

## **New regulations for Swedish Competition Law**

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# New regulations for Swedish Competition Law

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**The Competition Act<sup>1</sup> came into force July 1, 1993 and governs all aspects of Swedish competition law. Articles 6 and 19 of the Competition Act correspond to Articles 81(1) and 82 of the EC Treaty.<sup>2</sup> However, even if the EC-and Swedish competition rules appear to be very similar, there are differences as regards, for example, with procedural issues. In fact, the Swedish Competition Authority (*Konkurrensverket*) does not have the power itself to impose fines upon companies. Only the Stockholm District Court (*Stockholms tingsrätt*) has the power to decide whether companies have infringed the Competition Act and subsequently to what extent they should pay fines.**

The Competition Act also provides for the control of concentrations. The Swedish merger rules correspond in general to what applies under the EC Merger Regulation<sup>3</sup> with regard to full-functionality and the definition of an undertaking. However, unlike the European Commission, the Competition Authority itself has rather limited powers as far as enforcement is concerned. Should it consider that a merger ought to be prohibited, it will have to file an application to this effect with the Stockholm District Court, which will decide the issue. The Stockholm District Court's competition law decisions can be appealed to the Swedish Market Court.

## New legislation

### Referral of concentrations pursuant to the EC Merger Regulation

In May 2003, amendments to the Swedish Competition Regulation<sup>4</sup> and to the Regulation with instructions for the Competition Authority<sup>5</sup> entered into force. According to the new rules, the Competition Authority is authorised to request the referral of concentrations pursuant to Article 9 and 22 of the EC Merger Regulation.

The reason for the amendments is the Commission's proposal for a new EC Merger Regulation, which extends the possibility of referral of concentrations between the Commission and national authorities. The Commission's proposal intends to ensure that the authority best suited for doing so examines a concentration. The new Swedish rules are set out in 3b § in the Competition Regulation and in 3 § (4) in the Regulation with instruction for the Competition Authority.

### New block exemption for motor vehicles

The Commission's new block exemption for motor vehicles entered into force January 1, 2003.

Amendments to the corresponding national rules for cases with only a Swedish dimension entered into force at the same time as the EC block exemption.<sup>6</sup> The new rules entail essentially the same changes within Sweden as the new EC block exemption within the EU and will be valid until May 2010.

## International cooperation

In April 2003, Sweden entered into an agreement with Denmark, Norway and Iceland in an effort to strengthen the fight against anti-competitive behaviour in the Nordic market. The agreement increases the possibilities for the competition authorities to exchange confidential information during cartel investigations and examinations of concentrations.

One of the reasons for entering into the agreement was that major players in the Nordic market often participate in cartel activities in more than one Nordic country. For example, cartel investigations are currently taking place in the construction sector on national level in several Nordic countries.<sup>7</sup> Another example of the need for extended cooperation between the competition authorities is the large number of concentrations in the financial and commodity sectors taking place on national level in the Nordic countries.

## Anti-competitive agreements

### The ventilation market

In September 2003, the Competition Authority brought action at the Stockholm District Court against Keyvent AB and ABB Building, two companies active in the ventilation sector in Sweden.

The Competition Authority accused the companies of having coordinated e.g. prices, price

levels and other commercial conditions to be presented in award procedures regarding ventilation structures in the forest industry. According to the Competition Authority, the ventilation companies had entered into a written agreement regarding one of the award procedures. The agreement set out e.g. that “Before submitting the final price to the contracting authority, the parties should have agreed on whom and which of the parties that is to offer the lowest price and thus which of them that is to be prepared to take on the project.” The agreement also set out that “The parties commit to divide the result according to costs, regardless of which of them that is awarded the contract.”

The Competition Authority was informed of the anti-competitive activities by ABB, a mother company to one of the ventilation companies in question.

The Competition Authority has proposed the Stockholm District Court to impose a fine of SKr660,000 on Keyvent AB and a fine of SKr23m on ABB Building. According to the Competition Authority, the fines imposed on ABB Building should be reduced by 50%, since the latter provided the Competition Authority with valuable information.

#### **Petrol cartel**

In April 2003, the Stockholm District Court confirmed that five petrol companies, holding approximately 80% of the Swedish petrol market, had engaged in cartel activities.

During the autumn of 1999, the petrol companies had sent letters regarding rebate cut and decrease of the petrol station prices to customers.<sup>8</sup> There were substantial similarities as to the wording of the letters in question and they had been sent within such a short time difference that the companies could not possibly have outlined their own letters without previously having consulted their competitors about the wording. Representatives from the companies had met frequently at least during the year 1999. Supposedly, the meetings concerned environmental issues, but were held in order for the companies to coordinate price reductions, rebates and to help them to divide customers between themselves.

The Stockholm District Court found that the companies had agreed on undertaking a rebate clean-up by jointly decreasing rebates granted to customers, while simultaneously decreasing their petrol prices. However, the Court considered the evidence of a number of other infringements invoked by the Competition Authority to be insufficient. In fact, the Court dismissed the Competition Authority’s argument that the practice between the companies constituted part of a long-term scheme to keep prices above competitive levels. The basis for

the dismissal was lack of evidence. Furthermore, the Competition Authority did not succeed in persuading the Court that the cooperation between the companies had actually affected the market price.

Whereas the Competition Authority proposed a total fine of SKr75m, the total fine finally imposed by the Court amounted to SKr50m. Thus, the fines set by the Court were considerably lower than those sought by the Competition Authority. The Court explicitly declared that the fines had not been calculated according to the method prescribed by EC law.

The Competition Authority has announced its intention to appeal the judgment to the Market Court on the basis that, in its view, the size of the fines marks a departure from common practice in EC law.

#### **Asphalt cartel**

At the end of October 2001, the Competition Authority launched an investigation into the asphalt sector in Sweden, suspecting the existence of a possible cartel. Following inspections carried out at the premises of a number of construction companies, the Competition Authority announced that the latter had allegedly rigged bids submitted in public procurements and shared the market geographically between them. The Competition Authority suspect that contracts of collusive nature existed between eleven construction companies, at least from the time of the introduction of the Competition Act in 1993, and until the Competition Authority launched its investigation. National competition authorities in Norway and Finland are currently undertaking similar investigations in the asphalt sector in their respective countries.

The Competition Authority brought action at the Stockholm District Court in March 2003, proposing a total fine for the eleven construction companies of approximately SKr1,600m. The amount of the fine is the highest ever proposed by the Competition Authority.

Vägverket (the Swedish National Road Administration) is one of the contracting authorities that the Competition Authority alleges is affected by the cartel activities. However, Vägverket Produktion, Vägverket’s construction unit, is one of the construction companies that the Competition Authority believes has participated in the cartel activities. Vägverket Produktion does not constitute a legal entity that is separated from Vägverket but is an integrated part of Vägverket, despite the fact that it in many ways is managed as a private company. Thus, on the one hand, Vägverket has allegedly participated in the rigging of bids through its construction unit,

whereas, on the other hand, it has suffered financial losses as a consequence of the proposed cartel activities, as one of the contracting authorities.

It is questionable whether the cartel activities could be considered to have caused *Vägverket* financial losses, since *Vägverket Produktion* and *Vägverket* normally are to be seen as one economic entity, and since that economic entity has, through *Vägverket Produktion*, participated in the alleged anti-competitive behaviour. Moreover, it is questionable whether the cartel activities have affected competition with regard to *Vägverket*, since *Vägverket* chose to procure asphalt from the members of the cartel, fully aware that rigging of bids had taken place.

The question whether the proposed cartel activities could be considered to have caused *Vägverket* damage and to have had affected competition is currently subject to a decision by the Stockholm District Court. Should the District Court consider that the construction companies cannot be held responsible for financial losses suffered by *Vägverket*, since *Vägverket*, through its construction unit, participated in the activities causing the financial losses, the Competition Authority will be forced to withdraw 70% of its claims with regard to the cartel.

### Initiated investigations

During the past year, the Competition Authority has maintained its strong policy as regards collusive behaviour, by initiating cartel investigations in important business sectors in Sweden.

#### The car distribution sector

In mid December 2002, the Competition Authority effectuated dawn raids at the premises of seven companies active in the motor assistance sector in Sweden. The companies subject to the investigation constitute distributors of Volvo vehicles and belong to a network of motor assistance companies, *Assistancekåren*, which holds approximately 47% of the Swedish market.

The purpose of the raid was to ensure evidence of the companies fixing prices collaterally. One of the reasons for the Stockholm District Court to authorise the raid was an e-mail sent by a distributor of Volvo vehicles to the seven companies subject to the investigation. The e-mail contained information that could be interpreted as a price-fixing agreement.

An initial investigation has shown that the motor assistance companies negotiate their larger individual contracts through *Assistancekåren*. According to the Competition Authority, the companies adjust their prices to a price list set out by *Assistancekåren*. Since

the companies share an invoicing system, *Assistancekåren* can easily spot deviations from the price list and undertake appropriate sanctions in relation hereto.

#### The bitumen market

The Competition Authority has initiated an investigation concerning a number of companies active on the Swedish bitumen market, a substance used as an adhesive in asphalt pavements. The companies in question are suspected of having entered into anti-competitive agreements, sharing the market between them, collaterally fixing prices. In addition, one of the companies is suspected of having abused a dominant position. In order to ensure evidence of the anti-competitive activities, the Competition Authority effectuated dawn raids at the premises of the companies in June 2003.

The investigation is, among other things, based on information provided by the Swedish Civil Aviation Administration, concerning the award procedure for the construction of the third runway at Arlanda Airport.

### New regulation for EC Competition Rules

The substantial and procedural rules set out in the Competition Act closely correspond to what is applicable under EC law. Following the European Council's decision to introduce a new implementing regulation for Articles 81 and 82 of the EC Treaty, the Swedish government appointed a Committee to propose amendments to the Competition Act, in order to ensure that Swedish legislation continues to follow EC competition law as closely as possible.<sup>9</sup>

#### The "effect on trade" criterion

The Committee proposes the introduction of a rule according to which EC competition law shall apply when the "effect on trade" criterion has been met. Thus, according to the Committee's proposal, the prohibition rules in the Competition Act shall apply only in situations of purely national character.

#### The system of prior authorisation

Currently, according to EC competition law, undertakings are allowed to implement an anti-competitive agreement only after they have been authorised to do so by the Commission. The system of authorisation will be abolished in the new implementing regulation.

In this respect, the Committee suggests that the system on national level, which corresponds to current EC competition law, shall be abolished. As on EC level, the new Swedish legislation shall contain an exemption rule, which will be directly applicable both in the Competition Authority's application of EC competition law and in its application of the

Competition Act. Hence, neither exemption decisions nor negative clearance decisions will be available.

### Group exemptions

The present system of group exemptions under EC competition law is preserved under the new implementing regulation.

However, according to the Committee's proposal, the Swedish block exemptions shall be abolished, the main reason being that they will no longer function as an administrative relief once the system for individual exemptions has been abolished.

Furthermore, block exemptions on EC level will provide sufficient guidance to undertakings and the Competition Authority, also in situations where national law applies.

### Structural measures

The new implementing regulation will give the Commission the authority to enjoin undertakings to effectuate structural measures.

The Committee has not proposed a corresponding rule to be introduced in the Competition Act, mainly since it does not consider dissolution of a company to be a viable method of rectifying distortion of competition. However, the Committee proposes that the Competition Authority shall be entitled not only to approve a commitment submitted by an undertaking that allegedly has violated a prohibition, but also to make such a commitment binding. This corresponds to what is set out in the new implementing regulation. The Committee also proposes provisions under which a decision approving commitments may be revoked on certain conditions.

### Questions concerning procedure

According to the new implementing regulation, national courts may ask the Commission to provide information and statements. Moreover, the new implementing regulation allows national competition authorities and the Commission to make written (or, with the permission of the court, oral) statements to national courts.

The Committee considers that most questions concerning procedure can be solved without special

legislative measures. However, the Committee finds it necessary to introduce a rule, allowing Swedish courts to ignore a written statement if considerable inconvenience arises in the legal proceedings.

Moreover, the Committee proposes a rule according to which the court may consider a statement from the Commission or the Competition Authority *ex officio*.

The Committee proposes that the changes in the Competition Act shall enter into force in May 2004, at the same time as the new rules on EC level.

### Notes:

- 1 *Konkurrenslag* (1993:20).
- 2 Prop. 1992/93:56, p. 21.
- 3 Council Regulation (EEC) No 4064/89 of December 21, 1989 on the control of concentrations between undertakings.
- 4 *Konkurrensförordningen* (1993:173).
- 5 *Förordning* (1996:353) med instruktion för Konkurrensverket.
- 6 *Förordning* (2002:871) om gruppundantag enligt 17 § konkurrenslagen (1993:20) för vertikala avtal inom motorfordonssektorn.
- 7 See below under Asphalt cartel.
- 8 Investigations were initiated by the Competition Authority in December 1999; Press release Nr 25:1999, the December 16, 1999.
- 9 Report from the Committee regarding the modernisation of the competition rules, SOU 2003:73.

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