

COMPETITION ECONOMICS HANDBOOK 2020

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E.CA Economics



Competition Economics Handbook 2020

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Global Competition Review is delighted to publish this thirteenth annual edition of the *Competition Economics Handbook*.

With economics at the centre of competition law, this handbook identifies the issues that antitrust economists are tackling today. The book's comprehensive format provides contact details for competition agencies' economists in over 70 jurisdictions. A Q&A format illustrates how the advisers are organised and their input into the regulation and enforcement process.

Much of the information has been provided by the agencies themselves and we are, as ever, grateful for all their cooperation.

The *Competition Economics Handbook 2020* is one of five special reports included in a *Global Competition Review* subscription each year, alongside four issues of the magazine, a survey on a four-year rotation (*Corporate Counsel* published in January 2019 and *40 Under 40*, to be published in January 2020) and two signature surveys, *Rating Enforcement* and *The GCR 100*.

We would like to thank all those who have worked on the research and production of this publication.

The information listed is correct as of October 2019.

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Overview

Karl Lundvall and Mattias Almqvist

Copenhagen Economics

What role will competition economics have in Sweden in the future?

The answer seems to be a tale of two extremes. First, to provide rock-solid and robust economic evidence for courts, and second, to support lawyers with quick and pragmatic economic advice early on in merger filings, investigations and compliance work. The two extremes require different types of economic analysis as well as different types of collaboration between lawyers and economists.

This article is based on interviews with prominent Swedish competition lawyers from the law firms Bokwall Rislund, Cederquist, Cirio, Delphi, Eric Ericsson, Front Advokater, Gernandt & Danielsson, Hannes Snellman, Kastell, Lindahl, Mannheimer Swartling, Roschier, Setterwalls, Vinge, as well as with the management of the Swedish Competition Authority (SCA).

Mergers: still the core of competition economics

Competition economics still has its most pronounced role in merger cases. Lawyers agree that having a complex merger filing without economists involved is unlikely. Additionally, Swedish competition lawyers see a continued and increasing need for economic analysis and advice in the early preparations of merger cases. However, actual or perceived high barriers for engaging economists seem to limit the use of economic analysis in early stages or for small tasks for some law firms.

The SCA has taken two mergers to Phase II since the SCA gained prohibitional powers on 1 January 2018. The first, in which a company providing security services acquired another security services company, was cleared without remedies in November 2018. In the second, in which three dairy companies acquired a company managing certain cheese brands, the SCA exercised its prohibitional powers for the first time in April 2019. The prohibition was at the time of writing appealed to the Patent and Market Court, a specialised first instance court in Sweden. Economic analysis played significant roles in both investigations by the SCA.

Swedish competition lawyers praise the SCA's efficiency and accessibility in uncomplicated merger

filings. This praise has been consistent over several years of interviews. However, in complicated merger filings and investigations, lawyers sometimes experience limited transparency about the SCA's work and a lack of clarity about the direction of the case.

Abuse of dominance and anticompetitive public sales activities: several judgments

Several judgments have come since the summer of 2018 and the SCA has won two victories in the Patent and Market Court. In the first, the court obliged a packaging recycling company to grant a competing recycling company access to their recycling stations. In the second, the court prohibited a municipality to prevent private companies from installing underground fibre cables for high-speed internet.

In June 2019, the Patent and Market Court of Appeal confirmed the lower court's previous judgment clearing a stock exchange from the SCA's charges of abuse of dominance by preventing a competing stock exchange from using a data centre.

Digital dominants: competition law or regulation?

A case concerning price parity clauses of an online travel agency (OTA) received its final judgment in the Patent and Market Court of Appeal in May 2019. The appellate court overturned the lower court's judgment and concluded that it was not demonstrated that the vertical price parity clause, which bans hotels from offering lower prices on their own websites than on the OTA's website, had anticompetitive effects. A German court reached a similar conclusion a month later in a related case.

In June 2019, the SCA decided to close an investigation into the Swedish state-owned train company's online ticket sales platform. The investigation was based on complaints from two commercial train operators arguing that their inability to access the platform restricted competition. The SCA identified competition issues but decided not to prioritise the case because the SCA believed that the issues could be solved more effectively by measures other than competition law, for example by the regulation of online sales of commercial passenger train tickets. In

relation to the case, the Swedish government decided in August 2019 to initiate a Commission of Inquiry to investigate the case for a national ticket system for public transport.

The judgement in the OTA case, the possible regulation of ticket sales and the fact that digitalisation is a prioritised area for the SCA in 2019-2021 has stirred a discussion about the limits of competition law on digital markets. Is there a case for regulating certain digital platforms? In Austria, Belgium, France and Italy, for example, price parity clauses of OTAs are banned or regulated. Swedish competition lawyers give no unanimous answer as to whether competition law or regulation is most effective in dealing with the (potential) issues.

From an economic point of view, competition issues can go beyond the reach of competition law, thereby motivating sectoral regulation. After all, the regulation of price terms and access are common features in regulated sectors like telecoms, postal and energy and could potentially be used to solve the (potential) issues on digital platforms. However, motivating regulation requires clear documentation of the competition issues and the expected effects of the proposed measures since regulation could bring excessive administrative burden and regulatory intervention.

Anticompetitive agreements and damages: limited presence of economic analysis

Several long-lived investigations into potential anticompetitive agreements are currently ongoing. The investigations consume large amounts of resources, both for the SCA and for the parties, but have so far not resulted in any judgements of convictions.

Few damage cases following competition law infringements have emerged in recent years. The few findings of infringements in the appellate court as well

as the Swedish business culture of resistance towards suing for damages seem to be the main reasons. Few lawyers believe that the implemented damages directive will have a substantial effect until any of these two things change.

The future for competition economics: robust evidence in courts and quick advice on speed dial

The two judgments in the appellate court, adding to previous years' judgments, in favour of the defendant have also sparked a debate about the standards of proof in the appellate court. Is it possible to win a case while having the burden of proof? Most lawyers believe that it is possible but emphasise that it is difficult. Economic evidence needs to live up to high standards and be robust to alterations of uncertain assumptions. High standards increase predictability and robustness of judgments but could make it too difficult for the SCA and private plaintiffs to win cases. The high standards on precision challenges empirical economics, which is uncertain by nature, and may limit what can be proven as well as increase the amount of resources necessary for economic evidence to withstand the scrutiny of courts.

On the contrary, recent developments call for economists on speed dial to guide competition lawyers through the increasingly complex economic analysis required early on in merger filings, investigations and in compliance work. While most competition lawyers recognise their need for such guidance, not all use it. High barriers, in terms of actual and perceived effort and cost could be one reason why this is not common practice at all Swedish law firms. We expect to see closer collaboration between lawyers and economists in the future to enable evidence to meet the high standards of courts as well as to enable high-quality and quick advice to clients at a reasonable cost.



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Karl Lundvall helps clients with economic arguments and analysis in competition law cases, providing support that helps them present their cases convincingly. He specialises in competition and regulation cases where he excels at clearly arguing, for example, the value creation that stems from sound competition in various markets. He is listed in the *Who's Who Legal: Competition Economists*. Karl spent seven years working for the Swedish Competition Authority prior to Copenhagen Economics and taught economics at the University of Gothenburg.

Mattias specialises in economic analysis in competition law, regulation and disputes. He has experience from a range of industries such as payments, postal, telecommunications, electricity and healthcare. Mattias has an MSc in economics from Stockholm School of Economics and from University of St. Gallen.



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Copenhagen Economics is one of the leading economic consultancies in Europe. Founded in 2000, we currently employ more than 90 people operating from our offices in Copenhagen, Stockholm, Helsinki and Brussels. Based on established research methods and in-depth sector knowledge, we help our clients make better choices in their political and commercial reality. Our senior team provides pragmatic solutions founded in economics to law firms, private companies, regulators, and policy makers all over the world. We are particularly dedicated to 12 service areas, including competition, dispute support, digital economy, intellectual property valuation and transfer pricing, and postal and delivery. *Global Competition Review* lists Copenhagen Economics among the top 20 economic consultancies in the world and has done so since 2006.

