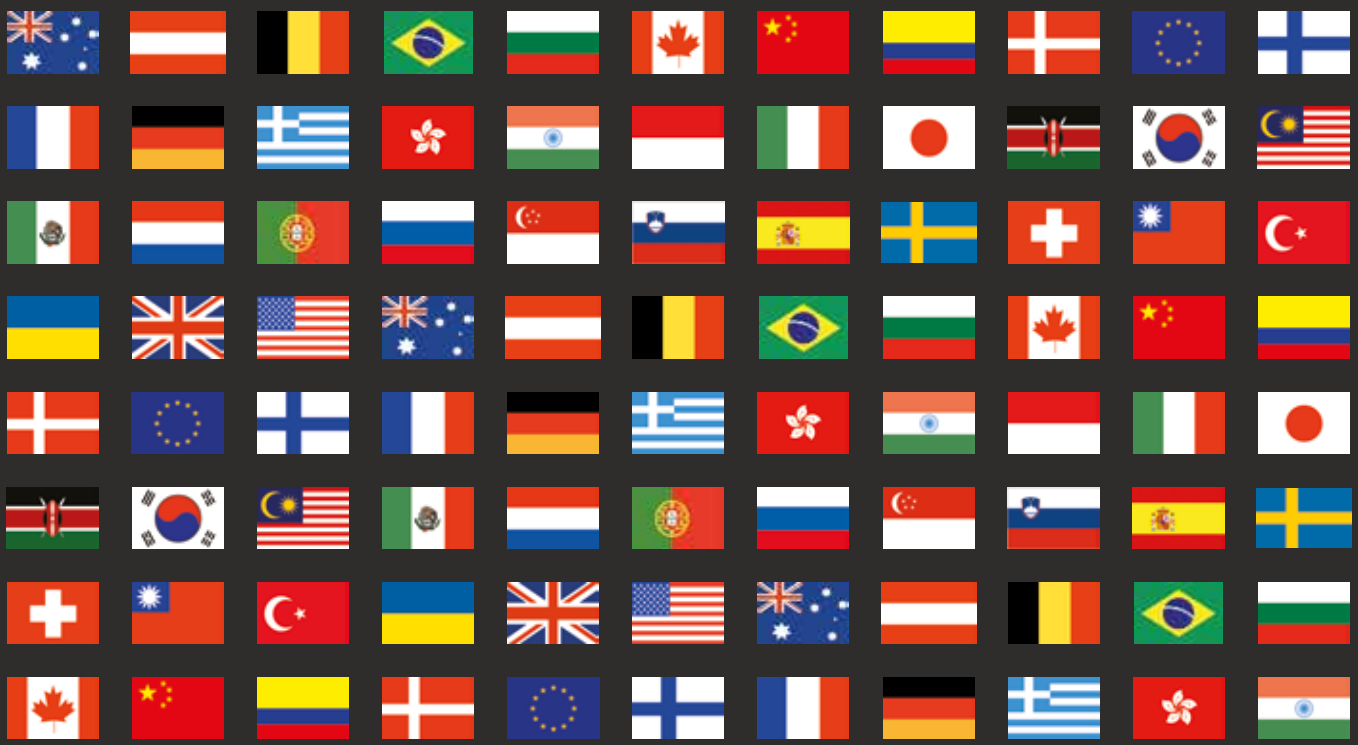
Cartel Regulation

Contributing editor
A Neil Campbell



2019

GETTING THE DEAL THROUGH

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Cartel Regulation 2019

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Preface

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Nineteenth edition

Getting the Deal Through is delighted to publish the nineteenth edition of *Cartel Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Belgium.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, A Neil Campbell of McMillan LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
November 2018

Sweden

Johan Carle and Stefan Perván Lindeborg
Mannheimer Swartling

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Swedish Competition Act (2008:579) (the Act) came into force on 1 November 2008, replacing the previous legislation 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 may be referred to in decisions under the Act.

The Act contains two general prohibitions, one against anticompetitive agreements 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 (Chapter 4). The Act's provisions on anticompetitive agreements 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). The Act's merger control rules are modelled on the EU Merger Regulation. The preparatory works (*travaux préparatoires*) to the Act provide that the Act is to be interpreted in line with EU law, including the case law of the Court of Justice of the European Union.

As with article 101(1) TFEU, the elements of an agreement or practice that violate 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 produced by an agreement outweigh the anticompetitive 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 (SCA) may be appealed to the Patent and Market Court.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The SCA is responsible for implementing and administering the Act, and thus for investigating cartel matters.

The SCA has the power to order an undertaking to terminate an infringement and to apply to the Patent and Market Court for a fine to be imposed on the undertaking for infringement of the Act. The SCA itself also has the right to impose binding fines on undertakings where the undertaking in question does not dispute the fines (a form of settlement in non-contentious cases – see question 30). The SCA may also initiate investigations and has fact-finding powers. The SCA issues guidelines on the application of the competition rules.

The SCA is an independent governmental body consisting of around 200 officials, led by director general Rikard Jermsten (appointed in 2017) and a management group consisting of the heads of departments. It is organised into specialised departments and other units. The SCA is independent of the European Commission but is required to cooperate with it.

Instead of being divided according to different sectors as was previously the case, the SCA's competition enforcement tasks are now entrusted to two units, responsible for investigating infringements of the Act and of EU competition law, as well as handling complaints and notifications; the cartel and merger unit (T1) and the abuse and vertical restraints unit (T2). In addition, there is the department responsible for the enforcement of the public procurement rules, as well as the Chief Economist's department, Legal Services and the International Department. Following a further reorganisation, the department previously responsible for general supervision and support of the public procurement rules was transferred to the newly created National Agency for Public Procurement in 2015.

There is no separate prosecution authority since there are no criminal sanctions for cartel activity or any other violation of the Act.

See question 13 for more details.

3 Changes

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

The Competition Act was amended on 1 January 2016 to include a specific provision allowing the SCA to carry out indexing and searching of digital material at its own premises in connection with dawn raids. Such an off-site review can only be carried out with the consent of the affected undertaking. Furthermore, the undertaking has the right to oversee the measures taken by the SCA concerning the digital material, such as the SCA's electronic search. It should be noted that this was already common practice prior to the amendment.

On 1 September 2016, the Patent and Market Court replaced the Stockholm District Court as the court of first instance for competition cases. The reform was made in order to make the court procedure in such complex matters more uniform. A new court of appeal, the Patent and Market Court of Appeal, has replaced the previous Market Court and is now set up at the Svea Court of Appeal in Stockholm. The Supreme Court is the final court of appeal.

On 27 December 2016, a separate Competition Damages Act (2016:964) entered into force. The Damages Act governs actions for damages for infringements of the competition law provisions and ensures compliance of Swedish law with the requirements of the EU Damages Directive. The amendments include changes and clarifications concerning, for example, liability, limitation periods, compensation, recourse, passing on of overcharges, disclosure and other general procedural provisions.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The Act, like its TFEU equivalent, 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.

The prohibition renders the cartel agreement null and void and results in liability to pay fines as well as damages (see question 18). However, there are two possible exceptions to this.

First, to fall under the prohibition against anticompetitive 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) (the 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.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

The Act contains similar exemption rules as the EU competition law regime on, inter alia, motor vehicles. Taxi operations and farming are also, to some extent, covered by special rules. With respect to hard-core cartels, there are no industry-specific bans or exemptions or any specific exemptions applicable to government-sanctioned or regulated conduct. However, the Act will not apply to behaviour that is an intended result of legislation or an inevitable consequence thereof.

6 Application of the law

Does the law apply to individuals or corporations or both?

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 healthcare, distribution of fire appliances and leasing of real estate. Activities that have been considered non-commercial activities and thus falling outside 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 private use.

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

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Act prohibits agreements between undertakings that have as their object or effect an appreciable prevention, restriction or distortion of competition. The relevant geographic 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.

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.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

The prohibition under the Act requires that the agreement has actual or potential effects on competition in Sweden (see question 7).

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

When obtaining information, either ex officio or from an informant (leniency applications or tip-offs) that 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 Patent and Market Court for authorisation to conduct an inspection (dawn raid) at the premises of one or more of the suspected parties (see question 10).

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 uninvolved in the suspected wrongdoing and question 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 issue a statement of objections to the suspected undertakings setting out its position and the evidence it has obtained. After having received the response 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 Patent and Market Court and request a judgment ordering the undertakings to pay an administrative fine for infringing the Act. The decision of the Patent and Market Court may be appealed to the Patent and Market Court of Appeal. Finally, if the undertaking does not contest the SCA's claim, the SCA does not have to sue before the Patent and Market Court but can instead issue an order for the undertaking to pay fines (a fining order – form of settlement; see question 30).

Typical contentious cartel matters will take a fairly long time from start to finish, often several years. The only time limit to which the SCA is subject 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. In 2017, the SCA was criticised by the Parliamentary Ombudsman for its slow handling of an abuse of dominance case that had been investigated for more than four years (Dnr 1145-2016). The case was subsequently closed without any action being brought against the investigated undertaking.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The SCA may order a suspected undertaking, or any natural or legal person, to provide 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 (dawn raid) at the premises of an undertaking, it must file an application with the Patent and Market Court. 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 a dawn raid, may be imposed under penalty of a fine for non-compliance.

Such an application to the Patent and Market Court can be granted without consulting the suspected undertakings in advance 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). This is the normal approach.

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. Provided the company under investigation consents, the SCA usually also 'mirrors' digitally stored material and reviews the material at the SCA's own premises (see question 3). 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 is typically the case, the SCA does not normally wait long 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, or collect documents that are not covered by the scope of the court authorisation. In the event of a dispute as to whether a certain document is privileged, the document shall immediately be sealed and sent to the Patent and Market Court by the SCA. The Court shall decide, without delay, whether the document is privileged.

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

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? 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 European Competition Network (ECN). The ECN allows for exchange of information on current investigations and assistance through evidence sharing and investigative measures. 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 anticompetitive behaviour in the market for natural gas. In September 2017, a new Nordic cooperation agreement was proposed to replace and extend the equivalent arrangement to which Sweden had been party since 2003. This Agreement on Cooperation in Competition Cases between Sweden, Denmark, Finland, Greenland, Iceland and Norway formalises and strengthens the existing framework for information exchange and other inter-authority collaboration to improve Nordic enforcement during cartel, abuse of dominance and merger control investigations.

The SCA also cooperates with other national competition authorities outside the ECN and the Nordic agreement. On a global level, such cooperation takes place within the frameworks of the International Competition Network, the OECD's Competition Committee and the UN's Conference on Trade and Development, with the purpose of exchanging experience regarding methodology and to further the understanding of competition law matters and the value of effective competition policies. On occasion, the SCA has also coordinated certain reports with its equivalents in the Baltic states, for instance, with the Latvian competition authority concerning the waste disposal sector.

Sweden is not, however, a party to any legal assistance treaty in relation to non-EEA countries. This is partly owing 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.

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.

Furthermore, at the request of such an authority, the Patent and Market Court may, upon written application by the SCA, allow it to carry out a dawn raid 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 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 various 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.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

See question 11.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

The SCA does not have authority to impose fines other than in non-contentious cases. If the SCA decides to sanction companies for cartel activities and the undertakings do not accept the fines, the SCA will have to file an application before the Patent and Market Court. Hence, such an application results in civil litigation under the general procedural framework.

The decision of the Patent and Market Court may be appealed to the Patent and Market Court of Appeal. Leave to appeal is required, but should typically be granted in a cartel case. The judgment by the Patent and Market Court of Appeal may, in turn, be appealed to the Supreme Court subject to the Patent and Market Court of Appeal's leave and provided that the determination of the Supreme Court is of importance as a precedent (see question 16).

When the SCA issues a cease-and-desist order (see question 9), its decision may be appealed to the Patent and Market Court.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

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. The SCA must prove that the conditions are fulfilled for imposing a fine, and the Market Court (now replaced by the Patent and Market Court of Appeal) has held that the level of proof for the SCA is relatively high, but not as high as the level required in criminal cases (ie, beyond reasonable doubt).

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

In principle, there are no rules in Swedish law to limit the type of evidence that the court may try. Parties, like the SCA, can rely on virtually any kind of document, statement and occurrence in attempting to prove their case. The court may freely evaluate the evidence presented by the parties at its discretion. Thus the court has to examine what has been put forward by the parties in line with the principles of free submission of evidence and free evidence assessment. On a purely practical level, proving an infringement on circumstantial evidence alone would, of course, be more challenging. As mentioned in question 14, the SCA must prove that the conditions are fulfilled for imposing a fine and the level of proof for the SCA is relatively high.

16 Appeal process

What is the appeal process?

As mentioned in question 13, the Patent and Market Court is the court of first instance in fining matters. Its judgments can be appealed to the Patent and Market Court of Appeal, which will review the case on the merits. Leave to appeal in the Patent and Market Court of Appeal will be granted if there is reason to question the accuracy of the Patent and Market Court's decision; it must grant leave to appeal to be able to determine the accuracy of the Patent and Market Court's decision; the determination of the Court may be of importance as a precedent; or otherwise there are extraordinary reasons to grant appeal. Judgments by the Patent and Market Court of Appeal may be appealed to the Supreme Court subject to the Patent and Market Court of Appeal's leave and provided that the determination of the Supreme Court is of importance as a precedent. Also the Supreme Court's leave to appeal is required, and would typically only be granted in exceptional cases.

The party who wishes to appeal must do so in writing within three weeks of the pronouncement of the judgment or from when the plaintiff received the judgment. As regards timing, the procedure before the Patent and Market Court of Appeal is usually less time-consuming than the procedure before the Patent and Market Court.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

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

18 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 are also legally unenforceable. 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 Patent and Market Court to pay fines as an economic sanction for their illegal activities. The decision of the District Court may be appealed to the Patent and Market Court of Appeal. As mentioned earlier, the SCA itself has the right to impose binding fines on undertakings where the undertaking in question does not dispute the fine (see question 30).

A fine may not exceed 10 per cent of the turnover of the undertaking concerned during the previous financial year. There is no lower limit to the fine. 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, it may also be taken 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 new Trading Prohibition Act was introduced in 2014 and the SCA has published guidelines on the application of the rules on injunctions against trading. The new act broadened the scope for trading prohibitions, in the sense that injunctions can now be imposed on all persons that conduct the management of a business. The Act also gives the Swedish Enforcement Authority a mandate to oblige a third party to submit information regarding his or her economic dealings with the person alleged to have participated in the infringement.

In assessing whether an injunction against trading is necessitated by the public interest, special consideration shall be given 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 seriously to prevent, restrict or distort competition. The infringement 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 investigation of the infringement by the SCA, the European Commission or a competition authority in another member state, 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 individual risking such an injunction may apply to the SCA for individual leniency.

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 wrongdoing 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 infringing conduct. 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 before the Patent and Market 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 anticompetitive 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. Damages should equal, and thus compensate, the injuries sustained (and proven) by the plaintiff. A private antitrust action may be brought under the general Swedish procedural rules. Since the entry into force of the new Competition Damages Act (2016:964) on 27 December 2016, the competence to hear private antitrust actions has moved from the general courts to the Patent and Market Courts.

There is also a possibility for the Consumer Ombudsman to represent consumers in class actions, in accordance with the Group Proceedings Act (2002:599) (see question 23). 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.

To date, the SCA has filed about 30 applications for fines with the Stockholm District Court (now to be filed with the Patent and Market Court) for activities restricting competition. These applications have concerned both alleged abuses of a dominant position and anticompetitive cooperation between undertakings. The highest individual fine so far imposed by the courts amounted to 200 million kronor as a result of a cross-appeal in the *Asphalt* case (see below). A tendency can be observed regarding the SCA's increased interest in different kinds of unlawful behaviour, whereby it no longer focuses only on the most grave and obvious cartels, but also pursues companies for fines in less traditional cases (eg, involving forms of bidding cooperation).

In the biggest cartel case in Sweden to date, following the 2007 judgment of the Stockholm District Court in the *Asphalt* cartel, total fines on all nine companies involved amounted to approximately 500 million kronor after all appeals were settled. Although the amount is high for Sweden, it is considerably lower than the 1.2 billion kronor sought by the SCA. To establish the fines in that case, the court made an overall assessment of the violations that had occurred and all relevant circumstances.

The most recent judgment from the Patent and Market Court on anticompetitive agreements was handed down in July 2018, and concerned Booking.com's price parity clauses, requiring hotels not to offer lower prices on their own websites than on Booking.com, which the Court found to restrict competition. The judgment is the result of a private action. The most recent judgment in a case driven by the SCA on anticompetitive agreements was handed down in February 2018, and concerned procurement-related competition infringements. In December 2017, the Patent and Market Court fined two telecom companies for engaging in anticompetitive arrangements before a public procurement of internet fibre services in 2009, where one company agreed not to participate in the tender. However, one of the parties subsequently appealed and in February 2018 the case was overturned by the Patent and Market Court of Appeal (see 'Update and trends').

It should also be mentioned that the SCA has used its authority to issue binding fines in non-contentious cases on a number of occasions. This power for the SCA was introduced by the current Act (see question 30).

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

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. Similar to under EU law, 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 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 or has in some way punished other companies in order to keep them adhering to the behaviour that constitutes the infringement. Regarding mitigating circumstances, particular attention is paid to evidence that the undertaking's involvement in the infringement is substantially limited. The lack of intent of the undertaking to be involved in the infringement is also taken into account. However, to participate in the infringement because of pressure from other companies, to prove that no profits were made or that the company suffered damage from the cartel operations are not considered to be mitigating circumstances.

The SCA may also 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. As previously stated in question 18, a fine may not exceed 10 per cent of the turnover of the undertaking concerned during the previous year.

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

The sentencing principles mentioned are binding on the adjudicator. The SCA methodology paper, however, is not binding on the adjudicator, but it is binding on the SCA when determining what fines to ask for (and when imposing binding fines on undertakings not disputing the fines, see also question 30).

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures may be available as a discretionary choice for the government authority that conducts a procurement, according to Chapter 13, section 3, paragraph 1(4) of the Public Procurement Act (2016:1145). It is not a sanction that can be imposed during the competition infringement procedure, but is instead decided in the procurement procedure. For debarment, some conditions must be met.

First, the undertaking must have been guilty of grave professional misconduct proven by any means that the contracting authorities can demonstrate. Non-compliance with the cartel ban, which has been the subject of a final judgment, or a decision by the SCA where the undertaking in question does not dispute the fine, may constitute professional misconduct of that kind.

Second, debarment must be proportionate to the gravity of the professional misconduct, according to Chapter 4, section 1 in the Public Procurement Act and the Supreme Administrative Court in the case RÅ 2010 ref 79. If those conditions are met, the authority may debar an undertaking from participation in a procurement process. The possibility of debarment shall, however, be construed restrictively considering the grave consequences for excluded undertakings.

A decision to debar a tenderer can be made at any time during the procurement procedure, although it should as a general rule be made as early aspossible in the procurement procedure, although there is no provision in the Public Procurement Act stating a formal time limit. The decision can be appealed to the Administrative Court of the circuit where the procuring authority is located.

There are a number of cases concerning debarment from government procurement procedures as a result of cartel activity (see, for example, the judgments of the Stockholm Administrative Court of Appeal of 2 December 2013 in cases 3727-13, 3725-13, 4081-13 and 5060-13).

21 Parallel proceedings

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 17 and 18.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

An undertaking that has intentionally or negligently violated Chapter 2, section 1 or Chapter 2, section 7 of the Act, or articles 101 or 102 TFEU, is liable to compensate other parties for the damage the violation has caused them, including parties to the agreement violating the Act. Both contractual liability and indemnity liability are included, and the liability covers pure economic loss without any link to personal or property damage. Thus, this means that the proven injury can be recovered, which presumably would be considered single level damages. Hence, Swedish rules on damages are of a 'compensatory nature'. Passing-on defences and similar will thus be permitted under Swedish law.

The scope of persons entitled to damages is not defined in the Act. The scope is limited by considering the purpose and object of the Act and the subjects protected by the Act, as well as general principles on damages, including the principle of proximate cause.

The Act itself gives little guidance on the size of damages that can be awarded, and there are very few cases.

Regarding the judicial procedure, see question 18.

To fulfil the requirements of the EU Damages Directive, a separate Swedish Competition Damages Act (2016:964) has been enacted. It governs actions for damages for infringements of the competition law provisions and includes changes and clarifications on, inter alia, liability, limitation periods, compensation, recourse, passing on of overcharges, disclosure and other general procedural provisions.

Finally, if the SCA after having investigated a possibly anticompetitive agreement, decides not to issue a cease-and-desist order (see question 9), a company affected by the behaviour has the option to file an application at the Patent and Market Court for such an order.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Under the Group Proceedings Act (2002:599), 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 procedural rules are with only a few exceptions the same as in civil proceedings.

A group action can be initiated in certain competent courts. Since the entry into force of the Competition Damages Act in 2016, the jurisdiction to hear private antitrust group actions has moved from the general courts to the Patent and Market Courts.

No competition cases have to date been subject to a class action in Sweden.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Full leniency (ie, immunity from fines) may be granted to the first undertaking to notify the SCA if it is owing only to the information contained in the application that the SCA has obtained sufficient material to take action against the infringement, if the undertaking: (i) provides the SCA with all the information about the infringement that it has at its disposal; (ii) cooperates fully with the SCA throughout the investigation of the infringement; (iii) does not destroy, falsify or conceal relevant information or evidence relating to the alleged anticompetitive agreement; and (iv) has ended its involvement in the infringement, or ends it as soon as possible after informing the SCA. An undertaking that has forced others to participate may not obtain immunity.

In the event that another company has already obtained a marker (see question 27), immunity may not be granted before the period of extension has ended, nor may immunity be granted if the SCA has stated in a decision that the conditions for immunity are fulfilled.

All the information that the leniency applicant has at its disposal relating to the alleged anticompetitive agreement at the time of the application has to be provided for an application to be considered as filed. In addition, the information must be relevant to prove the infringement and include the identification of the other participants, the affected market, as well as the type and duration of the infringement. Even where the SCA already suspects an infringement at the time of the application, this does not prevent an undertaking from being granted immunity. However, the requirements are not fulfilled if the SCA has already in some other way received sufficient information to intervene. It does not matter whether a decision to intervene has already been made.

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 voluntarily, submit all relevant information regarding the infringement and copies of all relevant material to which the undertaking has access, for example, notes or minutes from meetings. Informing other participants about the application or evidence supplied and other measures that hinder the SCA's investigation will remove the possibility of immunity.

If the SCA has received sufficient information to commence an investigation into an infringement and no undertaking has applied for leniency in accordance with the above, immunity may still be granted to an undertaking if it, in addition to criteria (i) to (iv) set out above, is (v) the first to provide information that makes it possible to establish that an infringement has occurred, or (vi) in some other way to a very significant extent has facilitated the investigation of an infringement. The latter criterion will, according to the SCA's guidelines, be interpreted strictly and the availability of immunity is intended to be very limited under this rule. Revised guidelines on immunity and leniency were published in September 2017.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Under the Act, only the first undertaking to cooperate with the SCA may qualify for immunity. However, the undertaking that comes second may get a reduced fine under Chapter 3, section 13 of the Act if the undertaking fulfils the same kinds of conditions on cooperation applicable to immunity applicants. 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.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

See question 25.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Although there are no express 'deadlines', 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.

An undertaking whose application is incomplete may obtain a marker, provided that the application contains information on the market concerned by the infringement, which other companies are involved in the infringement and the object of the infringement. The time limit is at the discretion of the SCA, but is usually no longer than two weeks unless the undertaking can provide sufficient reasons for a longer time limit.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

See questions 24 and 25.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Confidentiality issues are regulated by the Public Access to Information and Secrecy Act (2009:400). Under those rules, information regarding planning and other preparations for investigations, dawn raids, etc, that the SCA intends to undertake may be confidential, provided it can be assumed that the purpose of the investigation will be negatively affected if the information is revealed. The information related to an investigation by the SCA (not only planning and preparations) 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 subject to 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.

The provisions guarantee 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 by an informant, 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 provisions also guarantee the confidentiality of certain information in the context of legal assistance requested by another state (see question 11).

Information in public records related to the SCA's investigations and other enforcement measures remain confidential for a maximum of 20 years, or otherwise as long as it can be assumed that the informant will suffer substantial damage or other substantial detriment if the information is revealed.

It follows from the rules that the level of confidentiality does not depend on the level of cooperation by the parties.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

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 to alleged cartel members. This is referred to as a fine order. This section is of a non-mandatory nature, which means that the SCA can issue settlements in suitable cases. According to the preparatory works 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 Patent and Market Court within a year of the written confirmation.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

As mentioned in question 18, 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 whom the injunction could 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.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party 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 (see question 24). The contact must be made by a person empowered to represent the undertaking (but can initially be anonymous). The undertaking cannot qualify for immunity until a formal application has been filed with the SCA. This application can be made in writing. However, in practice, the SCA accepts oral applications since undertakings sometimes hesitate to file written applications due to the risk that the material will be used in proceedings for damages.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no ongoing or proposed leniency and immunity policy assessments or policy reviews in the public domain.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

As indicated above (see question 29), the SCA may keep certain information confidential for a company concerned during the investigation

Update and trends

In July 2018, the Patent and Market Court ruled in favour of the private action launched by Visita against Booking.com, ordering Booking.com to remove existing, and discontinue its use of, vertical price parity clauses in its agreements with hotels (requiring the hotels not to offer lower prices on their own websites than on Booking.com). The action was launched by Visita, a hospitality sector business association, after the SCA ended its investigation of Booking.com in 2015 by accepting the company's commitments to cease its use of horizontal price parity clauses. The Court found in its judgment that the vertical price parity clauses had been shown by Visita to limit competition in the market for hotel accommodation, raising both prices and barriers to entry into the market. The Court rejected Booking.com's arguments that the clauses were ancillary restraints, necessary for the company's operation, and that the clauses should be exempted on grounds of efficiency. The cease-and-desist order was issued under penalty of a 35 million kronor fine. Booking.com has appealed the judgment to the Patent and Market Court of Appeal. This case is interesting as the outcome is not fully consistent with the view of the SCA. Similar actions throughout Europe have also led to contrasting results.

In April 2018, the Swedish Supreme Court allowed insurance broker Söderberg & Partners' appeal of the Patent and Market Court of Appeal's ruling that it was not possible to challenge an SCA decision on what digital material seized during a dawn raid is transferred to a case file. The case concerns a dawn raid carried out at the premises of Söderberg & Partners in 2017 by the SCA, during which digital material was mirrored and seized. The SCA then reviewed the material and decided that a large amount was relevant and would become part of the case file, at which point the material becomes 'official documents'. Söderberg & Partners challenged the SCA's decision on what was considered relevant material to copy, on the grounds that much of it was not covered by the court order authorising the dawn raid and that it would violate fundamental rights of access to effective remedies and a fair trial to deny the company the possibility to appeal. The Patent and Market Court and the Patent and Market Court of Appeal both dismissed the appeal, taking the view that the SCA's decision was not a reviewable act under the relevant legislation. A ruling from the Supreme Court is currently pending.

In February 2018, the Patent and Market Court of Appeal ruled in favour of Telia (previously TeliaSonera), against the SCA in the case against Telia and the Swedish fibre transmission company, GothNet. The companies had been found by the lower court in 2017 to have engaged in an anticompetitive arrangement in relation to a public tender in 2009, whereby Telia agreed not to participate in the tender process. When GothNet won the tender, Telia was subcontracted as its exclusive supplier. A total fine of 16 million kronor was ordered by the lower court. The SCA had sought a total fine of 35 million kronor. The court of appeal found in its judgment that Telia's behaviour had not been shown to restrict competition by object or effect and reversed the Patent and Market Court's judgment. Only Telia appealed, resulting in the full annulment of its fine.

The SCA's appeal of the May 2016 judgment of the Stockholm District Court involving three removal firms was dismissed by the Patent and Market Court of Appeal in November 2017. The case concerned five-year non-compete clauses in two share-purchase agreements. The SCA had claimed that the non-compete clauses were not ancillary to the two transactions as there was no direct and necessary link thereto. The lower court dismissed the SCA's case on the basis that there was indeed such a link in one instance and there was insufficient proof of appreciable restriction of competition as regards the other. The court of appeal upheld the judgment, finding that it had not been shown that the non-compete clauses restricted competition by object. The frailty of a case focusing mainly on proving an anticompetitive object (as opposed to looking at effects) has become something of a trend in Sweden in the past couple of years as a result of various judgments, such as this one, the *Telia/Gothnet* case above, and the *Capio* case from 2017.

Two private litigation cases for damages were dismissed by the Patent and Market Court in 2018. The first case concerned alleged anticompetitive agreements (between TeliaSonera and Svea Billing Services). The Patent and Market Court dismissed the claim in March 2018, finding that the defendants had not been shown to have entered into any anticompetitive agreement. The second case concerned alleged abuse of dominance by the municipality-owned company GothNet. The Patent and Market Court dismissed the claim in February 2018, finding that it was not shown that GothNet held a dominant position in the relevant market.

Aside from court cases, the SCA has closed a number of anticompetitive agreement investigations during 2017 and 2018 without taking any further action. The SCA has indicated in statements and reports that it will place a greater focus on the connection between competition infringing behaviour and corruption in the future. This may be expected to lead to increased cooperation with other regulatory authorities, to coordinate efforts in cases combining the fields.

phase. This is typically the case for trade secrets provided to the SCA by certain third parties, for instance competitors or customers, and evidence concerning other parties' involvement in an infringement.

Access to the case file in its entirety (with few exceptions, see below) is normally granted at the stage when the SCA considers that it has sufficient evidence to prove the existence of a suspected cartel and thereby issues a draft statement of claim (similar to a statement of objections). The companies concerned will, before the SCA files an allocation to issue fines, be granted an opportunity to review and comment on the draft application and the evidence disclosed.

As indicated, there are a few limited possibilities, however, for the SCA to keep certain information confidential to a party also after the draft statement of claim has been issued, or to release documents to a limited number of individuals under the proviso that the documents may only be used for exercising defence rights, etc. Similarly, certain information may be disclosed only at the SCA's own premises (typically quantitative data). Also in such cases, the SCA issues a decision to limit the group of people that may have access to the information, for instance legal and economic advisers.

At the stage when the SCA has submitted an application to the Patent and Market Court asking the Court to impose fines on a company, the rules on evidence in the Swedish Code of Judicial Procedure (1942:740) will prevail over the rules set out in the Public Access to Information and Secrecy Act. In practice, this means that all documents submitted to the Court (ie, evidence invoked against a party) must be disclosed to the party in question.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

As mentioned in questions 18 and 31, 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 preparatory works 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.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

The guidelines on ethics 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 possibility to represent multiple corporate defendants. Subject to these limitations, a multiple corporate defence is possible.

37 Payment of penalties and legal costs

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

Legal penalties are imposed on the undertakings involved in the cartel, and are not imposed on the employees of those undertakings. Hence, individual employees cannot be ordered to pay fines or other monetary sanctions. However, undertakings may pay the legal costs of their employees.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

No. Fines, penalties and similar public charges (such as fines imposed by the SCA or the European Commission) are non-deductible for Swedish tax purposes.

Private damages awards may be tax deductible depending on the circumstances. In general, private damages awards should be tax-deductible if they qualify as an operating expense. Certain specific exemptions exist but these should not be relevant here.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

To answer this question, first it must be considered whether the SCA or the courts can fine or otherwise penalise an undertaking that has been penalised in other jurisdictions. Second, the question arises as to whether sanctions already imposed in other jurisdictions shall be taken into account when determining the fine. Regard must be had to EU law and consequently to whether the earlier penalty had been imposed within the EU.

The European Competition Network (ECN) was set up with the objective that each case involving application of EU competition law should be dealt with by a single authority in a member state. However, the rules are not binding and Regulation 1/2003 article 13 paragraph 2 stipulates that a complaint that has already been dealt with by another competition authority may be rejected by the authority (here: the SCA). Hence, the SCA can choose not to reject the complaint and the system consequently allows for sanctions under the EU competition rules by more than one authority in the same case. However, the principle of ne bis in idem is a general principle of EU law (article 50 of the Charter on Fundamental Rights). The ECJ held in *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* that if the Commission had penalised an undertaking for anticompetitive behaviour with reference to the object or effects in a certain territory, the undertaking cannot again be brought to a national court with reference to the object or effects in the same territory. It follows from the principle of ne bis in idem and the condition of 'identity of facts'. Accordingly, an undertaking cannot under the principle of ne bis in idem be fined in a Swedish national court for the same anticompetitive conduct, if the object or effects in Sweden have already been taken into account in a previous proceeding within the EU (including the Commission's power to issue fines).

Thus it should not be considered 'double jeopardy' if a company will be fined in respect of indirect sales in Sweden where the direct sales have been penalised elsewhere, following *Toshiba Corporation and Others*.

With respect to non-EU member states, there are no safeguards protecting an undertaking from fines or penalties in Sweden if the undertaking has been penalised in a state outside the EU.

There is no clear legal ground for taking into account any penalties imposed in other jurisdictions. The SCA does not mention it as a mitigating factor in its methodology paper on how to determine fines (see question 19), nor is it mentioned as a mitigating factor in the Act.

The system of reducing a fine by the amount of previous penalties has been rejected by the advocate general as not satisfying the principle of ne bis in idem (opinion in C-213/00 P, pages 96–97). Similarly, the European Court of Human Rights has rejected that kind of system.

As indicated in question 22, Swedish rules on damages are of a compensatory nature. This means that overlapping liability for damages can be taken into account when assessing damages.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

Companies can avail themselves of the leniency principles described in question 24. The existence of a compliance programme does not affect the level of the fine, owing to the difficulties in assessing the impact of such a programme. Hence, compliance initiatives undertaken after the investigation has commenced would typically not affect the level of the fine.

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