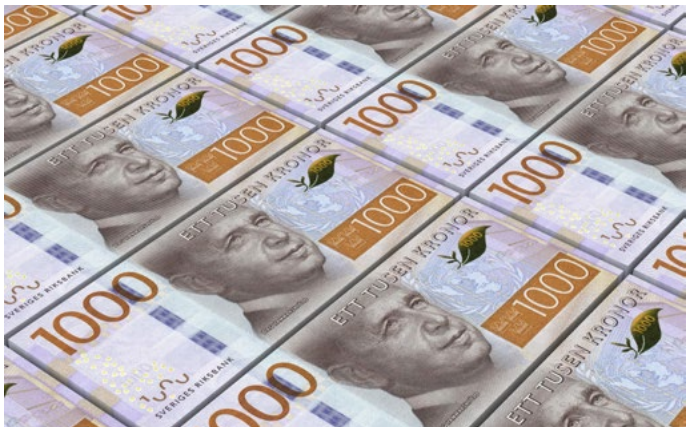
Sanctions busters beware – Sweden hikes its cap on corporate fines

The maximum corporate fine in Sweden has been raised to €50 million. Carolina Dackö, David Kaye, Anna Remse, and Robert Scherman look at the implications on sanctions enforcement.

On 1 January 2020, the cap on corporate fines in Sweden, previously set at SEK 10 million, was drastically increased to SEK 500 million (approximately €50 million). The increase was prompted in part by criticism from *inter alia* the Organisation for Economic Co-operation and Development that the relatively modest level of the Swedish fine might not serve to fulfil Sweden's international commitments to effectively and proportionally deter, in particular, larger businesses from criminal activity in the line of their business.[1]

In Sweden, a corporate fine can be issued in relation to all crimes under Swedish law that can be committed in the exercise of a company's business activities (Sw. *näringsverksamhet*). This article, however, focuses on violations of trade and financial sanctions only, and consequently covers aspects of a potential fine in respect of such violations.[2]

Given that, in Sweden, the threat of corporate fines is meant to serve as the primary whip at the backs of corporations, necessitating effective procedures for trade and financial sanctions compliance, the concrete implications of the 50-fold increase are of considerable interest to Swedish corporations. Although the increase may *prima facie* seem like a decisive response to criticism, the actual effects might not be as daunting. The construction of the corporate fine and its dependency on personal guilt effectively reduces the risk under Swedish law of corporate liability for sanctions violations. From a practical standpoint, the upward adjustment of the fine is likely to have a limited effect on the size of corporate fines for most sanctions violations.



Fines in Sweden are set in Swedish krona (SEK). However, for ease of reading, the article refers to values in euros based on a currency conversion of SEK 10 to €1.

Formal requirements – the needle's eye

Under Swedish law, criminal acts can be committed by and subsequent punishment imposed upon natural persons only. Thus, corporations cannot face criminal liability. To this effect, the corporate fine (Sw. *företagsbot*), which is in fact levied on companies, is neither a criminal nor an administrative penalty. Instead, it is a rather rare and specific form of legal construction, referred to as 'a special legal effect of a crime' (Sw. *särskild rättsverkan av brott*). The issuing of a corporate fine is contingent upon a crime having been committed by an individual company representative or employee in the exercise of that company's business activities. Noticeably, if a Swedish court does not have jurisdiction over the individual or the crime in question (which is often the case if the crime was committed by a foreign national abroad),[3] it cannot impose a corporate fine.

Generally, the corporate fine is tried in the same criminal court procedure as that of the company representative or employee that has allegedly committed a criminal act. If the defendant (i.e., the accused company representative or employee) is acquitted – e.g., because the prosecutor fails to prove intent or gross negligence – the company would also be cleared since no prerequisite crime has been committed. Although in theory, the fine does not necessitate identification of the individual offender, the prosecutor must in practice prove beyond reasonable doubt that a crime has *de facto* been committed by someone at the company. Consequently, this theoretical possibility has only materialised in cases of obvious negligence (e.g., corporate environmental pollution).[4]

THE CONCRETE IMPLICATIONS OF THE 50-FOLD INCREASE ARE OF CONSIDERABLE INTEREST.

Therefore, the legal principles that protect the defendant, such as the presumption of innocence, the right to a fair trial, and the principle of legality, will in effect also serve the company. When it comes to sanctions violations, the principle of legality is of particular interest, stipulating *inter alia* that a person cannot be convicted of a crime if statutory criminalisation is not adequately clear.

Even if the prosecutor succeeds in proving that a company representative or employee has committed a crime, there are additional criteria to be met for the imposition of a corporate fine. The prosecutor must also show either that:

1. the company did not do what could reasonably be required to prevent the offence; or
2. the offence was committed by:
   a. a person with a leading position in the company based on a power of representation of the company or to take decisions on its behalf (e.g., a director of the board or a senior manager); or
   b. a person who otherwise had particular responsibility for supervision or control of the activities (such as a head of trade compliance).[5]

As regards sanctions compliance, Swedish law does not lay out any particular due diligence requirements. For that reason, the question on how robust an internal trade compliance programme needs to be and what due diligence or monitoring measures need to be taken for a company to do what can reasonably be required, is rather unclear. Ultimately,

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this opacity is likely to work in favour of the accused individual and therefore also the company under the threat of fines.

Sizing the corporate fine – the complex calculation of a base value

The first step in setting the size of the corporate fine is for the court to decide on a base value (Sw. *sanktionsvärde*). The base value, according to the law, is to be set at somewhere between €500 and €1 million. It is to be based primarily on the so called 'penalty value' (Sw. *straffvärde*) of the offence(s) in question.[6] This 'penalty value' is to be assessed and decided by the court, somewhere between the minimum and maximum penalty for the crime(s) in question as set out in the law (Sw. *straffskala*). In Sweden, the penalty for an intentional violation of a sanctions provision ranges from a low fine to imprisonment of up to four years.[7] The courts tend, however, to reserve the upper ranges of penalties for the most severe crimes imaginable.[8] In practice, an indictment for intentional sanctions violations is not likely to render more than two years imprisonment.[9] If committed with gross negligence, the penalties for an individual ranges from a low fine to imprisonment of up to six months. However, for reasons beyond the scope of this article, an indictment for such offences will in fact likely result in no more than a fine.

When assessing the penalty value, consideration is given to the damage, violation and danger involved in the criminal act, what the accused individual realised or ought to have realised in this respect, and his or her intentions or motives.[10] Thus, in case the court considers that a sanctions violation by a company representative is severe, the penalty value could reach, for example, one year in prison. That one year in prison would then be translated into a base value for determining the corporate fine for the company in question.

This way of calculating the base value for corporate fines is new in the Swedish context and quite clearly contrasted by previous legal practice (most noticeably in regard to corporate transgressions in the field of environmental and work environment law).[11] The extent to which prior practice will prevail remains to be seen.[12]

Therefore, in most cases, the base value of any corporate fine for international sanctions violations is, and is likely to continue to be, low.

Sizing the corporate fine – the actual risk for large companies

Even if, as set out above, the authors assess that the base value of the fine may continue to be low, the new law does introduce a new element of increased fines directed at large companies.

Two criteria have to be met. The company in question has to qualify as a 'large company' and the base value has to be determined to at least €50,000.

In short, a 'large company' is defined as one that is either publicly traded or qualifies for at least two of the following criteria: (i) more than 50 employees, (ii) a consolidated balance sheet with a total of more than €4 million yearly, or (iii) net sales of more than €8 million yearly.[13] Depending on the financial position of such a company, the court may decide to increase the corporate fine by

LINKS AND NOTES

1 Government bill (Sw. *proposition*) 2018/19:164 page 27.
2 This article focuses on risks related to the corporate fine; other potential corporate risks, such as the forfeiture of profit of criminal activities, liability under other jurisdictions with aggressive extraterritorial reach and negative publicity, are consequently not within its scope.
3 See further in Chapter 2 of the Swedish Criminal Code (Sw. *Brottsbalken*) (1962:700). For an English translation of the Swedish Criminal Code, please refer to www.government.se/490f81/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf.
4 See e.g. RH 1992:73.
5 Chapter 36, Section 7 of the Swedish Criminal Code.
6 Chapter 36, section 8, second paragraph of the Swedish Criminal Code. In addition to the penalty value, consideration should be given to (i) the damage and danger involved in the offence(s), (ii) the relationship of the offence to the business, and (iii) if the company has been sentenced to pay a corporate fine before. As regards damage and danger, these factors should already have been be paid attention to by the court when deciding on the penalty value (c.f. Chapter 29, section 1 of the Swedish Criminal Code). For that reason, it is difficult to gauge what effects the 'second' addition of these factors will have in practice. As regards the relationship of the offence to the business, this factor will likely have mitigating rather than aggravating effects on the base value.
7 Section 8 of the Swedish law on certain international sanctions (Sw. *lagen om vissa internationella sanktioner*) (1996:95).
8 Compare Martin Borgeke and Catharina Månsson, Studier rörande påföljdspraxis m.m., sixth edition, 2018; government bill 2009/10:147, which lead to changes in the Swedish Criminal Code aiming to increase the courts' use of the upper parts of the scales of penalty for serious violent crimes; and Martin Borgeke, Stefan Reimer, Magnus Ulväng and Fredrik Wersäll, Straffvärdebedömningen av allvarliga våldsbrott, SvJT 2011 s 71.
9 To date, the most severe punishment imposed under the Swedish law on certain international sanctions is imprisonment for one and a half year, see RH 1998:18. In that case, the defendant had for several years, in direct violation of sanctions, imported boots from Serbia to a total value of around €1.4 million, and because of the systematicity each transactions was considered a gross offence.
10 Chapter 29, section 1 of the Swedish Criminal Code.
11 Historically, the base value of the corporate fine has been decoupled from the penalty value of such crimes. In other words, even when such crimes have rendered a relatively low penalty value for the responsible individual, the courts have often decided on a relatively high corporate fine (see e.g. the judgment of the Swedish Supreme Court, NJA 2014 s. 139).
12 According to the legislator, the higher base values for work environment and environmental crimes set in Swedish legal practice are intended to remain (government bill 2018/19:164 pages 31f). To be noted, in its May 2020 manual on corporate fines (www.aklagare.se/globalassets/dokument/handbocker/foretagbot.pdf) the Swedish Public Prosecution Development Centre is arguing that its previously documented internal principles on the calculation of base values for work environment and environmental crimes is not only still relevant, but ought to apply in respect of other types of crimes too (see section 8.1). Still, a broadening of the use of those principles not only goes against the wording of the new law, but also stands in contrast to the legislator's stated intent to uphold the current legal practice in relation to work environment and environmental crimes without having it result in increased corporate fines for other types of crimes (government bill 2018/19:164 page 31).
13 Chapter 1, section 3, first paragraph, point 4 of the Annual Accounts Act (Sw. *Årsredovisningslagen*) (1995:1554).
14 Chapter 36, section 9 of the Swedish Criminal Code.
15 See government bill 2018/19:164 page 67 and the Swedish Public Prosecution Development Centre's May 2020 manual on corporate fines.
16 Government bill 2018/19:164 page 38.
17 Compare the Swedish Data Protection Authority's SEK 75 million administrative fine on Google LLC for failure to comply with the GDPR, decision nr 2020-03-10, case nr DI-2018-9274, which was based on the financial status of its parent company Alphabet Inc.
18 The applicability and principles of the corporate fine also stand in sharp contrast to e.g. the sanctions available under the Swedish/EU anti-money laundering legislation. Compare e.g. the Swedish Finance Inspection's SEK 4 billion administrative fine on Swedbank AB (publ) for deficiencies in the bank's management of the risk of money laundering in the operations of its Baltic subsidiaries.
19 Chapter 36, section 10, paragraph 1 points 3 and 4 of the Swedish Criminal Code.

up to 50 times the base value. The maximum hypothetical penalty is therefore €50 million.[14] However, the highest level, i.e., the 50 times increase of the base value, is reserved for companies with more than €7,000 million in equity (Sw. *eget kapital*).[15]

The circumstances determining whether a company qualifies as a large company are limited to the financial position of the legal entity in which the relevant offence has been committed.[16] Thus, unlike certain other compliance areas in which the rules on fines originate from EU legislation,[17] there is likely no room for considering the financial status of a parent company or company group to which the company in question belongs.[18]

An important feature of this step is the link between the penalty value for the individual and the base value for the company fine. If the court has determined that the base value does not exceed €50,000, this second step for increasing the company fine is not applicable. In practice, this means that if the individual is convicted and the penalty value is somewhere in the low-to-medium range of the scale, this will generally translate into a low-to-medium base value for the company fine (and thus likely under the €50,000 threshold). In other words, the likelihood and risk of entering into this second step for the company fine is in practice contingent upon how severely the individual is punished. Since prosecutors many times have difficulties in proving that a violation of sanctions was intentional, convictions based on gross negligence (rather than intent) are more probable. Thus, for sanctions crimes, a base value of €50,000 or more will, arguably, be uncommon.

Sizing the corporate fine – mitigating factors

The third and final step for the court is to assess whether there are any mitigating factors that warrant a reduction of the corporate fine, whereby the court may take into account e.g., that:

1. the company, according to its ability, attempted to prevent, remedy or limit the damaging effects of the offence; or
2. the company voluntarily reported the offence.[19]

There is no clear mechanism in Sweden for voluntary self-disclosure of sanctions violations. Although if a company has self-disclosed a violation to the competent authority and the matter later goes to trial, the voluntary disclosure should be taken into consideration by the court as a mitigating factor when determining a potential corporate fine.

It could really hurt. Theoretically.

The new maximum corporate fine of €50 million is not as draconian as it might seem at first glance. For the majority of criminal sanctions violations, the prosecutor has several hurdles to overcome, and subsequently the court has a number of boxes to check before such increased fines come into play. The legislator has left the interpretation and practical application of key pieces of the new law to the notoriously conservative judicial system. To most companies at risk of being fined for sanctions violations, the heavier stick that the increased corporate fine is intended to be, is perhaps best described as visibly swinging, safely out of reach. If the Swedish legislator is intent on higher fines being imposed as a deterrent, it will have to address the web of safeguards that, even with the increase, lower the pecuniary risk of an offender.

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