

Cartel Regulation

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in 41 jurisdictions worldwide

2011

Contributing editor: Martin Low QC



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Sweden

Tommy Pettersson, Johan Carle and Stefan Perván Lindeborg

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Legislation and jurisdiction

1 Relevant legislation

What is the relevant legislation and who enforces it?

Relevant legislation

A new Swedish Competition Act (the Act) came into force on 1 November 2008, replacing the previous one dating from 1993. The Act 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 (chapter 2 section 1) and one against abuse of a dominant position (chapter 2 section 7). 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 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (ex articles 81 and 82 of the EC Treaty). The Act's merger control rules are modelled on the EC Merger Regulation. The White Paper of the Act provides that the Act is to be interpreted in line with EU 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 101(1) TFEU, the elements of an agreement or practice that violates the Act are void and unenforceable unless the conditions for exemption in chapter 2 section 2 of the Act are satisfied. The conditions for exemption are the same as under article 101(3) TFEU, 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 EU counterparts.

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

A decision by the Swedish Competition Authority (the SCA) may be appealed to the Market Court. It should also be noted that since 1 January 2001, the SCA, the Stockholm District Court and the Market Court have the power to apply directly articles 101 and 102 TFEU.

The SCA

The SCA 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. The

SCA also itself has the right to impose binding fines on undertakings where the undertaking in question does not dispute the fines (in non-contentious cases – see question 28). Concentrations are notified to the SCA, and it has the power to initiate proceedings before the Stockholm District Court with a view to obtaining a prohibition. The SCA may also initiate investigations and has fact-finding powers. Finally, the SCA issues guidelines on the application of the competition rules.

The SCA is an independent governmental body consisting of some 130 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 SCA's law enforcement departments 1, 2, 3 and 4 are responsible for investigating infringements of the Act and of EU 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 1 is also responsible for the coordination of leniency applications. 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. Department 4 specialises in competition between the public and private sector, primarily within sectors involving public production of services. The department for public procurement is, among other things, responsible for monitoring that procuring entities act in compliance with the Public Procurement Act.

The economic analysis department is responsible for economic analysis in relation to investigations and legislative proposals. The legal department is responsible for legal analyses and for representing the SCA 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 SCA's cooperation with foreign organisations and authorities. The administrative department is responsible for the SCA's overall planning process, personnel, budget and financial issues and IT coordination.

2 Proposals for change

Have there been any recent changes or proposals for change to the regime?

As mentioned in question 1, the Act came into force on 1 November 2008. On 1 January 2010 the Act was amended with rules that prohibit the state, municipalities and county councils from adopting and engaging in certain anti-competitive behaviour (see chapter 3 section 27 of the Act).

3 Substantive law

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 chapter 2 section 1 of the Act and, to the extent that collective dominance may be involved, the prohibition against abuse of a dominant position found in chapter 2 section 7 of the Act.

According to the wording of chapter 2 section 7 of the Act, a dominant position can be held by ‘one or several undertakings’. In other words, the Act reproduces the same expression used in article 102 TFEU. The SCA has confirmed that the EU case law regarding collective dominance constitutes the basis for its analysis when deciding similar questions. It follows that market behaviour by two or more undertakings, although these undertakings do not constitute a single economic entity, can be evaluated by the SCA under chapter 2 section 7 of the Act.

Although the SCA 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 economic or structural links, enabling them to act jointly in the market, independently of customers and suppliers.

Normally, cartels fall under the prohibition contained in chapter 2 section 1 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 SCA has published a Notice on Agreements of Minor Importance (KKVFS 2009:1). As to the concept of appreciable effect on competition, the notice refers to the methodology applied in the European Commission’s de minimis notice. 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 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 are normally prohibited even where the market shares are below the thresholds set out in the notice.

Second, chapter 2 section 2 of the Act provides for a directly applicable legal exemption. The conditions for exemption are the same as in article 101(3) TFEU:

- 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 that 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 chapter 2 section 1 of the Act is applicable, despite the de minimis principle). There may also be room for exemption in relation to ‘crisis cartels’.

4 Industry-specific offences and defences

Are there any industry-specific offences and defences?

No.

5 Application of the law

Does the law apply to individuals or corporations or both?

The Act is applicable only to ‘undertakings’ (but see question 15).

Chapter 1 section 5 of the Act defines an undertaking as a legal or natural person 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 EU competition law. Virtually every natural or legal person participating in the economic process will be regarded 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.

6 Extraterritoriality

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 an appreciable prevention, restriction or distortion 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 or the undertakings involved are not Swedish. However, public international law imposes restrictions on the exercise of extraterritorial jurisdiction under the Act and the SCA is unlikely to take action against foreign undertakings unless such action can be enforced.

Investigation

7 Steps in an investigation

What are the typical steps in an investigation?

When obtaining information, either *ex officio* or from an informant, which suggests the existence of a cartel, the SCA must decide whether to proceed with an investigation. If there is sufficient evidence to suggest the existence of a cartel, the SCA 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 (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 SCA will continue the investigation. At this stage, it is likely that the SCA will contact customers and competitors outside the suspected cartel and interrogate persons working for the suspected undertakings.

If the SCA 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 SCA can adopt three 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 SCA 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. Finally, if the undertaking does not contest the SCA's claim, the SCA does not have to sue before the Stockholm District Court but can instead issue an injunction for the undertaking to pay fines (see question 28).

Typical contentious cartel matters will take a fairly long time from start to finish. The only time limit imposed on the SCA is that fines may only be imposed if the SCA's application has been served on the undertaking in question within five years from the date on which the violation ended.

8 Investigative powers of the authorities

What investigative powers do the authorities have?

The SCA 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 interrogation. If the SCA 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, if 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 if 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 SCA 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 undertakings and otherwise investigate

the premises, property and means of transport of the undertaking. To ensure that the undertaking allows the officials of the SCA 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 SCA does not normally wait for counsel to arrive before starting its investigation.

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

Subject to approval by the Stockholm District Court, dawn raids may also be carried out in the private homes of board members and employees of the undertaking in question.

International cooperation

9 Inter-agency cooperation

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

Under EU law, the SCA must cooperate with the European Commission and assist it in gathering information from undertakings in Sweden. In addition, under Regulation 1/2003 the SCA 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 SCA undertook, under article 22(1) of Regulation 1/2003, its first cross-border dawn raid in cooperation with the Danish Competition Authority concerning alleged anti-competitive behaviour in the market for natural gas.

There is also 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 due to the provisions of the Public Access to Information and Secrecy Act (2009:400), which places restrictions on the SCA 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 SCA 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 SCA, 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 chapter 2 sections 1 or 7 of the Act or of articles 101 or 102 TFEU, 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 SCA 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 SCA 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 SCA. The SCA also regularly consults with other Swedish authorities affected by its activities.

10 Interplay between jurisdictions

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 SCA, 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.

11 Adjudication

How is a cartel matter adjudicated?

When the SCA 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 SCA decides to request the imposition of a fine as an economic sanction for a violation committed and the undertakings in question do not agree to the fines, the SCA must sue the undertakings concerned before the Stockholm District Court. The decision of the Stockholm District Court may be appealed to the Market Court, but leave to appeal is required.

The ordinary courts handle private damages claims based on violations of the Act in the same way as any other damages 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 also always has jurisdiction over damages claims based on the Act. Appeals are made to the relevant courts of appeal.

12 Appeal process

What is the appeal process?

See question 11.

13 Burden of proof

With which party is the burden of proof?

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

Sanctions

14 Criminal sanctions

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

There are no criminal sanctions for cartel activity or any other violation of the Act.

15 Civil and administrative sanctions

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 SCA 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, as an administrative sanction, upon application by the SCA, 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. As mentioned earlier, from 1 November 2008 the SCA itself has the right to impose binding fines on undertakings where the undertaking in question does not dispute the fine, the amount of which may not exceed 10 per cent of the turnover of the undertaking concerned during the previous financial year. Unlike under EU competition law, only the turnover of the violating undertaking itself is taken into account in this calculation, rather than the turnover of all 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. Moreover, when setting the fines, one may also take into account whether the undertaking in question has previously violated articles 101 and 102 TFEU or the corresponding national rules.

In addition to fines, the current Act introduced the possibility of imposing an injunction against trading for persons who have participated in serious breaches of chapter 2 section 1 or article 101 TFEU, provided such an injunction is necessitated by the public interest. The SCA has published guidelines on the application of the rules on injunctions against trading (KKVFS 2010:1).

In assessing whether an injunction against trading is necessitated by the public interest, special consideration shall be given as to whether the conduct was systematic or intended to produce significant personal gain, whether such conduct caused or was intended to cause significant harm, whether the person in question has previously been convicted of criminal acts in respect of business activities and whether the conduct was intended to seriously prevent, restrict or distort competition. The cartel must therefore have been of a serious nature and of relatively long duration for an injunction to be imposed. Furthermore, where the person against whom the injunction is considered has participated in giving significant assistance in the SCA's investigation of the infringement, an injunction shall not be considered necessitated by the public interest. This will particularly apply to companies that are first to report an infringement to the SCA.

An injunction against trading may be issued against members and alternate members of the board of directors, the managing director and the deputy managing director, provided that such a person committed the previous crime in respect of business activities or was serving in such a post at the time of the infringement of the competition rules. An injunction against trading can further be imposed against persons who, in another capacity, have in fact conducted the management of a business, or who have held themselves out to third parties as responsible for a business. Negligence in appointing,

instructing and supervising staff is normally not sufficient for an injunction against trading to be imposed. The board of directors and the management are, however, obliged to take corrective actions if they learn that persons within the company are engaged in cartels with competitors. If such actions are not taken immediately, infringements that are committed thereafter may be relevant when assessing whether an injunction should be imposed. The SCA may apply for an injunction against trading either in conjunction with an action for administrative fines or in separate proceedings in a district court.

In addition to administrative sanctions, the Act contains an explicit right to claim damages for parties who have suffered injury as a result of infringements of the prohibitions against anti-competitive agreements or abuse of a dominant position. Chapter 3 section 25 of the Act stipulates a right to damages for parties injured as a consequence of infringements of chapter 2 sections 1 or 7 of the Act or articles 101 or 102 TFEU. A private antitrust action may be brought under the general Swedish procedural rules. The general courts are competent in private antitrust actions according to the forum rules in chapter 10 of the Code of Judicial Procedure (1942:740). The competent court is primarily the district court where the defendant resides or has its seat, as the case may be. An action for damages can also, alternatively, be brought where the infringement took place or where the injury occurred. Furthermore, the Stockholm District Court is always competent to hear cases relating to damages pursuant to the Act. Finally, the Swedish Arbitration Act (1999:116) stipulates that the civil law consequences of competition law violations may be the subject of arbitration.

Administrative fines imposed by competition authorities are normally not taken into account when determining damages.

16 Civil and administrative sanctions

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

See questions 14 and 15.

17 Private damage claims and class actions

Are private damage claims or class actions possible?

An undertaking that has intentionally or negligently violated chapter 2 section 1 or chapter 2 section 7 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 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 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.

18 Recent fines and penalties

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? What is the history of criminal sanctions against individuals?

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

Up to now, the SCA 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 in the asphalt case (see below).

In 2000, the SCA sued a number of oil companies in Sweden for alleged price-fixing activities, requesting fines totalling 740 million kronor. 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, which is considerably lower than those sought by the SCA. The Court explicitly declared that the fines were not to be calculated according to the method used in EU 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. The Act has been amended in relation to the method for calculating fines, and the calculation will now be done in accordance with the method used in EU law.

In the biggest cartel case yet in Sweden, the Stockholm District Court in a judgment in July 2007 ordered nine companies involved in an asphalt cartel to pay fines totalling over 460 million kronor. 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 sought by the SCA. The District Court referred to the White Paper of the previous Act, which states 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 Court found that the evidence presented by the SCA did not substantiate the SCA'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. The District Court's judgment was appealed to the Market Court by most defendants, and in May 2009 the Market Court delivered its judgment. The Market Court partially upheld the District Court's judgment and increased the fines for one of the companies involved in the cartel.

On 10 September 2008, the Market Court in another case (2008:12) annulled the judgment of the Stockholm District Court and ruled that eight independent Volvo/Renault dealers in the south of Sweden had engaged in anti-competitive price-fixing agreements and market sharing from 1998 to 2002 in breach of section 6 of the previous Competition Act. The companies were ordered to pay fines in excess of 21 million kronor in total, ranging from 500,000 kronor to 6 million kronor each.

Since Swedish legislation does not, as mentioned in question 14, provide for criminal sanctions for violations of the competition rules, there is no such history.

It should also be mentioned that the SCA has used its authority to issue binding fines in non-contentious cases on two occasions. This

power for the SCA was introduced by the new Act (see question 28). On 30 June 2009, the SCA adopted a decision against two companies that were found to have acted in breach of the prohibition of anti-competitive agreements by cooperating in public procurements of waterproof poles for power lines. One of the companies involved cooperated fully with the SCA and was given immunity for its participation in the cartel whereas the other company involved was ordered to pay a fine of 2 million kronor. Further, on 2 July 2010 the SCA adopted a decision according to which three Swedish funeral undertakers accepted the administrative fines imposed on them by the SCA for engaging in unlawful price collusion. The funeral undertakers, which all operate in the region of Värmland, Sweden, agreed on price levels when participating in public procurements of contracts for the transportation of the deceased in the municipality of Karlstad and the Värmland county council. The fines imposed on the companies amounted to 143,000 kronor, 41,000 kronor and 301,000 kronor. The amounts were reduced by 5 per cent in each case since the purchasing authorities had not expressed themselves clearly and unequivocally when communicating with the suppliers in the public procurement process.

Sentencing

19 Sentencing guidelines

Do sentencing guidelines exist?

Swedish legislation does not provide for criminal sanctions for violations of the competition rules. With respect to fines, the Act follows the method used in EU law and the SCA has also published a methodology paper on how to determine fines (Dnr 394/2009). Chapter 3 section 8 of the Act states that the gravity and the duration of the violation shall be taken into account when determining the basic amount of the fine. When determining the gravity of the violation the following factors are of particular importance:

- the nature of the infringement;
- the scope and importance of the market; and
- any concrete or potential effect on competition in the market.

When the basic amount of the fine has been determined, the SCA may take into account aggravating and mitigating circumstances that result in an increase or decrease in the basic amount as determined above. Regarding aggravating circumstances, particular attention is paid to any steps taken to coerce other undertakings to participate in the infringement, or if the undertaking has had a role of leader in the cartel. Regarding mitigating circumstances, particular attention is paid to evidence that the undertaking's involvement in the infringement is substantially limited. Moreover, the SCA may take into account circumstances that are not connected to the specific infringement in question. These circumstances include previous infringements of the prohibitions in the Act or in the TFEU, evidence that shows that the infringement was terminated as soon as the SCA intervened and the financial situation of the undertaking.

Finally, it is stated that no fines will be imposed in minor cases.

20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

Yes.

21 Leniency and immunity programmes

Is there a leniency or immunity programme?

A leniency and immunity programme has existed in Sweden since 2002. The rules are applied by the SCA in accordance with statements in the White Paper and the SCA has recently issued general guidelines on reduction of fines and immunity from fines (KKVFS 2009:2). The guidelines are modelled on the European Commission's

2006 Notice on Immunity from Fines and Reduction of Fines in Cartel Cases. In the guidelines, the SCA provides information on how it interprets and applies the Act's leniency rules in chapter 3 sections 12 to 14. The guidelines cover the reduction of fines and immunity from fines only in relation to infringements of the prohibition against restrictive agreements in chapter 2 section 1 of the Act and article 101 TFEU, 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.

22 Elements of a leniency or immunity programme

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

Under the Act, only the undertaking first in can qualify for immunity. For participants that do not qualify for immunity, there is a chance of getting fines reduced by up to 50 per cent under chapter 3 sections 13 to 14.

23 First in

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

The first undertaking in may qualify for immunity from fines for infringement of chapter 2 section 1, if the undertaking:

- reports the infringement to the SCA before it had sufficient grounds to intervene against the infringement and no other participant in the infringement has filed a report;
- provides the SCA with all the information about the infringement that the undertaking has at its disposal;
- cooperates fully with the SCA throughout the investigation of the infringement; and
- does not destroy, falsify or conceal relevant information or evidence relating to the alleged cartel and has ended its involvement in the infringement, or ends it as soon as possible after informing the SCA.

Qualification for immunity under this rule requires that the application under the first bullet point above is filed by an undertaking and that only one single undertaking files the application. The application can be made in writing or verbally. If the application is made in writing it can 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. The fact that the SCA 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 SCA 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 SCA. In other words, the undertaking must continuously, and on its own initiative, provide the SCA with all relevant information regarding the infringement 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 SCA'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

Update and trends

On the enforcement side the following developments are worth mentioning. On 24 June 2010, the SCA decided to remove a case concerning cooperation between Sweden's five largest telecom operators from further action. The cooperation consisted of a joint application to the Swedish Post and Telecom Agency (SPTA) for licence to use radio transmitters in the 900 MHz mobile network. Competition concerns were raised as the operators, in the application and following certain previous agreements, evenly apportioned the entire frequency space in the 900 MHz frequency band between themselves. However, as the SPTA had encouraged a mutual understanding, but still had a legal as well as a de facto right to dismiss the application, the SCA found that there was a very limited margin to act for the five operators. Further, in the legal and economic context of this case, no negative results stemming from the cooperation could be found. The case was closed without further actions.

On 2 July 2010, the SCA adopted a decision under which three Swedish funeral undertakers accepted the administrative fines imposed on them by the SCA for engaging in unlawful price collusion. The funeral undertakers, which all operate in the region of Värmland, Sweden, agreed on price levels when participating in public procurements of contracts for the transportation of deceased in the municipality of Karlstad and the Värmland county council. The fines imposed on the companies amounted to 143,000 kronor, 41,000

kronor and 301,000 kronor. The amounts were reduced by 5 per cent in each case since the purchasing authorities had not expressed themselves clearly and unequivocally when communicating with the suppliers in the public procurement process.

Finally, on 8 September 2010, a case involving cooperation between two telecom operators was closed without further action. The parties had formed a joint venture for the development of the next generation mobile network, 4G, and the modernisation of a mutual GSM network. The SCA found it unlikely that a lack of capacity in the 4G network would arise within the foreseeable future, and that the total frequency space within the 4G network for both parties at present did not lead to a significant advantage in the downstream market. Consequently, no further investigation was necessary. Nevertheless, the SCA stated that it will closely observe the outcome of future awarding of frequency in the 4G network.

During 2010, the SCA has also carried out dawn raids against companies active in the transport sector and against companies active in the market for transportation of combustion leftover products.

On the policy front, the SCA has adopted new guidelines on the application of the rules on injunctions against trading (KKVFS 2010:1) as well as a methodology paper on how to determine fines (Dnr 394/2009).

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 SCA 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 SCA 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. Thus, the mere fact that the undertaking has the leading position in the market is not enough to exclude it from the possibility of immunity.

If no undertakings in the alleged cartel fulfil the conditions mentioned above, immunity can be granted according to chapter 3 section 12 paragraph 2 of the Act if an undertaking provides the SCA with information about the alleged cartel which makes it possible to determine that the infringement has occurred, or if the undertaking concerned to a very substantial extent has facilitated the investigation of the infringement committed by the undertaking or other participants. According to the SCA's guidelines the 'very substantial extent' test will be interpreted strictly and the availability of immunity under this rule is intended to be very limited.

24 Going in second

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

Under the Act, only the first undertaking that cooperates with the SCA may qualify for immunity. However, the undertaking that goes second may get a reduced fine under chapter 3 section 13 of the Act if the undertaking fulfils the conditions that apply for immunity as mentioned in question 23. The SCA decides in its writ of summons whether the information an undertaking has provided has added considerable value, and the level of reduction. The reduction for the first undertaking for providing information adding considerable value will be between 30 and 50 per cent, for the second undertaking the reduction will be 20 to 30 per cent, and for other undertakings the reduction will be up to 20 per cent. In determining the level of reduction within these categories, the SCA 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 SCA after the information was provided.

25 Approaching the authorities

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

Reference is made to the answer given in question 25 in the EU chapter in this publication. Similar factors and considerations are relevant in the context of the 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.

26 Confidentiality

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 Public Access to Information and Secrecy Act. Under those rules, information regarding planning and other preparations for investigations, dawn raids, etc. that the SCA 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 investigation 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 SCA (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 chapter 2 section 1 and chapter 2 section 7 of the Act or articles 101 or 102 TFEU, of reports and other information provided to the SCA, 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 SCA 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).

27 Successful leniency or immunity applicant

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

To benefit from immunity, the undertaking must provide the SCA with sufficient information for it to intervene 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.

28 Plea bargains

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 SCA may not enter into a plea bargain or a binding resolution to resolve liability and penalty for alleged cartel activity. However, chapter 3 section 16 of the Act provides the SCA with the right to issue a binding settlement with alleged cartel members. This section is of a non-mandatory nature, which means that the SCA can issue settlements in suitable cases. According to the White Paper of the Act, settlements should not be issued in cases where the facts are uncertain. If the settlement is confirmed in writing by the alleged cartel member, within a period of time determined by the SCA, the settlement will have the same effect as that of a judgment with legal force. A settlement that has been approved in writing can be appealed to the Stockholm District Court within a year of the written confirmation. A settlement that has not been approved in accordance with the Act does not have any legal effect.

29 Corporate defendant and employees

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

As mentioned in question 15, the current Act introduced the possibility of imposing an injunction against trading for persons who have participated in serious breaches of chapter 2 section 1 of the Act or article 101 TFEU, provided such an injunction is necessitated by the public interest. However, where the person against which the injunction can be imposed has participated in the provision of significant assistance in the SCA's investigation of the infringement, an injunction shall not be considered necessitated by the public interest.

30 Cooperation

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 SCA anonymously and present information in hypothetical terms to enable it to clarify with the SCA 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 SCA 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 SCA, once the SCA has verified that the undertaking qualifies. Such decision is also binding upon the Stockholm District Court and the Market Court.

31 Dealing with the enforcement agency

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 SCA 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 SCA. This application should normally be made in writing and signed by a person empowered to represent the undertaking. However, the SCA has, in practice, recently accepted oral applications since undertakings have hesitated to file written applications due to the risk that the material will be used in proceedings for damages in the United States.

32 Ongoing policy assessments and reviews

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

There are no ongoing assessments or policy reviews.



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Defending a case

33 Representation

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?

As mentioned in questions 15 and 29, the Act provides the SCA with the possibility of imposing an injunction against trading for persons who have participated in serious breaches of chapter 2 section 1 of the Act or article 101 TFEU. The White Paper of the Act states that nothing prevents the employee being represented by counsel during interrogations held by the SCA. As there are often conflicting interests between an undertaking under investigation on the one hand, and its employees on the other, it is advisable to have separate counsel representing the undertaking and its employees.

Furthermore, when the SCA applies for an injunction against a person in a district court, the court may appoint a public defence counsel if there are special reasons.

34 Multiple corporate defendants

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, a multiple corporate defence is possible.

35 Payment of legal costs

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

Yes, the undertaking may pay the legal costs of its employees.

36 Getting the fine down

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

Companies can avail themselves of the leniency principles described in questions 23 and 24.

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