (our ref dnr 304/2010).*

30. It should be noted that since the competitive neutrality rules are national provisions, no guidance or precedent can be found at an EU level. More extensive case law will, most likely, facilitate the use of this tool in terms of providing greater foreseeability regarding the outcome of a certain case, as well as providing greater means to determine the harmful effects of a certain conduct or activity on competition in the market.

6.2 Challenges related to taking actions against the state

31. When addressing municipalities and county councils the SCA can, as well as challenging their conduct when carrying out a sales activity, also seek an injunction to prohibit an entire sales activity. To do this, the court needs proof that the activity is not compatible with the law and that competition is distorted or impeded.

32. However, when addressing the state, the SCA is limited to challenging specific conduct that distorts competition. The explanation can be found in the legislative history of the rules. When the competitive neutrality rules were issued a parallel investigation on a general prohibition on all anti-sales activities by the state was being conducted, and its conclusions had not yet been published. The investigation later proposed a general prohibition of the state's sales activities, but with some exemptions to the rule¹². The investigation has not led to any legislative amendments.

33. There are some particular challenges for the SCA when investigating state-owned enterprises (SOEs). Governmental activities are subject to a vast amount of legislation and regulations, and in some areas of operations the prices charged for goods and services are also subject to legislation. Additionally SOEs, fully or partly, exercise governmental authority, and are often assigned tasks with a societal benefit. This may lead to difficulties in determining which activities fall outside their competencies and constitute a sales activity as defined in the rules.

34. Moreover, these entities often enjoy the benefit of having once been a state monopoly, which can put them in a unique position regarding material and strategic resources. This difference can, for example, be seen in public procurement procedures. Investigations of cases in which a former state monopoly entity has offered very low prices in its tender often show that these tenders are properly based on low production costs originating from economies of scale, early acquired resources, and vast internal knowledge of the area in question. However, competitive neutrality cases can arise when prices are considered to be unjustifiably low and where the behaviour can risk distorting competition.

35. A few investigations have been carried out by the SCA against SOEs under the competitive neutrality rules, but they have all been closed at an early stage. For example, the SCA investigated whether the state-owned company AB Svenska Spel, which operates on the gambling market in Sweden, had distorted competition on the restaurant market through its restaurant and entertainment operations within its casinos¹³. Svenska Spel outlined a number of measures to remedy the alleged competition problem, including ensuring that its restaurant operations will always bear their own costs independent of revenues from gambling activities, setting the costs of its marketing of its restaurant offers according to certain benchmarks, and ensuring that restaurant customers must first pay an entry fee for and register with the casino. As a result of these measures the SCA decided to close its investigation.

6.3 Challenges related to taking actions against municipalities and county councils

36. Municipalities and country councils must adhere to certain key principles set out in the Local Government Act (LGA) (1991:900) and shall ensure that companies they control adhere to the same principles. This raises particular challenges in relation to applying the competitive neutrality rules.

¹² SOU 2008:118.

¹³ Dnr 451/2010

6.3.1 *Determining the scope of municipal and county competences*

37. In order to prohibit a certain sales activity, this activity has to fall outside the scope of what the municipality or county council may legally provide according to the Swedish Local Government Act (LGA) (1991:900).

38. There is a very strong local self-government principle in Sweden which allows municipalities to act independently, and the LGA entails several general principles that are very flexible. For instance, Chapter 2, Article 1 LGA states that municipalities and county councils should attend to matters of general concern which are connected with the area of the municipality or county council or with the people residing there. The notion “matters of general concern” has never been defined in law and the municipals powers have significantly widened over the years through case law.

39. Determining the scope of this constitutes a challenge for the SCA when investigating a case under the competitive neutrality rules. If the sales activity falls under the responsibilities of the municipality or county council according to the LGA, the SCA can still investigate a particular conduct that is applied in the sales activity, such as the price of the service or goods offered or the way in which the goods is offered in the market (for example whether they are offered on non-discriminatory terms).

40. In considering the possibility to prohibit anticompetitive sales activities under the competitive neutrality rules it should be noted that the scope under the LGA for challenging decisions by municipalities and county councils on the basis that they exceed their authority is somewhat limited.

6.3.2 *Determining costs and revenues of sales activities*

41. According to the prime cost principle (Chapter 8 Article 3a LGA) municipalities and county councils may levy charges for services and utilities which they provide but these may not exceed the cost of the services or utilities provided (known as the prime cost). It follows that the prime cost principle does not prohibit pricing below cost.

42. The SCA has received several complaints regarding public entities’ pricing methods, questioning whether they have set their prices on a market basis. However, charging a lower price than what private undertakings may consider to be on a market basis is not in itself prohibited by the competitive neutrality rules.

43. Regarding the pricing of external sales activities, public entities carry the risk of confusing taxpayers’ money with revenues generated from the sales activities, making it difficult to determine the actual costs and revenues for the particular sales activity. The SCA has frequently experienced that financial accounts, particularly in municipalities, are inadequately separated regarding the allocation of costs and revenues. This constitutes a significant challenge when trying to assess whether the price of goods actually covers the production costs. In several cases, the public entity does not know, or has limited knowledge of, its production costs, which makes the assessment of whether the price is reasonable very difficult to conduct. This often results in these types of cases not being prioritized, since the distortion of or impediment to competition cannot be demonstrated.

7. Other non-enforcement efforts to tackle anti-competitive measures

44. In 2013, the SCA issued a report entitled Competition in Sweden¹⁴. In this report the SCA identified policy recommendations with the potential to promote effective competition and competitive neutrality. Among these were recommendations to introduce a requirement that public entities should separate financial accounts of their competitive activities from their non-competitive activities, as well as requirements in the LGA that municipalities should implement a competition policy to ensure transparency and competitive neutrality, and review their sales activities regularly to ensure that they conform to the competitive neutrality rules. The SCA also recommended being granted decision-making powers to issue an injunction under penalty of a fine for violations of the rules on anti-competitive sales activities by public entities.

45. Encouraging public entities to change and correct a conduct or activity that distorts or impedes competition is an important way of ensuring competitive neutrality without resorting to enforcement measures. It is therefore important to stimulate awareness of the rules both in the media and in a local government setting. The SCA is working actively on spreading knowledge about the competitive neutrality rules based on cases which the SCA has investigated.

46. In the summer of 2015, an interactive guide will be published on the SCA's website. Furthermore, each time an application for an injunction is filed, the SCA issues a press release with information on the case, and uses opinion articles in local and national media to reinforce its message.

8. How have the rules and the SCA's work been received by stakeholders?

47. Initially, stakeholders held great expectations for the unique scope of the competitive neutrality rules, which resulted in the heavy influx of tip-offs and complaints. Today, these expectations are better anchored to reality which, nevertheless, does not lessen the importance of the existence of the rules.

48. In its 2013 report on Competition in Sweden the SCA outlined different responses to the competition neutrality rules from both private actors and public entities, based on reports and surveys conducted with different stakeholders. The Competition in Sweden report showed that around two-thirds of public entities had re-assessed their sales activities as a result of the rules coming into force, and a third had made changes to their activities. However, surveys with private companies show that there is a perception that competition from public entities has not decreased since the rules came into force. This latter perception is confirmed by a follow-up study conducted by the SCA in 2014¹⁵.

49. The study aimed to identify, quantify and visualize the areas of conflicts between private and public enterprises. Selected municipal companies were asked to describe what products they offered and to whom. The companies also answered whether they faced competition from private companies, what pricing strategies they applied for their sales and how often they had submitted bids in public procurement processes. From the answers provided, the SCA concluded that the number of municipal companies is increasing, that sales of municipal companies are not declining, and that the areas of conflict between public and private companies are set to persist and diversify.

¹⁴ Konkurrensen i Sverige 2013, 2013:10. http://www.kkv.se/globalassets/publikationer/rapporter/rapport_2013-10_summary.pdf

¹⁵ Kartläggning av kommunala bolags försäljningsverksamhet - I konflikt med privata företag, Rapport 2014:3, http://www.kkv.se/globalassets/publikationer/rapporter/rapport_2014-3.pdf