

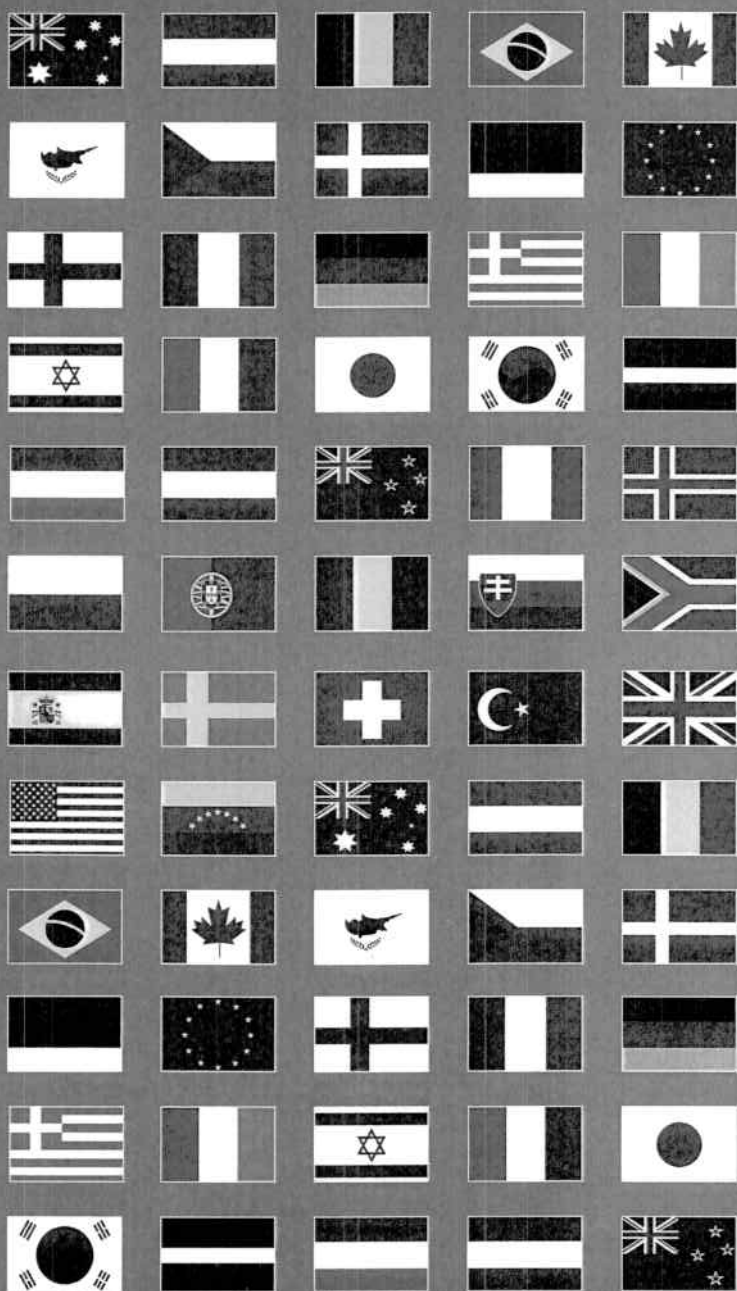
GETTING THE DEAL THROUGH

Cartel Regulation

Getting the fine down
in 37 jurisdictions worldwide

2008

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Published by
GLOBAL COMPETITION REVIEW

in association with:

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The relevant legislation

The Swedish Competition Act came into force on 1 July 1993, and governs all aspects of Swedish competition law.

The object of the Act is to eliminate and counteract obstacles to effective competition in the production of and trade in goods and services. The ultimate aim of the legislation is to promote growth and efficiency in the Swedish market. Consumer protection is covered by other legislation, although consumer interests are often referred to in decisions under the Act, since free competition is ultimately to the benefit of consumers.

The Act contains two general prohibitions, one against anti-competitive cooperation between undertakings (section 6) and one against abuse of a dominant position (section 19). The Act also provides for the control of concentrations. The Act's provisions on anti-competitive cooperation between undertakings and abuse of a dominant position are modelled on articles 81 and 82 of the EC Treaty. The Act's merger control rules are modelled on the EC Merger Regulation. The preparatory works of the Act provide that the Act is to be interpreted in line with EC law, including the case law of the European Court of Justice.

On 1 July 2004 the Swedish system of individual exemptions and negative clearance was abolished and replaced with a directly applicable legal exemption system. Individual exemptions granted before 1 July 2004 will, however, continue to be valid until the exemption period expires. This means that, similarly to article 81(1) of the EC Treaty, the elements of an agreement or practice that violates the Act are void and unenforceable unless the conditions for exemption in section 8 of the Act are satisfied. The conditions for exemption are the same as under article 81(3) of the EC Treaty, which require that the efficiencies following an agreement outweigh the anti-competitive effects. Moreover, block exemptions have been adopted in the form of separate regulations largely incorporating their EC counterparts.

Fines may be imposed for infringements of the Act and injured parties may claim damages.

A decision by the Competition Authority may be appealed to the Market Court. It should also be noted that since 1 January 2001, the Competition Authority, the Stockholm District Court and the Market Court have been granted the power to apply directly articles 81 and 82 of the EC Treaty.

The Competition Authority

The Competition Authority is responsible for implementing and administering the Act. It has the power to order an undertaking to terminate an infringement and to apply to the Stockholm

District Court for a fine to be imposed on the undertaking for infringement of the Act. Concentrations are notified to the Competition Authority, and it has the power to initiate proceedings before the Stockholm District Court with a view to obtaining a prohibition. The Competition Authority may also initiate investigations and has fact-finding powers. Finally, the Competition Authority issues guidelines on the application of the competition rules.

The Competition Authority is an independent governmental body consisting of 110 officials. It is organised into specialised departments and other units. The Authority is independent in relation to the European Commission but is required to cooperate with it.

The Competition Authority's law enforcement departments 1, 2 and 3 are responsible for investigating infringements of the Act and of EC competition law, and for handling complaints and notifications. Each of the three law enforcement departments deals with different sectors of the economy. Department 1 specialises in the building sector, foodstuffs (including non-durable goods) and the agriculture sector. Department 2 specialises in financial services, telecommunications, media and IT. Department 3 specialises in the transport, energy and petroleum sectors, chemical-technical industry and pharmaceuticals, and competition between public and private sectors.

The economic analysis department is responsible for economic analysis in relation to investigations and legislative proposals. The information department is responsible for handling tip-offs and inquiries, in addition to its duties relating to the Authority's relations with the public. The legal secretariat is responsible for legal analyses and for representing the Authority in courts. The secretariat for strategy and international affairs assists the director general in strategic matters and administrative law issues. The secretariat also has overall responsibility for the Authority's cooperation with foreign organisations and authorities. The administration department is responsible for the Authority's overall planning process, personnel, budget and financial issues and IT coordination.

2 What is the substantive law on cartels in the jurisdiction?

The Act provides no legal definition of a cartel. In Swedish doctrine and case law the term 'cartel' is generally applied to horizontal agreements and concerted practices covering hard-core restrictions of competition such as price fixing, limitations on production or sale, market allocation and bid rigging.

Cartels may violate the general prohibition against restrictive agreements found in section 6 of the Act and, to the extent collective dominance may be involved, the prohibition against abuse of

a dominant position found in section 19 of the Act.

According to the wording of section 19 of the Act, a dominant position could be held by 'one or several undertakings'. In other words, the Act reproduces the same expression used in article 82 of the EC Treaty. The Competition Authority has confirmed that the EC case law regarding collective dominance constitutes the basis for the Authority's analysis when deciding similar questions. It follows that market behaviour by one or a number of undertakings, although these undertakings do not constitute a single economic entity, can be evaluated by the Authority under section 19 of the Act.

Although the Competition Authority has not yet found any collective behaviour on the Swedish market to constitute an abuse of a collective dominant position, it has confirmed the existence of collective dominance and defined the market conditions that need to be present for collective dominance to exist. In short, a collective dominant position exists when two or more independent economic entities are, in a specific market, united by links of an economic or structural character, enabling them to act jointly in the market, independently of customers and suppliers.

Normally, cartels fall under the prohibition contained in section 6 of the Act. The prohibition renders the cartel agreement null and void and results in liability to pay fines as well as damages (see question 15). However, there are two possible exceptions to this.

First, to fall under the prohibition against anti-competitive agreements, the agreement must restrict competition to an appreciable extent. Like the European Commission, the Competition Authority has published a Notice on Agreements of Minor Importance (KKVFS 2004:1) listing certain categories of agreements that normally do not, in the Authority's view, have an appreciable effect on competition. According to the notice, agreements between actual or potential competitors where the parties' combined market share does not exceed 10 per cent, and agreements between non-competitors where none of the parties has a market share exceeding 15 per cent, normally fall outside the prohibition against restrictive agreements. Where the individual turnover of each of the parties does not exceed 30 million kronor (approximately €3.2 million) the 15 per cent threshold applies irrespective of the type of agreement. However, according to the notice, these *de minimis* principles do not apply to agreements that contain certain 'hard-core' restrictions. More specifically, typical cartels of the kind referred to above may be prohibited even where the market shares are below the thresholds set out in the notice.

Second, section 8 of the Act provides for a directly applicable legal exemption. The conditions for exemption are the same as in article 81(3) of the EC Treaty, namely that:

- the agreement must contribute to improving the production or distribution of goods or promote technical or economic progress;
- the agreement must pass on to consumers a fair share of the resulting benefits;
- the agreement must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the positive effects; and
- the agreement must not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Even though most cartels would be unlikely to fulfil the four criteria for exemption, there may be situations in which cooperation

of a 'cartel-like' nature between small or medium-sized undertakings with small market shares could possibly benefit from an exemption (to the extent the prohibition in section 6 of the Act is applicable, despite the *de minimis* principle). There may also be room for exemption in relation to 'crisis cartels'.

3 Are there any industry-specific offences and defences?

No.

4 Does the law apply to individuals or corporations or both?

Currently the Act is applicable only to 'undertakings' (but see question 14).

Section 3 of the Act defines an undertaking as a legal or natural person that is engaged in an activity of an economic or commercial nature. The term 'undertaking' must be viewed in the broadest sense and is interpreted in the same way as under EC competition law. Virtually every natural or legal person participating in the economic process will qualify as an undertaking. The term covers any activity directed at trade in goods or services, irrespective of the legal form of the undertaking and regardless of whether or not it is intended to create profits.

Activities that have been held to be commercial activities falling under the Act include health care, distribution of fire appliances and leasing of real estate. Activities that have been considered non-commercial activities, and therefore as not falling within the scope of the Act, include the public procurement of translation services, the financing of an information brochure on a national system concerning doctors, the distribution of instructions and dissemination of information, as well as the procurement of work clothes for personal use.

The Act does not apply to agreements between employers and employees regarding wages and other conditions of employment.

5 Does the regime extend to conduct that takes place outside the jurisdiction?

The Act prohibits agreements between undertakings that have as their object or effect the prevention, restriction or distortion, to an appreciable extent, of competition. The relevant geographical market can be defined as Sweden, a part of Sweden, or an area larger than Sweden. An agreement between undertakings situated outside Sweden may be prohibited under the Act if the agreement has actual or potential effects in Sweden.

Abuse of a dominant position is prohibited if the abusive conduct has effects in Sweden. The geographical market can, in this case too, be defined as Sweden, a part of Sweden, or an area larger than Sweden.

In practice, this means that a cartel may be prohibited under Swedish law, and the undertakings involved pursued under the Act, if the cartel has appreciable effects on competition in Sweden, even if the cartel in question is organised outside Sweden, the undertakings involved are not Swedish, or both. However, public international law imposes restrictions on the exercise of extraterritorial jurisdiction under the Act and the Competition Authority is unlikely to take action against foreign undertakings unless such action can be enforced.

6 Are there any proposals for change to the regime?

As mentioned in previous editions, a government committee has analysed whether the various forms of proceedings governed

by the Act could be rationalised, including whether the Competition Authority should be empowered to impose fines on undertakings for infringements. The final report was delivered in November 2006. The report concludes that the present procedural system works relatively well but that some measures may be taken to increase efficiency and legal certainty in procedures before the Competition Authority and the courts. The committee did not find sufficient reasons to propose that the Competition Authority should be generally authorised to decide fines, but proposed that the Competition Authority should be able to formulate a draft decision that will be legally binding if accepted by the undertaking or undertakings concerned.

The committee also reviewed the legislative proposals for the criminalisation of cartel activities submitted in a previous report (Competitive Crime: A legislative model (SOU 2004:131)) and concluded that criminalisation should not be proposed. It is proposed that the current Act should be replaced with a new act, which should come into force on 1 January 2009.

Investigation

7 What are the typical steps in an investigation?

When obtaining information, either *ex officio* or from an informant, that suggests the existence of a cartel, the Competition Authority must decide whether to proceed with an investigation. If there is sufficient evidence to suggest the existence of a cartel, the Authority may file an application with the Stockholm District Court for authorisation to conduct an on-the-spot investigation (a 'dawn raid') at the premises of one or more of the alleged cartel members. Such an application can be granted without consulting in advance the suspected undertakings if there is a risk that the value of the investigation would otherwise be reduced (ie, in particular where the undertakings can be expected to destroy or hide evidence if they are informed about the investigation). To our knowledge the District Court has never consulted suspected undertakings before granting an authorisation and has only once declined a dawn-raid request.

If the information collected during the dawn raid supports the suspicion, the Competition Authority will continue the investigation. At this stage, it is likely that the Authority will contact customers and competitors outside the suspected cartel and interrogate persons working for the suspected undertakings.

If the Competition Authority considers that it has sufficient evidence to prove the existence of the suspected cartel, it will send a statement of objections to the suspected undertakings, setting out its position and the evidence it has obtained. After having received the reaction of the undertakings (and providing that its suspicions remain), the Authority can adopt two different courses of action. It can order the undertakings to cease the violation of the Act, subject to a fine for non-compliance (a cease-and-desist order). The Authority can also sue the undertakings before the Stockholm District Court and request a judgment ordering the undertakings to pay a fine as a sanction for infringing the Act. The decision of the Stockholm District Court may be appealed to the Market Court.

Typical cartel matters will take a fairly long time from start to finish. The only time limit imposed on the Competition Authority is that the Stockholm District Court may only impose a fine if the Authority's application has been served on the undertaking in question within five years from the date on which the violation of the Act ended.

8 What investigative powers do the authorities have?

The Competition Authority may order a suspected undertaking, or any natural or legal person, to place information and documents at its disposal and to ask any person considered likely to have useful information to appear before it for an interrogation. If the Authority deems it necessary to undertake an on-the-spot investigation at the premises of an undertaking, it must file an application with the Stockholm District Court (see question 7). Authorisation will only be granted if there is reason to believe that an infringement has been committed; the undertaking fails to comply with an order to provide information, documents, etc, or there is otherwise a risk of evidence being withheld or tampered with; and the importance of the measure being taken is sufficient to outweigh the disruption or other inconvenience caused to the party affected by it. An order to provide information, documents, etc, as well as a decision to allow an on-the-spot investigation, may be imposed under penalty of a fine for non-compliance.

During a dawn raid, the Authority may examine, and take copies of or extracts from, accounting records and other business documents (including computer records), request oral explanations from representatives or employees of the undertaking, and otherwise investigate the premises, property and means of transport of the undertaking in question. To ensure that the undertaking in question allows the officials of the Authority full access to the premises, the officials are normally accompanied by representatives of the Swedish Enforcement Service.

An undertaking whose premises are about to be searched may send for legal counsel. The investigation may not start until the lawyers have arrived, unless the investigation would be unduly delayed by waiting, or the investigative order has been made without consulting the undertaking concerned. Since the latter has so far always been the case, the authority does not normally wait for counsel to arrive before starting its investigation.

The Competition Authority may not examine or take copies of or extracts from documents that are covered by legal professional privilege. In the event of a dispute about whether a certain document is protected by legal professional privilege, the document shall immediately be sealed and presented to the Stockholm District Court by the Competition Authority. The court shall decide, without delay, whether the document is privileged.

With effect from 1 August 2005, the Competition Authority has been granted additional fact-finding powers. Subject to approval by the Stockholm District Court, dawn raids may now be carried out in the private homes of board members and employees of the undertaking in question. The purpose of the new legislation is to align Swedish law with EC competition law.

International cooperation

9 Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

Under EC law, the Competition Authority must cooperate with the European Commission and assist it in gathering information from undertakings in Sweden. In addition, under the Implementing Regulation the Competition Authority must cooperate with the national competition authorities of other EU member states within the framework of the network of European competition authorities. In October 2004, the Authority undertook, under article 22(1) of Regulation 1/2003, its first cross-border dawn raid in cooperation with the Danish Competition Authority con-

cerning alleged anti-competitive behaviour on the market for natural gas.

There is also a certain amount of cooperation between the national competition authorities of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden). Sweden is not, however, at present a party to any legal assistance treaty in relation to non-EEA countries. This is partly owing to the provisions of the Secrecy Act (1980:100), which places restrictions on the Competition Authority regarding the provision of information covered by secrecy to authorities outside Sweden and the possibility of keeping information received from non-Swedish authorities secret.

New rules on some forms of international cooperation were introduced in 2002. These rules provide that the Competition Authority may, upon application by an authority in a state with which Sweden has entered into an agreement on legal assistance in competition law matters, order an undertaking to provide information, documents and other materials, and require persons who are thought to be able to provide information to attend interrogations.

Moreover, at the request of such an authority, the Stockholm District Court may, upon written application by the Competition Authority, allow it to carry out an on-the-spot investigation to assist the other state in its investigation into whether a party has infringed the competition rules of that state, if the following conditions are met:

- there is reason to believe that an infringement has been committed;
- the conduct under investigation would have been found to infringe sections 6 or 19 of the Act or of articles 81 or 82 of the EC Treaty, if those rules had been applied to the conduct;
- there is particular reason to believe that evidence is in the possession of the party to which the request refers;
- the party in question does not comply with an order to provide information, documents, etc, or there is otherwise a risk that evidence will be withheld or tampered with; and
- the importance of the action being taken is sufficient to outweigh the disruption or other inconvenience caused to the party affected by it.

Under a confidentiality rule introduced together with the new rules on international assistance described above, information received by the Competition Authority in the context of international assistance is confidential if it can be assumed that the assistance was requested by the foreign Authority on condition that the information would not be disclosed.

In view of the increasing regulation at an EU level of cooperation between national competition authorities of the member states and between national authorities and the European Commission, the rules on international assistance described above are believed to be of practical relevance mainly in the context of cartels limited to another Nordic country where information also needs to be collected in Sweden.

At the domestic level, the Competition Authority cooperates in various ways with the 21 county administrative boards in Sweden. Pursuant to a government regulation, the county administrative boards have a responsibility to promote competition in their respective counties and to report activities suspected of restricting competition to the Competition Authority. The Competition Authority also regularly consults with other Swedish authorities affected by its activities.

- 10 How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

Apart from the general positive effects that international cooperation may have on the activities of the Competition Authority, there is not enough information available to say to what extent the interplay between jurisdictions affects the investigation, prosecution and punishment of cartel activity in Sweden.

Adjudication

- 11 How is a cartel matter adjudicated?

When the Competition Authority issues a cease-and-desist order, its decision may be appealed to the Market Court, which primarily handles competition and consumer protection matters. The Market Court's decisions cannot be appealed.

If the Competition Authority decides to request the imposition of a fine as an economic sanction for the violation committed, the Authority must sue the undertakings concerned before the Stockholm District Court. The decision of the Stockholm District Court may be appealed to the Market Court.

The ordinary courts handle private damage claims based on violations of the Act in the same way as any other damage claim. Typically this means that the suit should be filed before the district court where the respondent has its legal seat. However, the Stockholm District Court always has jurisdiction over damage claims based on the Act. Appeals are made to the relevant courts of appeal.

- 12 What is the appeal process?

See question 11.

- 13 With which party is the burden of proof?

The burden of proof lies with the Competition Authority, or, in the case of private damage claims based on violations of the Act, normally with the party claiming to have suffered damage.

Sanctions

- 14 What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

As stated in question 6, there are currently no criminal sanctions for cartel activity or any other violation of the Act and the government committee in charge of the review process of the Act has concluded that no change in this respect is to be proposed. The committee did however propose the introduction of a ban on carrying on a business for the directors of companies involved in cartels. As mentioned before, it has been proposed that the current act should be replaced with a new act, which should come into force on 1 January 2009.

- 15 What civil or administrative sanctions are there for cartel activity?

Cartel agreements are void *ex tunc*. Unlawful concerted practices between competing undertakings that are not based on agreements cannot be legally enforced.

The Competition Authority may order cartel members to cease the cartel activity, subject to a fine for non-compliance with the order. The imposition of the fine requires a decision by the relevant courts.

Further, the cartel members may, upon application by the Competition Authority, be ordered by the Stockholm District

Court to pay fines as an economic sanction for their illegal activities. The decision of the District Court may be appealed to the Market Court. The amount of the fine may be between 5,000 and 5 million kronor (approximately €530 to €530,000) or a maximum of 10 per cent of the turnover of the undertaking concerned. Unlike under EC competition law, only the turnover of the violating undertaking itself is taken into account in this calculation, rather than the turnover of all the undertakings belonging to the same group. Fines are primarily determined according to the gravity and duration of the infringement. The degree of gravity is measured by the harmful effects of the infringement on competition and prices in the market, as well as by the extent of direct economic losses suffered by other parties.

An amendment of the Act taking effect from 1 August 2005 permits fines to be increased if the infringing undertaking in question is found to have previously violated articles 81 and 82 of the EC Treaty or the corresponding national rules.

16 Are private damage claims or class actions possible?

An undertaking that has intentionally or negligently violated section 6 or 19 of the Act is liable to compensate other parties for the damage the violation has caused them, including parties to the agreement violating the Act.

On 1 January 2003, a new Law on Group Actions (2002:599) came into force. Under this Law, it is possible to initiate individual group actions (class actions), public group actions and organisational group actions. A person who is a member of a group may bring an individual group action. This means that the plaintiff must have standing to be a party to litigation with respect to one of the claims to which the action relates. The organisational action means, as with the public group action, that someone is given standing to sue without the dispute in any way affecting the plaintiff's own legal interests. This is contrary to the normal principles regarding qualification for standing under Swedish law.

The Act has been amended with effect from 1 August 2005, enlarging the group entitled to claim damages to 'anyone' damaged by the infringement.

The amendment also includes an extension of the limitation period during which damages can be claimed. The previous period of five years has been replaced by a 10-year period counted from the time the damage occurred.

17 What recent fines or other penalties are noteworthy? What is the history of fines? How many times have fines been levied? What is the maximum fine possible and how are fines calculated?

The present system of fines for activities restricting competition was introduced into Swedish competition law with the adoption of the Act in 1993.

Up to now, the Competition Authority has filed about a dozen applications for fines with the Stockholm District Court for activities restricting competition. These applications have concerned both alleged abuses of a dominant position and anti-competitive cooperation between undertakings (cartels and similar). The highest individual fine so far imposed by the courts amounted to 170 million kronor (approximately €18.1 million) in the asphalt case (see below).

In 2000, the Competition Authority sued a number of oil companies in Sweden for alleged price-fixing activities, requesting fines totalling 740 million kronor (approximately €78.9 million). In April 2003, the Stockholm District Court delivered its judgment. Although the court found the companies guilty of most

of the price-fixing activities they were accused of having participated in, it set the fines to 52 million kronor (approximately €5.5 million), which is considerably lower than those sought by the Competition Authority. The court explicitly declared that the fines were not to be calculated according to the method used in EC law. While it is not clear exactly how the court calculated the fines, the court's reasoning indicates that a proportionality test was used. Following appeal, the Market Court delivered its judgment in February 2005, increasing the fines to a total of 112 million kronor (approximately €11.9 million).

In the biggest cartel case yet in Sweden, the Stockholm District Court recently ordered nine companies involved in an asphalt cartel to pay fines totalling over 460 million kronor (approximately €49 million). Although the amount is high for Sweden and includes the highest individual fine yet in a Swedish cartel case, it is considerably lower than the 1.2 billion kronor (approximately €128 million) originally sought by the Competition Authority. The judgment, delivered on 10 July 2007, has been appealed to the Market Court by most defendants. The preparatory works of the Competition Act state that the fines should be sufficiently high to deter the company in question and also to have an exemplary effect on other companies. To establish the fines, the court made an overall assessment of the violations occurred and all relevant circumstances. The district court found that the evidence presented by the Competition Authority did not substantiate the Authority's allegation that the companies involved had an overall agreement to share procurements of asphalt during 1993 to 2001. The court did, however, find that the companies had divided a number of individual procurements between them in different Swedish regions during a period of four years. The companies were also found to have persuaded other asphalt companies not to compete in certain procurement proceedings by offering them compensation.

Sentencing

18 Do sentencing guidelines exist?

As mentioned in question 6, Swedish legislation does not currently provide for criminal sanctions for violations of the competition rules. With respect to fines, section 28 of the Act states that in setting the fine, the following must be taken into account:

- the gravity and duration of the violation; and
- other aggravating or mitigating circumstances of importance.

Moreover, it is stated that no fine will be imposed in minor cases.

19 Are sentencing guidelines binding on the adjudicator?

Yes.

Leniency or immunity programmes

20 Is there a leniency or immunity programme?

A leniency and immunity programme has existed in Sweden since 2002. The rules are applied by the Competition Authority in accordance with statements in the preparatory works and the Authority's recently issued general guidelines on reduction of fines and immunity from fines (KKVFS 2006:1). The guidelines are partly modelled on the European Commission's 2002 Notice on Immunity from Fines and Reduction of Fines in Cartel Cases. In the guidelines, the Competition Authority provides informa-

tion on how the Authority interprets and applies the Act's rules on reduction of fines under section 28a(1) and immunity from fines under section 28a(2) and section 28b-c. The guidelines cover the reduction of fines and immunity from fines only in relation to infringements of the prohibition against restrictive agreements in section 6 of the Act and article 81 of the EC Treaty, and only concerning cooperation between competitors.

The guidelines are without prejudice to the interpretations made by the courts in relation to fines under the Act.

21 What are the basic elements of a leniency or immunity programme?

Under the main rule, only the undertaking first-in can qualify for immunity. There is a further, albeit very limited, possibility for an undertaking to qualify for immunity, namely if it has facilitated the investigation to a very substantial extent. For participants that do not qualify for immunity, there is a chance of getting fines reduced by up to 50 per cent under section 28a.

22 What is the importance of being 'first-in' to cooperate?

The first-in may qualify for immunity from fines for infringement of section 6, if the undertaking:

- reports the infringement to the Competition Authority before the Authority had sufficient grounds to intervene against the infringement and no other participant in the infringement has filed a report;
- provides the Competition Authority with all the information about the infringement that the undertaking has at its disposal;
- cooperates fully with the Competition Authority throughout the investigation of the infringement; and
- has ended its involvement in the infringement, or ends it as soon as possible after informing the Competition Authority.

Qualification for immunity under this rule requires that the application under point one above be filed by an undertaking and that only one single undertaking file the application. The application must be made in writing and be signed by a person empowered to represent the company. An application from several undertakings together will not qualify for immunity. A further requirement for immunity from fines is that the undertaking is the first to file an application, before any other participant. An application is not considered filed until the undertaking has provided all information about the infringement available to it when filing, and that the information is relevant to prove the infringement. The information should include the other participants, the affected market, the type of infringement and for how long the infringement has been going on. That the Competition Authority already suspects an infringement does not prevent an undertaking from fulfilling the requirement under the first bullet point above. However, the undertaking does not fulfil the requirements if the Competition Authority in some other way has already received enough information to intervene. It does not matter whether a decision to intervene has already been made.

The requirement under the second bullet point above that all information must be provided refers initially to what must be handed in at the time of application. However, additional information to which the undertaking may subsequently gain access during the ongoing investigation must also be given to the Competition Authority. In other words, the undertaking must continuously, and on its own initiative, provide the Competition Authority with all relevant information regarding the infringe-

ment and provide all documents, notes, etc, no matter how they have been drawn up or saved. Further, the undertaking must refrain from measures obstructing the Competition Authority's investigation and from informing the other participants about what information it has provided.

Immunity will not be granted if the undertaking has played the leading role in the infringement and it would therefore, under the circumstances, be manifestly unreasonable to grant immunity. If two or more undertakings have shared the leading role, each of them may qualify for immunity. In other words, it must be possible to identify one single undertaking as the leader for this exception to be applicable. The Competition Authority will decide on a case-by-case basis whether a specific undertaking has played a leading role, taking into account above all whether the undertaking has initiated the cartel, has been the convener, has provided services required for the cooperation, etc. Also in respect of the 'manifest unreasonableness' test, a case-by-case assessment will be made. The Competition Authority will take into account whether the undertaking has forced other undertakings into the cartel, the undertaking's position in the market, whether the undertaking has made the largest profits from the illegal cooperation, and so on. So the mere fact that the undertaking has the leading position in the market is not enough to exclude it from the possibility of immunity.

Even if it does not qualify for immunity under section 28b, because the undertaking is the second in or because the Competition Authority has already initiated an investigation on its own initiative or following complaints from competitors or customers, an undertaking may still qualify under an alternative rule. The undertaking must then to a very substantial extent have facilitated the investigation of the infringement committed by the undertaking or other participants. Immunity under this rule is available mainly where the undertaking has provided truly decisive evidence of its own and the other participants' involvement in the infringement. The 'very substantial extent' test will be interpreted strictly and the availability of immunity under this rule is intended to be very limited, particularly where another undertaking has already qualified for immunity under the main rule.

23 What is the importance of going second? Is there an 'immunity plus' or 'amnesty plus' option?

There is a limited possibility of qualifying for immunity under the alternative rule described under question 22. Further, a fine may be reduced if:

- the undertaking has to a substantial extent facilitated the investigation of the infringement committed by the undertaking or other participants; or
- there are other special reasons in relation to the undertaking.

To qualify for a reduction under the first point above, the undertaking must provide information that represents considerable added value compared with the information already available to the Competition Authority. So it is not enough just to voluntarily participate in interrogations or to answer questions. The Competition Authority decides in its writ of summons whether the information an undertaking has provided added considerable value, and the level of reduction. The reduction for the first undertaking to provide information adding considerable value will be 30 to 50 per cent, for the second undertaking providing such information the reduction will be 20 to 30 per cent and for other undertakings providing such information the reduction

Update and trends

As mentioned, a new Swedish Competition Act is proposed to come into effect on 1 January 2009. To make the Act easier to understand and lead to a faster and more efficient judicial procedure, a completely new disposition of the Act is proposed. The changes entail clearer and more precise rules on what circumstances may be taken into consideration when calculating and determining fines, a possibility for the Competition Authority to issue a binding settlement if the parties agree and the introduction of a ban for individuals on carrying on a business as a sanction for serious violations of competition law. As stated in question 6, the new Act is not expected to involve criminalisation of cartel activities.

With the aim to harmonise the Swedish rules on leniency with the European model leniency programme, the Swedish rules are currently being revised. One of the most significant changes in this respect is that the European model leniency programme, unlike the current Swedish leniency rules, contains a so-called 'marker system'. This provides a respite for the company reporting a violation it has been part of which in turn enables it to gather information and complete the application of the violation and still be the first in.

As mentioned in question 17, on 10 July 2007 the Stockholm District Court rendered its judgment in the asphalt cartel case ordering nine Swedish companies involved in an asphalt procurement cartel covering several regions

in southern Sweden during a period of four years to pay administrative fines totalling more than 460 million kronor. The Competition Authority had originally claimed that the companies should be ordered to pay fines in excess of 1.2 billion kronor. Unlike what the Competition Authority had claimed, the court did not find that the companies had an overall agreement implying that all procurements of asphalt in southern Sweden were to be divided between the companies. The court did, however, find that the companies had divided several individual procurement proceedings between them. Six of the nine companies have appealed the judgment to the Market Court. Moreover, for the first time, the Competition Authority applied the leniency rules granting one company total immunity and two other companies a reduction of fines by 30 per cent each since they had helped the authority in its investigations. The district court did not find reason to question this assessment.

In a case regarding an alleged cartel concerning tow-truck services, the Market Court in a judgment in November 2007 upheld the decision of the Stockholm District Court concluding that the evidence presented by the Competition Authority was not sufficient to prove that the tow-truck association had coordinated its members' activities, including common pricing, to restrict competition in the Swedish market for tow-truck services.

will be up to 20 per cent. In determining the level of reduction within these categories, the Competition Authority will take into account at what time the information was provided, to what extent the information added value, and to what extent and with what continuity the undertaking has cooperated with the Competition Authority after the information was provided.

24 What is the best time to approach the authorities when seeking leniency or immunity?

Reference is made to the answer given under question 24 in the EU chapter in this publication. Similar factors and considerations are relevant in the context of the new Swedish leniency programme.

If an undertaking wishes to benefit from full immunity under the Swedish leniency programme, it should file an application as soon as it has gathered the necessary information. Otherwise it runs the risk that one of the other participants may 'blow the whistle' first, considerably limiting the undertaking's chance of qualifying for immunity. However, even if the undertaking is not first in, there is a chance of qualifying for a reduction of the fine.

25 What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

Confidentiality issues are regulated by relatively complex rules in the Secrecy Act. Under those rules, information regarding planning and other preparations for investigations, dawn raids, etc, that the Competition Authority is planning to undertake is confidential, provided it can be assumed that the purpose of the investigation will be negatively affected if the information is revealed. As this rule on secrecy during the planning phase of an investiga-

tion has been perceived as insufficient, an additional secrecy rule was introduced as of 1 April 2002. Pursuant to this new provision, information related to an investigation by the Competition Authority (not only planning and preparations or both) will be confidential if, considering the object of the investigation, it is of exceptional importance that the information is not disclosed. The information is primarily confidential in relation to the companies that are the object of the investigation, but it may also be confidential in relation to third parties. Information provided by leniency applicants or other cooperating parties may be treated as confidential under this rule.

Further, on 1 August 2002 two new secrecy rules came into force. One of them guarantees the confidentiality, in matters regarding investigations of infringements of sections 6 and 19 of the Act or articles 81 or 82 of the EC Treaty, of reports and other information provided to the Competition Authority, if it can be assumed that the informant will suffer substantial damage or other substantial detriment if the information is revealed. The confidentiality concerns both legal and natural persons. Both information given on an informant's own initiative and information provided on request from the Competition Authority may be confidential under this rule. However, since the object of the rule is to protect the informant, only information that could somehow disclose the identity of the informant is treated as confidential under this rule. The second new rule guarantees the confidentiality of certain information in the context of legal assistance requested by another state (see question 9).

26 What is needed to be a successful leniency or immunity applicant?

To benefit from immunity, the undertaking must provide the Competition Authority with sufficient information for it to inter-

vene in an infringement or, under the alternative rule, facilitate to a very substantial extent an investigation of an infringement. To qualify for a reduction in the fine for cooperation at a later stage, an undertaking must provide information that adds considerable value to the information already available.

- 27 Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

The Competition Authority may not enter into a plea bargain or a binding resolution to resolve liability and penalty for alleged cartel activity. However, as mentioned in questions 6 and 14, the Act is currently the object of revision and in the proposed new wording the Competition Authority will have the right to issue a binding settlement with alleged cartel members. The new Competition Act is scheduled to come into effect 1 January 2009.

- 28 What is the effect of leniency or immunity granted to a corporate defendant on its employees?

Not applicable, as penalties cannot be imposed on individuals under Swedish competition rules.

- 29 What guarantee of leniency or immunity exists if a party cooperates?

An undertaking participating in a cartel and contemplating reporting the cartel may initially contact the Competition Authority anonymously and present information in hypothetical terms to enable it to clarify with the Competition Authority whether it is in a position to qualify for immunity. However, such contacts do not qualify the undertaking as the first one in, since a formal application is required for this. If the Competition Authority finds, based on the information given, that qualification for immunity is a possibility, it will notify the undertaking. The undertaking will, upon application, be granted a binding declaration of immunity by the Competition Authority, once the Authority has verified that the undertaking qualifies. Such a decision is also binding upon the Stockholm District Court and the Market Court.

- 30 What are the practical steps in dealing with the enforcement agency?

If an undertaking wishes to take advantage of the leniency programme, it should contact the Competition Authority for an assessment of its chances of qualifying for immunity from, or

a reduction of, fines. The contact must be made by a person empowered to represent the undertaking. The undertaking cannot qualify for immunity until a formal application has been filed with the Competition Authority. This application should normally be made in writing and signed by a person empowered to represent the undertaking. However, the Competition Authority has, in practice, recently accepted oral applications since undertakings have hesitated to file a written application owing to the risk that the material will be used in proceedings for damages in the US.

- 31 Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

See question 27 and 'Update and trends'.

Defending a case

- 32 May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

Currently, the Act contains no criminal or other provisions under which employees risk personal responsibility for the anti-competitive activities of their employer. Employees would typically not need representation during an investigation under the Act.

- 33 May counsel represent multiple corporate defendants?

The ethical guidelines of the Swedish Bar Association contain stringent provisions relating to the representation of clients with conflicting interests. For members of the Swedish Bar and their employees, these provisions limit the possibilities of representing multiple corporate defendants. Subject to these limitations, multiple corporate defence is possible.

- 34 May a corporation pay the legal costs of and penalties imposed on its employees?

Not applicable.

Getting the fine down

- 35 What is the optimal way in which to get the fine down?

Companies can avail themselves of the leniency principles described in questions 20 and 21.

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