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Getting the Deal Through – Cartel Regulation 2004 – Sweden

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Cartel Regulation 2004 – getting the deal through

Sweden

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The relevant legislation

The Swedish Competition Act (konkurrenslagen (1993:20), the Act) entered into force on 1 July 1993, and governs all aspects of Swedish competition law.

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

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

The elements of an agreement or a practice which violate the Act are void and unenforceable. Individual exemptions may, however, be granted by the Competition Authority (Konkurrensverket) from the prohibition in Section 6 of the Act. Moreover, block exemptions have been adopted in the form of separate regulations largely incorporating their EC counterparts. Negative clearance can also be obtained in relation to the prohibition against anti-competitive agreements and the prohibition against abuse of a dominant position. In the light of the new EC Regulation on the implementation of Articles 81 and 82 of the EC Treaty (Regulation 1/2003) it can however be expected that the Swedish system of exemptions and negative clearances will be abolished in the near future (see 6 below).

Fines may be imposed for infringements of the Act and injured parties may claim damages.
A decision by the Competition Authority may be appealed to the Market Court.
It may also be noted that as of 1 January 2001 the Competition Authority, the Stockholm District Court and the Market Court have been granted the power to apply directly Article 81 and Article 82 of the EC Treaty.

The Competition Authority

The Competition Authority is responsible for implementing and administering the Act. Applications for negative clearance and notifications for individual exemptions are filed with the Competition Authority. It has the power to order an undertaking to terminate an infringement and to request the Stockholm District Court to impose a fine on the undertaking for infringement of the Act. Concentrations meeting certain turnover thresholds are notified to the Competition Authority, and it has the power to initiate proceedings before the Stockholm District Court with a view to obtaining a prohibition decision. The Competition Authority may also initiate investigations and has fact-finding powers. Finally, the Competition Authority issues guidelines on the application of the competition rules.
The Competition Authority is an independent governmental body consisting of some 120 officials. It is organised in specialised departments and other units. The Authority is independent in relation to the European Commission but is required to cooperate with it.
The Competition Authority's law enforcement departments 1 and 2 are responsible for investigating infringements of the Act and for handling applications and notifications under the Act, as well as cases falling under EC competition law. The two departments deal with different sectors of the economy. Department 1 specialises in the building sector, foodstuffs (including non-durable goods), the petroleum sector, the chemical-technical and the pharmaceutical industry. Department 2 specialises in financial services, telecoms, media and IT, air and rail transport and energy.
The Economic Analysis Department is responsible for economic analysis in relation to investigations and legislative proposals. The Information Department is responsible for handling advice and inquiries, in addition to its work concerning the Authority's relations with the public. The Legal Secretariat is responsible for legal and economic analyses and for representing the Authority in the courts. The International Secretariat has overall responsibility for the Authority's cooperation with the European Commission and other foreign organisations and authorities. The Secretariat for

Planning and Coordination is responsible for administrative matters as well as budgetary and financial issues.

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

The Act does not provide a legal definition of a cartel. In Swedish doctrine and case-law the term ‘cartel’ is generally applied to horizontal agreements and concerted practices covering hard-core restrictions of competition such as price-fixing, limitations on production or sale, market allocation and bid-rigging.

Cartels may violate the general prohibition against restrictive agreements found in Section 6 of the Act and, to the extent collective dominance may be involved, the prohibition against abuse of a dominant position found in Section 19 of the Act. According to the wording of Section 19 of the Act, a dominant position could be held by ‘one or several undertakings’. In other words, the Act reproduces the same expression as that used in Article 82 of the EC Treaty. The Competition Authority has confirmed that the EC case law regarding collective dominance constitutes the basis for the Authority’s analysis when deciding similar questions. It follows that market behaviour by one or a number of undertakings, although these undertakings do not constitute a single economic entity, can be evaluated by the Authority under Section 19 of the Act. Although the Competition Authority has not yet found any collective behaviour on the Swedish market to constitute an abuse of a collective dominant position, it has confirmed the existence of collective dominance and defined the market conditions that need to be present for collective dominance to exist. In short, a collective dominant position exists when two or more independent economic entities are, in a specific market, united by links of an economic or structural character, enabling them to act jointly in the market, independently of customers and suppliers.

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

First, in order to fall under the prohibition against anti-competitive agreements, the agreement must restrict competition to an appreciable extent. Like the European Commission, the Competition Authority has published a Notice on Agreements of Minor Importance (Konkurrensverkets allmänna råd om avtal av mindre betydelse (bagatellavtal) som inte omfattas av förbudet i 6 § konkurrenslagen (1993:20), KKVFS 1999:1) listing certain categories of agreements that normally do not, in the Authority’s

view, have an appreciable effect on competition. According to this so-called de minimis notice, horizontal agreements where the parties have a combined market share not exceeding 10 per cent and vertical agreements where the parties do not have an individual or combined market share exceeding 15 per cent normally fall outside the prohibition against anti-competitive agreements. However, according to the notice this does not apply to agreements that contain certain 'hard-core' restrictions. More specifically, typical cartels of the kind referred to above may be prohibited under Section 6 of the Act even if the combined market share of the parties is below the thresholds set out in the notice.

Second, pursuant to Section 8 of the Act, the Competition Authority can exempt notified restrictive agreements. The conditions for exemption are the same as under Article 81(3) of the EC Treaty, namely that:

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

Even though most cartels would be unlikely to fulfil the four criteria for exemption, there may be situations in which cooperation of a 'cartel-like' nature between small or medium-sized undertakings with small market shares could possibly benefit from an exemption (to the extent the prohibition in Section 6 of the Act is applicable despite the de minimis principle). There may also be room for exemption in relation to 'crisis cartels'.

3 Are there any industry-specific offences/defences?

No.

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

The Act is applicable only to 'undertakings'.

Section 3 of the Act defines an 'undertaking' as a legal or natural person that is engaged in an activity of an economic or commercial nature. The term undertaking must be viewed in the broadest sense and is interpreted in the same way as under EC competition law. Virtually every natural or legal person participating in the economic

process will qualify as an undertaking. The term covers any activity directed at trade in goods or services irrespective of the legal form of the undertaking and regardless of whether or not it is intended to create profits.

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

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

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

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

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

6 Are there any current proposals for change to the regime?

A committee has been appointed by the Swedish government to consider whether amendments to Swedish law are needed following the adoption of European Council Regulation 1/2003, the new implementing regulation for Articles 81 and 82 of the EC Treaty.

The committee works on the basis that Swedish competition law should continue to be modelled on EC law in both substance and procedure. Consequently, it has made several proposals in line with the changes to EC competition law, most significantly that the current notification-based exemption system be replaced by a directly applicable legal exemption system.

Investigation

7 What are the typical steps in an investigation?

When obtaining information, either ex officio or from an informant, that suggests the existence of a cartel, the Competition Authority must decide whether or not to proceed with an investigation. If there is sufficient evidence to suggest the existence of a cartel, the Authority may file an application with the Stockholm District Court for authorisation to conduct an on-the-spot investigation (a 'dawn raid') at the premises of one or more of the alleged cartel members. Such an application can be granted without consulting the undertakings suspected of participating in a cartel if there is a risk that the undertakings would destroy or hide evidence. So far, the Court has never consulted such undertakings before granting an authorisation.

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

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

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

8 What investigative powers do the authorities have?

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

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

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

The Competition Authority has no right to examine or take copies of or extracts from documents that are covered by legal professional privilege. In the event of a dispute about whether or not a certain document is protected by legal professional privilege, the document shall immediately be sealed and presented to the Stockholm District Court by the Competition Authority. The Court shall, without delay, decide whether the document is privileged.

International cooperation

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

Under EC law, the Competition Authority is required to cooperate with the European Commission and to assist it in gathering information from undertakings in Sweden. In addition, under the recently adopted Implementing Regulation the Competition Authority is obliged to cooperate with the national competition authorities of other EU Member States within the framework of the network of European competition authorities. There is also a certain amount of cooperation between the national competition authorities of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden). Sweden is not, on the other hand, at present a party to any legal assistance treaty in relation to non-EEA countries. This is partly due to the provisions of the Swedish Secrecy Act (sekretesslagen (1980:100)), which place restrictions on the Competition Authority regarding the provision of information covered by secrecy to authorities outside Sweden and the possibility of keeping information received from non-Swedish authorities secret.

On 1 August 2002 new rules on some forms of international cooperation came into force. These rules provide that the Competition Authority may, upon application by an authority in a state with which Sweden has entered into an agreement on legal assistance in competition law matters, order an undertaking to provide information, documents and other materials, and require persons who are thought to be able to provide information to attend interrogations.

Moreover, at the request of such an authority, the Stockholm District Court may upon written application by the Competition Authority allow the Authority to carry out an on-the-spot investigation (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 Section 6 or Section 19 of the Act or of Article 81 or Article 82 of the EC Treaty, if those rules had been applied to the conduct;
- there is particular reason to believe that evidence is in the possession of the party which the request refers to;

- 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 new confidentiality rule introduced together with the new rules on international assistance described above, information received by the Competition Authority in the context of international assistance shall be 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 new 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.

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

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

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

Adjudication

11 How is a cartel matter adjudicated?

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

Where the Competition Authority decides to request the imposition of a fine (konkurrensskadeavgift) as an economic sanction for the violation committed, the Authority must sue the undertakings concerned before the Stockholm District Court. The decision of the Stockholm District Court may be appealed to the Market Court. The ordinary courts handle private damage claims based on violations of the Act in the same way as any other damage claim. Typically this means that the suit should be filed before the District Court where the respondent has its legal seat. However, the Stockholm District Court always has jurisdiction over damage claims based on the Act. Appeals are made to the relevant courts of appeal.

12 What is the appeal process, if any?

See 11 above.

13 With which party is the onus of proof?

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

Sanctions

14 What criminal sanctions are there for cartel activity?

There are no criminal sanctions for cartel activity or any other violation of the Act. Recently, a government committee considered whether to propose criminalisation, but decided for various reasons not to submit any such proposal.

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

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

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

Further, the cartel members may, upon application by the Competition Authority, be ordered by the Stockholm District Court to pay fines (konkurrensskadeavgift) as an economic sanction for their illegal activities. The decision of the District Court may be appealed to the Market Court. The amount of the fine may be between SKr5,000 and

SKr5 million (approximately US$700 to US$700,000) or a maximum of 10 per cent of the turnover of the undertaking concerned. Unlike under EC competition law, only the turnover of the violating undertaking itself is taken into account in this calculation, rather than the turnover of all the undertakings belonging to the same group. Fines are primarily determined according to the gravity and duration of the infringement. The degree of gravity is measured by the harmful effects of the infringement on competition and prices in the market, as well as by the extent of direct economic losses suffered by other parties.

16 Are private damage claims or class actions possible?

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

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

17 What recent fines or other penalties are noteworthy?

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

Up to now, the Competition Authority has filed about a dozen applications for fines with the Stockholm District Court for activities restricting competition. These applications have concerned both alleged abuses of a dominant position and anti-competitive cooperation between undertakings (cartels and similar). The highest individual fine so far imposed by the courts amounted to SKr20 million.

In 2000, the Competition Authority sued a number of oil companies in Sweden for alleged price-fixing activities, requesting fines totalling some SKr740 million. In April 2003, the Stockholm District Court delivered its judgment. Although the court found the companies guilty of most of the price-fixing activities they were accused of having

participated in, it set the fines to SKr52 million which is considerably lower than those sought by the Competition Authority. The court explicitly declared that the fines were not to be calculated according to the method used in EC law. While it is not clear exactly how the court calculated the fines, the court's reasoning indicates that a proportionality test was used. The decision has been appealed to the Market Court by the Competition Authority on the basis that, in its view, the size of the fines marks a departure from common practice in EC law. (See also Update and trends box on a pending case involving the asphalt industry.)

Sentencing

18 Do sentencing guidelines exist?

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

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

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

19 Are they binding on the adjudicator?

Yes.

Leniency/immunity programmes

20 Is there a leniency/immunity programme?

On 1 August 2002, three new sections of the Act (Sections 28a–28c) and a change to Section 28 entered into force, introducing for the first time a leniency/immunity programme in Sweden. The rules will be interpreted by the Competition Authority in accordance with statements in the preparatory works and the Competition Authority's new Notice on Immunity from Fines and Reduction of Fines under Sections 28a and 28b of the Competition Act in Cartel Cases (Konkurrensverkets allmänna råd om nedsättning och eftergift enligt 28 a och 28 b §§ konkurrenslagen (1993:20) i kartellärenden, KKVFS 2002:1). The Notice is partly modelled on the European Commission's 2002 Notice on Immunity from Fines and Reduction of Fines in Cartel Cases. When immunity or reduction is decided upon, measures taken by the undertaking

before the entry into force of the new rules will also be taken into account. The fact that an infringement has been going on before 1 August 2002 does not prevent the applicability of the new leniency rules.

The new rules do not limit the Competition Authority's ability to refrain from instituting legal proceedings for reasons other than those stated therein. The Act's rules on fines are also applicable to infringements of Articles 81 and 82 of the EC Treaty.

21 What are the basic elements of a leniency/immunity programme, if one exists?

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

The new leniency rules have been applied by the Competition Authority for the first time in the pending asphalt cartel case (see Update and trends box).

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

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

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

Qualification for immunity under this rule requires that the application under point one above is filed by an undertaking and that only one single undertaking files the application. The application must be made in writing and must be signed by a person empowered to represent the company. An application from several undertakings together will not qualify for immunity. A further requirement for immunity from fines is that the undertaking is the first undertaking to file an application, before any other participant. An application is not considered filed until the undertaking has provided all

information about the infringement available to the undertaking when filing, and that the information is relevant to prove the infringement. The information should include the other participants, the affected market, the type of infringement and for how long the infringement has been going on. The fact that the Competition Authority already suspects an infringement does not prevent an undertaking from fulfilling the requirement under point one. However, the undertaking does not fulfil the requirements if the Competition Authority in some other way has already received enough information to intervene. It does not matter whether a decision to intervene has already been made.

The requirement under point two above that all information must be provided refers initially to what must be handed in at the time of application. However, additional information that the undertaking may subsequently gain access to during the ongoing investigation must also be given to the Competition Authority. In other words, the undertaking must continuously, and on its own initiative, provide the Competition Authority with all relevant information regarding the infringement and provide all documents, notes etc, no matter how they have been drawn up or saved. Further, the undertaking must refrain from measures obstructing the Competition Authority's investigation and from informing the other participants about what information it has provided.

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

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

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

There is a limited possibility of qualifying for immunity under the alternative rule described under question 22 above.

Further, a fine may be reduced where:

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

To qualify for a reduction under the first point above, the undertaking must provide information which represents considerable added value compared to the information already available to the Competition Authority. Hence it is not enough just to voluntarily participate in interrogations or to answer questions. The Competition Authority decides in its writ of summons whether the information an undertaking has provided added considerable value, and the level of reduction. The reduction for the first undertaking to provide information adding considerable value will be 30 to 50 per cent, for the second undertaking providing such information the reduction will be 20 to 30 per cent, and for other undertakings providing such information the reduction will be up to 20 per cent. In determining the level of reduction within these categories, the Competition Authority will take into account at what time the information was provided, to what extent the information added value, and to what extent and with what continuity the undertaking has cooperated with the Competition Authority after the information was provided.

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

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

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

25 What confidentiality is afforded to (a) the leniency/immunity applicant and (b) any other cooperating party?

Confidentiality issues are regulated by relatively complex rules in the Secrecy Act. Under those rules, information regarding planning and other preparations for investigations, dawn raids etc that the Competition Authority is planning to undertake is confidential, provided it can be assumed that the purpose of the investigation will be negatively affected if the information is revealed. As this rule on secrecy during the planning phase of an investigation has been perceived as insufficient, an additional secrecy rule has been introduced as from 1 April 2002. Pursuant to this new provision, information related to an investigation by the Competition Authority (not only planning/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 being the object of the investigation, but it may also be confidential in relation to third parties. Information provided by leniency applicants or other cooperating parties may be treated as confidential under this rule.

Further, on 1 August 2002 two new secrecy rules entered into force. One of them guarantees the confidentiality, in matters regarding investigations of infringements of Section 6 and 19 of the Act or Article 81 or 82 of the EC Treaty, of reports and other information provided to the Competition Authority, if it can be assumed that the informant will suffer substantial damage or other substantial detriment if the information is revealed. The confidentiality concerns both legal and natural persons. Both information given on an informant's own initiative and information provided on

request from the Competition Authority may be confidential under this rule. However, since the object of the rule is to protect the informant, only information that could somehow disclose the identity of the informant is treated as confidential under this rule. The second new rule guarantees the confidentiality of certain information in the context of legal assistance requested by another state (see 9 above).

26 What is needed to be a successful leniency/immunity applicant (or other cooperating party)?

To benefit from immunity, the undertaking must provide the Competition Authority with sufficient information for it to intervene against an infringement or, under the alternative rule, facilitate to a very substantial extent an investigation of an infringement. To qualify for a fine reduction for cooperation at a later stage, an undertaking must provide information that adds considerable value to the information already available.

27 What is the effect of leniency/immunity granted to corporate defendant on employees of the defendant?

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

28 What guarantee of leniency/immunity exists if a party cooperates?

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

29 What are the practical steps in dealing with the enforcement agency?

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

from or a reduction of fines. The contact must be made by a person empowered to represent the undertaking. The undertaking cannot qualify for immunity until a formal application has been filed with the Competition Authority. This application must be made in writing and must be signed by a person empowered to represent the undertaking.

Defending a case

30 Can counsel represent employees under investigation as well as the corporation?

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

31 Can counsel represent multiple corporate defendants?

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

32 Can a corporation pay the legal costs of and/or penalties imposed on its employees?

Not applicable.

Getting the fine down

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

Companies can avail themselves of the new leniency principles described above.

UPDATE AND TRENDS

In March 2003, the Competition Authority filed a summons application with the Stockholm District Court requesting that fines of approximately SKr1.6 billion be imposed on 11 companies in the asphalt surface industry. One further company was awarded full leniency for initial cooperation. The companies are suspected of having

agreed on bid-rigging, price-fixing and market-sharing. The Competition Authority claims that the suspected asphalt cartel is the most extensive infringement of the Act revealed so far, and this is reflected in the highest fines ever requested in a Swedish cartel case.

Prior to the trial of the alleged anti-competitive cooperation the court was to decide in an intermediate judgment whether there could be anti-competitive cooperation at all within the meaning of Section 6 of the Act, where a division of the buyer has participated in a bid-rigging cartel against 'itself'. The question has arisen since a part of the alleged cartel activities relate to procurements by the Swedish National Road Administration and a division of said authority allegedly is one of the cartel participants. The court's decision was issued in December 2003 and concluded that the buyer's participation does not deprive the cooperation of its anti-competitive nature. The judgment has been appealed to the Market Court and its decision is expected by mid-2004.