

Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering
comparative analysis from top ranked lawyers

Cartels

Second Edition

Sweden
Mannheimer Swartling

[chambers.com](https://www.chambers.com)

2019

Law and Practice

Contributed by Mannheimer Swartling

Contents

1. Basic Legal Framework	p.5	3.2 Obtaining Documentary Information from Target Company	p.10
1.1 Statutory Bases for Challenging Cartel Behaviour/Effects	p.5	3.3 Obtaining Information from Entities Located Outside this Jurisdiction	p.10
1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards	p.5	3.4 Inter-Agency Co-operation/Co-ordination	p.10
1.3 Private Challenges of Cartel Behaviour/Effects	p.5	3.5 Co-operation with Foreign Enforcement Agencies	p.10
1.4 Definition of 'Cartel Conduct'	p.5	3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases	p.10
1.5 Limitation Periods	p.5	3.7 Procedure for Issuing Complaints/Indictments in Civil Cases	p.10
1.6 Extent of Jurisdiction	p.5	3.8 Enforcement Against Multiple Parties	p.10
1.7 Principles of Comity	p.5	3.9 Burden of Proof	p.10
2. Procedural Framework for Cartel Enforcement – Initial Steps	p.6	3.10 Finders of Fact	p.11
2.1 Initial Investigatory Steps	p.6	3.11 Use of Evidence Obtained from One Proceeding in Other Proceedings	p.11
2.2 Dawn Raids	p.6	3.12 Rules of Evidence	p.11
2.3 Restrictions on Dawn Raids	p.6	3.13 Role of Experts	p.11
2.4 Spoliation of Information	p.7	3.14 Recognition of Privileges	p.11
2.5 Procedure of Dawn Raids	p.7	3.15 Possibility for Multiple Proceedings Involving the Same Facts	p.11
2.6 Role of Counsel	p.7	4. Sanctions and Remedies in Government Cartel Enforcement	p.11
2.7 Requirement to Obtain Separate Counsel	p.7	4.1 Imposition of Sanctions	p.11
2.8 Initial Steps Taken by Defence Counsel	p.7	4.2 Procedure for Plea Bargaining or Settlement	p.11
2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony	p.7	4.3 Collateral Effects of Establishing Liability/Responsibility	p.11
2.10 Procedure for Obtaining Other Types of Information	p.7	4.4 Sanctions and Penalties Available in Criminal Proceedings	p.11
2.11 Obligation to Produce Documents/Evidence Located in Other Jurisdictions	p.8	4.5 Sanctions and Penalties Available in Civil Proceedings	p.12
2.12 Attorney-client Privilege	p.8	4.6 Relevance of 'Effective Compliance Programmes'	p.13
2.13 Other Relevant Privileges	p.8	4.7 Mandatory Consumer Redress	p.13
2.14 Non-co-operation with Enforcement Agencies	p.8	4.8 Available Forms of Judicial Review or Appeal	p.13
2.15 Protection of Confidential/Proprietary Information	p.8	5. Private Civil Litigation Involving Alleged Cartels	p.13
2.16 Procedure for Defence Counsel to Raise Arguments Against Enforcement	p.8	5.1 Private Right of Action	p.13
2.17 Leniency, Immunity and/or Amnesty Regime	p.8	5.2 Collective Action	p.14
3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds	p.10		
3.1 Obtaining Information Directly from Employees	p.10		

5.3	Indirect Purchasers and 'Passing-on' Defences	p.14
5.4	Admissibility of Evidence Obtained from Governmental Investigations/Proceedings	p.14
5.5	Frequency of Completion of Litigation	p.15
5.6	Compensation of Legal Representatives	p.15
5.7	Obligation of Unsuccessful Claimants to Pay Costs/Fees	p.15
5.8	Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation	p.15
6.	Supplementary Information	p.15
6.1	Other Pertinent Information	p.15
6.2	Guides Published by Governmental Authorities	p.15

Mannheimer Swartling has an extensive international practice, with an especially strong focus on the Nordic region. The firm employs over 400 lawyers, based in offices in Sweden, Belgium, Russia, China and the US. Its EU and Competition practice group, with more than 25 specialists, is involved in many of the largest and most complex cartel investigations in Sweden, including all stages from developing compliance programmes to assisting during investigations by the Swedish Competition Authority, the

European Commission and other national authorities, to leniency applications and subsequent court procedures and appeals. The lawyers of the practice group are also frequently involved in other alleged violations of competition rules and private litigation based on competition law, regularly handling merger notifications to the Swedish Competition Authority, the European Commission and other national authorities.

Authors



Johan Carle joined Mannheimer Swartling in 1993 and was elected partner in 1999. He was the firm's resident partner in Brussels for almost a decade, returning to Stockholm in 2003 where he now heads the EU and Competition practice group.

Johan has substantial experience of issues relating to merger control, cartels, abuse of a dominant position, state aid and public procurement.



Fredrik Sjövall is a partner in the EU and Competition practice group, having joined Mannheimer Swartling's Dispute Resolution team in 2010. He previously worked for several years in the Swedish court system and as agent to the Swedish

Government before the Court of Justice of the European Union. Fredrik has advised on several of the most high-profile Swedish competition court cases of recent years, including acting for Logstor in merger control litigation, Capio in a cartel case and Nasdaq in the largest Swedish abuse of dominance case to date: all of them successfully. Fredrik also advises clients on regulatory and competition law matters generally.



Stefan Perván Lindeborg is a partner in the EU and Competition practice group and head of Mannheimer Swartling in Brussels. He has extensive experience of complex merger control proceedings before national authorities and the

European Commission. He has been involved in many of the most important competition cases before Swedish courts, with special competence in competition-related litigation, distribution systems and merger control.



Sarah Hoskins is a senior associate in the EU and Competition practice group. She previously worked for several years in an EU and Competition practice in the UK and is now dual-qualified. She has been involved in antitrust and merger control

matters before the Office of Fair Trading and Competition Commission (now the CMA), the Competition Appeal Tribunal, the European Commission, European Courts and the Swedish Competition Authority. She is currently appointed as non-governmental adviser to the Swedish Competition Authority for the Cartels Working Group of the International Competition Network.

1. Basic Legal Framework

1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

The Swedish Competition Act 2008:579 (as amended) (the Act) came into force on 1 November 2008 and governs Swedish competition law. Chapter 2 of the Act covers anti-competitive agreements, including cartels.

In many respects, Swedish law in this area is similar to the equivalent rules at EU level, as found in the Treaty on the Functioning of the European Union (TFEU). Chapter 2, Section 1 and Chapter 2, Section 2 of the Act are structured in the same way as Articles 101(1) and 101(3) of the TFEU. Section 1 sets out the prohibition against anti-competitive agreements, and Section 2 explains the possible exemptions to it. Chapter 2, Section 6 states that agreements falling within Chapter 2, Section 1 are unenforceable (and as such is equivalent to Article 101(2) of the TFEU).

1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

The Swedish Competition Agency (the SCA) (*Konkurrensverket*) is the body in charge of investigating cartel matters through implementation of the Act. The SCA consists of around 200 officials and is led by Director General Rikard Jermsten, who was appointed in 2017, together with a management group made up of the heads of each department. The SCA is independent of the European Commission but is required to co-operate with it.

There are no other Swedish authorities tasked with administering the Act or otherwise prosecuting cartel infringements, as there are no criminal sanctions for cartel activity in Sweden.

1.3 Private Challenges of Cartel Behaviour/Effects

The SCA has exclusive authority to take legal action to impose fines or other enforcement action on companies that are suspected of infringing the prohibitions against cartel behaviour. An exception to this is when the SCA has decided not to deliver an injunction under Chapter 3 Section 1 of the Act to terminate an infringing behaviour. In such cases, a company that qualifies as being concerned by the infringement has the right to launch an action for such an injunction against the behaviour. The private action must be brought before the Patent and Market Court.

Of course, private parties also have the right to launch actions for damages for infringements of the competition rules. Such actions are brought under the Competition Damages Act (2016:694) before the Patent and Market Court. See **5.1 Private Right of Action**, **5.2 Collective Action**, **5.3 Indirect Purchasers and 'Passing-on' Defences** and **5.4 Admissibility of Evidence Obtained from Governmental Investigations/Proceedings**, below.

1.4 Definition of 'Cartel Conduct'

There is no definition in the Act of behaviour that amounts to 'cartel conduct'. According to practice, however, the term 'cartel' is generally used to describe horizontal agreements and concerted practices involving hardcore restrictions of competition, such as price-fixing, market-sharing, bid-rigging or limitation of production.

Like the European Commission, the SCA has guidance on Agreements of Minor Importance (KKVFS 2009:1). Under specific market share and turnover thresholds, certain agreements will fall outside the competition rules. However, these *de minimis* rules do not apply to hardcore restrictions, so cartel-like behaviour would not benefit from the *de minimis* regime.

1.5 Limitation Periods

The SCA may only impose a fine if it serves the allegedly infringing party with a summons application within five years of the infringement ceasing (ie, if the SCA initiates formal proceedings in court within this period).

If the undertaking concerned has been subject to an unannounced inspection or has been given the opportunity to respond to a draft summons application (the Swedish equivalent to a statement of objections at EU level) within the same period, then the five-year limitation period counts from this later point instead. However, in such a case, a fine may only be imposed if the summons application has been served within ten years of the infringement ceasing.

1.6 Extent of Jurisdiction

The geographic reach of public enforcement of the Act is determined by the effects of the relevant anti-competitive behaviour. The Act concerns behaviour affecting Sweden, a part of Sweden or an area larger than Sweden. An agreement outside Sweden may be prohibited under the Act if it has actual or potential effects in Sweden.

In practice, this means that a cartel may be prosecuted under Swedish law if it has appreciable effects on competition in Sweden, even in circumstances where it is organised from outside Sweden or involves non-Swedish undertakings. That said, there are generally applicable public international law restrictions on extra-territorial jurisdiction, which means that the SCA is unlikely to take action against foreign undertakings unless it is actually possible for the action to be enforced.

1.7 Principles of Comity

Where conduct is potentially subject to enforcement in multiple European jurisdictions, the SCA follows procedures flowing from its involvement in the European Competition Network (ECN). Regulation 1/2003 dictates that the SCA must co-operate closely with the NCAs of other EU member states under the auspices of the ECN, for example as regards

case allocation between the NCAs, assisting another NCA, sharing and using information supplied by another NCA and how multi-jurisdictional leniency applications should be treated. It is common, for example, for the SCA to assist in an unannounced inspection in Sweden on behalf of another NCA.

In the Nordic region, there is also specific co-operation between the NCAs in Denmark, Finland, Iceland, Norway and Sweden (revised in 2017 and more far-reaching than under the ECN). As regards non-EEA jurisdictions, however, Sweden is not a party to any form of specific co-operation agreement or treaty. It is involved in the activities of the International Competition Network, but this does not have a rule-making function.

2. Procedural Framework for Cartel Enforcement – Initial Steps

2.1 Initial Investigatory Steps

After receiving information suggesting cartel activity, either through market monitoring or through informants (leniency or tip-offs), the SCA will decide whether to initiate an investigation. In certain cases, the SCA may then file an application before the Patent and Market Court for authorisation to conduct an unannounced inspection at the premises of the companies in question (a dawn raid).

If the SCA's suspicion is supported by the information collected, then the SCA continues its investigation, for example by way of reaching out to the market via contacts with customers, other competitors and individuals working for the companies involved.

If sufficient evidence to establish a case is found, the next step is for the SCA to issue a draft summons application (a form of statement of objections) to the companies concerned, explaining its findings and position. Provided that the SCA maintains its stance after responses from the companies, it has three options for how to proceed:

- it can order the companies concerned to discontinue the alleged infringement through an injunction, subject to a non-compliance fine;
- it can launch an action before the Patent and Market Court for an administrative fine to be levied on the companies; or
- if the companies do not dispute the SCA's finding of an infringement, it can issue an order for the companies to pay a fine without suing in the Patent and Market Court (a form of settlement).

In principle, there is no time limit for how long an SCA cartel investigation may last, and in-depth cases will typically take a number of years from start to finish (however,

see **1.5 Limitation Periods**, above). In its annual reports on supervision of competition, the SCA typically gives an account of its average periods of review in different types of case (available on the SCA website).

2.2 Dawn Raids

With court approval, if there is a suspicion of infringement of Chapter 2 Section 1 of the Act or Article 101 of the TFEU, then the SCA has the authority to carry out unannounced inspections (dawn raids) at corporate premises, at the private homes of board members or employees of the concerned companies, or at the premises of companies that are not suspected of an infringement if there are special reasons to suspect that evidence of the infringement could be found there.

During an inspection, the SCA has the power to examine the books and other company records, to take copies of or extracts from books and business records (including electronic records), to ask for on-the-spot oral explanations and to access any premises, land, transport and other areas covered by the court authorisation.

In practice, the SCA will typically carry out a physical search of the tangible material found at the premises, as well as 'mirroring' digitally stored material for an in-depth search at the SCA's premises, subject to the consent of the company under investigation. The alternative (withholding permission) can be seen as less attractive as it involves a longer on-site inspection. The search of mirrored material at the SCA's premises can also be a long process, but the company will be invited to have a representative present throughout.

A company that is subject to a dawn raid may send for external legal counsel support but the SCA is not obliged to wait for lawyers to arrive, and will normally only wait for a short period of time.

During 2018, the SCA conducted ten site inspections in the context of two investigations (relating to the interior design and musical instrument sectors). In 2017 there were inspections in three investigations, visiting ten locations altogether.

2.3 Restrictions on Dawn Raids

During an inspection, the SCA may not examine or take copies of, or extracts from:

- documents relating to issues outside the scope of the court authorisation; or
- documents that are covered by legal professional privilege.

Where there is disagreement about whether a particular document should benefit from the protection afforded by legal privilege, the document is to be sealed immediately and sent by the SCA to the Patent and Market Court for the issue to be determined without delay.

Where there is disagreement about whether material falls within the scope of the court authorisation, case law from the Supreme Court (2018) has reaffirmed that the appropriate procedure is for the SCA to seek assistance from accompanying officials from the Swedish Enforcement Service (*Kronofogden*). The court confirmed that the measures taken by the SCA during a dawn raid are inadmissible for judicial review under Swedish law but that parties are in any event sufficiently protected as any eventual enforcement decision is subject to appeal (and a damages action for breach of fundamental rights remains an option).

2.4 Spoliation of Information

In order to ensure the SCA's full access to the premises of the companies concerned during an inspection, SCA officials are usually accompanied and assisted by representatives of the Swedish Enforcement Service, which has authority to gain access to premises and apply official seals.

Seized documents are copied in duplicate. After the on-site inspection, the SCA and company representatives verify that the two sets of copies are identical (and that each document is covered by the scope of the court authorisation allowing the inspection). The SCA and the company keep a copy each. The digital search typically continues off-site, but a similar process is followed. The SCA has recently invested in improving its forensic capabilities, both in terms of hardware, software and staffing.

2.5 Procedure of Dawn Raids

As part of an inspection, the SCA can request on-the-spot oral explanations from representatives or employees of the undertaking involved. This does not mean that the interviewee is required to provide incriminating information, only that the SCA can request clarifications in respect of the material found or sought during an inspection – for example, how a computer is activated, or what role a particular individual of interest has in the organisation.

Companies and interviewees can obtain copies of documents that are furnished to the SCA, or other records reflecting what transpired – see **2.4 Spoliation of Information** and **2.10 Procedure for Obtaining Other Types of Information**, below.

2.6 Role of Counsel

Legal counsel attending to assist a company during an inspection can also support an officer or employee when they are required to provide explanations to the SCA. Whether it is appropriate for an employee to seek separate counsel is assessed on a case-by-case basis (eg, when interests with the employer are not aligned).

2.7 Requirement to Obtain Separate Counsel

It is stated in the preparatory works of the Act that nothing prevents an employee or other representative of a company

under investigation from being represented by counsel during SCA interviews. Whether it is appropriate for an employee to seek separate counsel is assessed on a case-by-case basis (eg, when interests with the employer are not aligned), especially after dawn raids.

2.8 Initial Steps Taken by Defence Counsel

If the investigation commences with an inspection, guiding the client throughout the raid is a necessary first step. The investigated company's counsel is usually also present during the subsequent digital search at the SCA's or the company's premises.

Following the digital search, the SCA will formally close the dawn raid at a meeting to which the investigated company (usually its counsel) is invited. At this meeting, the SCA explains which documents it intends to seize following its digital search. As there is no formal possibility to appeal a decision to seize certain documents, the company should be prepared to present any objections to the seizure of certain documents during this meeting.

As in most jurisdictions, another key step in the initial stages of enforcement action is considering a leniency application. This would typically include an internal audit involving employee interviews and a forensic review of relevant individuals' e-mail accounts and other documentation to determine the degree to which the SCA's suspicions have foundation.

It may also be advisable to suggest that key individuals secure their own legal counsel, considering that trading prohibitions can be issued (or criminal charges in other jurisdictions).

2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony

The SCA may require undertakings or other parties to supply information, documents or other material by issuing a Request for Information (RFI) under Chapter 5 Section 1(1) of the Act, when necessary for the implementation of its duties under the Act. Possible targets for an RFI include both the company being investigated and other companies that the SCA has reason to believe hold information of interest.

Where the SCA has sufficient reason to suspect anti-competitive behaviour, it can apply to the Patent and Market Court for authorisation to conduct an inspection at locations that are relevant to the suspected infringement.

2.10 Procedure for Obtaining Other Types of Information

The SCA can require individuals who are likely to be in a position to provide relevant information on an investigation to attend a hearing at the SCA's premises, under Chapter 5

Section 1(2) of the Act. Counsel may assist the interviewee during the hearing.

The contents of the interview must be documented by the SCA, and the interviewed person must be given the opportunity to review the document and must be asked if they object to any of its contents. An objection requires the SCA to either adjust the document or at least note the objection.

While there is no obligation to speak at the hearing, a summons to attend a hearing may be combined with a general request to supply information. The summons can also be combined with the imposition of a conditional fine in the case of non-attendance.

2.11 Obligation to Produce Documents/Evidence Located in Other Jurisdictions

Information that is requested by the SCA and that is accessible to an individual or a company must be produced, without regard to its physical location. This includes information stored on data servers in other jurisdictions.

2.12 Attorney-client Privilege

During an SCA inspection, the authority may neither examine nor take full or partial copies of documents that are covered by legal professional privilege. According to Chapter 5 Sections 11(2) and (3) of the Act, documents that are disputed shall be sealed immediately and sent to the Patent and Market Court for it to assess whether or not privilege applies.

Communications with legal professionals from other jurisdictions that can be considered to have roles equivalent to that of a Swedish lawyer are also covered by legal privilege. Internal communications with in-house counsel are not recognised as privileged.

2.13 Other Relevant Privileges

The SCA's position on the privilege against self-incrimination flows from the general right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights and jurisprudence from the European Commission when applying the European competition rules.

The SCA may require an undertaking to provide specific documents or information, but cannot compel the provision of answers that might involve an admission of the existence of a competition law infringement, which it is incumbent upon the SCA to prove in court.

2.14 Non-co-operation with Enforcement Agencies

To ensure a company's compliance with an RFI, the SCA may combine it with a conditional fine. Failure to comply with the RFI will lead the SCA to apply to the Stockholm Administrative Court for it to impose the fine.

Companies usually co-operate with the SCA in order to simplify and streamline the process. However, it is not unusual for there to be discussions seeking to adjust the scope of questions before responding.

2.15 Protection of Confidential/Proprietary Information

Companies targeted by enforcement actions are not obliged to disclose business secrets of a technical nature to the SCA.

After documents and information come into the SCA's possession, they will be kept confidential from third parties by general secrecy rules. Material concerning a company's business or operating conditions, inventions or research findings that is gathered by the SCA during an investigation is to be kept confidential, on the basis that loss will result if such information is revealed. Information pertaining to third parties that have entered into business relationships with the investigated party are protected by even stronger, unconditional rules.

2.16 Procedure for Defence Counsel to Raise Arguments Against Enforcement

Arguments can be raised by an investigated company or its counsel at any point, depending on how the investigation is pursued. A typical opportunity to present arguments is in response to an RFI or during a hearing. Parties will also have the opportunity to respond to the SCA's statement of objections, which in effect doubles as a draft for the SCA's summons application.

2.17 Leniency, Immunity and/or Amnesty Regime Eligibility

Chapter 3, Sections 12-15 of the Act provide for immunity or a reduction in the fine imposed where infringing undertakings fulfil certain specific conditions. These rules were amended in 2014 to introduce more predictability and to mirror the EU leniency system (through the addition of a marker system). The SCA also publishes guidelines on its leniency policy (KKVFS 2015:1).

The Swedish leniency regime is, in a sense, broader than that at EU level as it is available for all infringements falling within Chapter 2, Section 1 (ie, more than cartel-related infringements). Notwithstanding this, proportionately fewer cases dealt with in Sweden are understood to be the result of an immunity applicant when compared to the caseload of certain other national competition authorities. Investigations are often triggered by tip-offs or complaints from other sources, such as competitors, customers or suppliers.

In early 2019, the SCA reported that it had 12 leniency cases open (relating either to ongoing SCA or European Commission investigations), with significantly more tip-offs (44 leading to preliminary investigation in 2018). Due to the sensitive nature of information tied to the leniency appli-

cations, the SCA does not tend to disclose more detailed information. An SCA tool in the process of being launched to assist procurement officials detect bidding irregularities may also lead to an increase in complaints of that nature. The SCA's whistle-blowing system, launched in 2017/2018, acts as a further complement to the leniency system.

First-in-the-Door (Whistle-blowers)

To obtain immunity from fines, a company must satisfy certain conditions set out in the Act. Immunity may be granted to the first company to notify the SCA of an infringement if it is only as a result of this contact that the SCA has sufficient information to take action against the infringement (Type 1A immunity).

Alternatively, if the SCA has already reached that point without the help of an immunity applicant, immunity may be granted where the company is the first to provide information that allows an infringement to be established, or contributes in some other very significant way to facilitating the investigation (Type 1B immunity).

In either case, a company seeking immunity must also fulfil the following additional conditions:

- provide all relevant information available;
- actively co-operate with the SCA throughout the investigation;
- ensure that no evidence is destroyed and in no other way hinder the SCA's investigation; and
- cease participation in the infringement as soon as possible.

As regards Type 1A immunity applications, the SCA issues a decision that states whether the initial condition has been fulfilled (compliance with the conditions above can, of course, only be assessed at a later stage). This decision is binding on the SCA and the courts.

Immunity is not available to a company that has compelled another undertaking to participate in the infringement.

Marker System

Following amendments to the Act, a marker system was introduced into the Swedish leniency regime in August 2014. Under this system, a company seeking immunity can now apply for a marker and subsequently perfect that marker within a specified period in order to secure its position.

To obtain a marker, a company must – as a minimum – provide information on the market affected by the infringement, the other companies involved and the nature of the infringement. Another company cannot leapfrog the queue for immunity unless and until the company with the prior marker fails to provide the additional information required within the time determined by the SCA.

When applying for a marker, the company should inform the SCA of the actions that need to be taken, how long this will take and what information it will be able to submit. The SCA will then consult with the company and determine when the information must be provided. As a general rule, the marker will last for two weeks, but the SCA may extend such a deadline if the company cannot reasonably submit the information within two weeks. If information sufficient for immunity is provided within this time, the information shall be deemed to have been provided at the time of the application.

In line with the ECN Model Leniency Programme, it is possible to submit a summary application to the SCA in circumstances where leniency has been sought in other EU member states. In such cases, an abbreviated volume of data is required.

Second-in-the-Door Companies and Latecomers

A company that is not the first to apply for leniency (ie, where immunity has been secured by another company) can still benefit from a reduction in fines (Chapter 3, Section 13 of the Act) if it can provide information to the SCA that facilitates the investigation to a significant extent. The conditions explained above in relation to immunity applicants apply equally to those seeking a reduction of the fines.

According to the SCA's guidelines, the first company in this category to satisfy the relevant conditions will be eligible for a 30-50% reduction, the second can receive a 20-30% discount and additional undertakings stand to benefit from a reduction of up to 20%. In determining the applicable reduction, the SCA will take into account the timing of the provision of the information, the extent to which the information has added value, and the continuity of the applicant's co-operation throughout the investigation.

There are no formalised amnesty-plus or penalty-plus systems available under the Swedish leniency regime. This means that there is no explicit scope to receive lenient treatment in one case as a result of providing information about an infringement in another separate case, nor does a company risk more severe fines if it does not report a previous infringement.

Corporate Oral Statements

There are few rigid rules of procedure when making a leniency application to the SCA, but it is necessary to demonstrate (for example, through a Power of Attorney) that the application is submitted by an individual with the authority to act on behalf of the applicant. A leniency marker can be submitted orally or in writing, in Swedish or in English. Initial contacts can be made on an anonymous basis in hypothetical terms (in a meeting or by telephone contact) but will be insufficient to secure the marker.

To submit an oral corporate statement, the relevant company must contact the SCA's Leniency Group to arrange a meeting, where the statement will be read aloud by a representative for the company and recorded by the SCA.

Access to Documents

In Sweden, there is a strong legal tradition of transparency. As a starting point, all (final form) documents and information created by or submitted to a public authority can be accessed. However, this is tempered by the Public Access to Information and Secrecy Act (2009:400) (the Secrecy Act). From submission to the SCA until at least the end of the investigative phase (ie, issuing the draft summons application to the parties), leniency applications are confidential under Chapter 30, Section 3 of the Secrecy Act. This is, however, always subject to the rights of defence of the other allegedly infringing parties. Additional protection is available for business secrets and information that could be damaging to an individual concerned, and to protect the integrity of the investigative process. However, the full extent and duration of this protection as regards leniency material is somewhat untested in Sweden.

3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds

3.1 Obtaining Information Directly from Employees

See 2.10 Procedure for Obtaining Other Types of Information, above.

3.2 Obtaining Documentary Information from Target Company

See 2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony, above.

3.3 Obtaining Information from Entities Located Outside this Jurisdiction

When the SCA requires information from a company or individual that is based outside Sweden, it will submit this request through the relevant NCA where the company is based. See 1.7 Principles of Comity.

3.4 Inter-Agency Co-operation/Co-ordination

The SCA normally conducts its investigations without assistance from other Swedish authorities. In 2018, the SCA acknowledged a trend of tip-offs relating to both competition and anti-corruption law issues, suggesting a future focus on such crossover matters, in particular in relation to procurement. In December 2018, the SCA published a report on 'Corruption that restricts competition'. For this reason, additional co-operation, for example in relation to advocacy work, with other agencies in this field may become

more common (such as the police and the 'Institute against bribery').

3.5 Co-operation with Foreign Enforcement Agencies

See 1.7 Principles of Comity, above.

3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases

There are no criminal charges in relation to the Act in Sweden.

3.7 Procedure for Issuing Complaints/Indictments in Civil Cases

The Patent and Market Court (organisationally part of the Stockholm District Court) has served as a first instance in competition law matters since September 2016. A judgment of the Patent and Market Court can be appealed to the Patent and Market Court of Appeal (organisationally part of the Svea Court of Appeal). While the Patent and Market Court of Appeal is the court of last instance in competition law matters, it may allow a judgment to be appealed to the Supreme Court if it is necessary to set precedent.

Under general Swedish administrative rules, parties to an investigation have the right to access all substantive material that the investigating authority adds to its file, including information held by the SCA. Limitations to this right normally only apply when the disclosure of a document would risk impeding the SCA's investigation.

Information held by third parties may be produced through court order if it is meaningful to the SCA's investigation and its understanding of the case. The same criteria apply for summoning witnesses. The exception is if the information pertains to business secrets, in which case its proportional importance to the case must be weighed against the need for it to remain secret.

3.8 Enforcement Against Multiple Parties

Actions against several participants in a cartel can be brought before the Patent and Market Court as a single case. The Court can decide if it is beneficial for the ongoing procedure to treat the actions together or separately, but the principal rule is that they will be dealt with together.

3.9 Burden of Proof

The SCA carries the burden of proof. Case law describes the standard of proof to which the SCA will be held in prosecuting its cases under the Act as high, but not as high as that required in criminal cases (ie, not beyond reasonable doubt). To some extent, the standard of proof can be adapted to fit the seriousness of the infringements involved and the fines sought in a particular case.

3.10 Finders of Fact

The SCA conducts the investigation into suspected cartel infringements, collecting information through inspections, interviews and requests for information.

Other than in the context of fine orders (ie, settlement) and cease-and-desist orders (see **2.1 Initial Investigatory Steps**, above), the SCA cannot itself impose sanctions and must instead file actions before the Patent and Market Court, which will apply law to the facts.

3.11 Use of Evidence Obtained from One Proceeding in Other Proceedings

Under Swedish law, a court may try virtually any document, statement or occurrence as evidence, disregarding its source, including evidence obtained in another proceeding. The Patent and Market Court can therefore freely evaluate evidence presented before it by the SCA or another party, using its discretion in line with the principles of free submission of evidence and free evidence assessment.

3.12 Rules of Evidence

See **3.11 Use of Evidence Obtained in One Proceeding in Other Proceedings**, above.

3.13 Role of Experts

It is common to retain professionals from different fields as expert witnesses during trial. Economists specialising in competition law are often employed to provide insights into market definitions and the economic effects of an alleged infringement. Other types of expert who are relevant to the understanding of markets and businesses are also commonly heard as witnesses.

One of the SCA's departments is the Chief Economist, which provides the SCA with its own economic analyses.

To deal with competition cases, the Patent and Market Court will consist of at least two legally trained judges and two economists. The intention is to provide the Court with sufficient expertise to review economic issues presented before it.

3.14 Recognition of Privileges

Legal privilege (for external counsel) is far-reaching under Swedish law. It is equally applicable during the NCA's investigation and during the process in court.

3.15 Possibility for Multiple Proceedings Involving the Same Facts

In theory, it is possible under Swedish procedural rules to consider the same facts in different SCA or court proceedings, provided that the proceedings concern different defendants. In practice, the SCA and the courts will consolidate cases so that the same facts are not presented in parallel proceedings.

4. Sanctions and Remedies in Government Cartel Enforcement

4.1 Imposition of Sanctions

The SCA does not have competence to fine companies for infringing behaviour (unless admitted by the parties involved); instead, the Patent and Market Court passes judgment. Appeal of a decision to the Patent and Market Court of Appeal involves a full review of facts and substance, affecting both legal assessment and sanctions.

4.2 Procedure for Plea Bargaining or Settlement

The SCA cannot agree a plea bargain to resolve an investigation but there is a form of settlement process.

Chapter 3, Article 16 of the Act gives the SCA the right to issue what is known as a 'fine order' – ie, a form of binding settlement used where the facts are uncontested. This was introduced into the Act in 2008, the same year as the equivalent EU model.

The SCA controls the process, selecting only those cases which it considers to be clear-cut infringements as being appropriate for settlement. If the company under investigation accepts the SCA's settlement terms, the fine order is binding and a simplified decision on liability is issued. Such settlements can be appealed to the Patent and Market Court within a year of written confirmation. Settlement allows the SCA to impose a fine directly, without the usual requirement of proving its case in court. However, unlike the fixed 10% reduction on offer at the EU level, there is no discount for settlement in Sweden. Advantages come in the form of a simplified and expedited process. The system is based on a desire not to disincentivise a party from fully exercising its legal rights. To date, fine orders have been used most often in bidding collusion cases.

4.3 Collateral Effects of Establishing Liability/Responsibility

A company may be debarred from government procurement procedures through a discretionary choice available to the procuring authority, according to Chapter 13 Section 3 paragraph 1(4) of the Public Procurement Act (2016:1145). This sanction is not imposed during the competition infringement procedure, but during the specific procurement procedure by the relevant contracting authority.

See also **5.1 Private Right of Action**, below.

4.4 Sanctions and Penalties Available in Criminal Proceedings

Breach of the competition rules is not a criminal offence in Sweden, but an individual can face imprisonment of up to two years for failing to respect a trading prohibition.

4.5 Sanctions and Penalties Available in Civil Proceedings

Fines

The SCA can apply to the court to impose fines on companies, and has published guidance on the setting of fines (Dnr 394/2009). The SCA may not fine an infringing company more than 10% of its turnover during the previous financial year. In contrast to the European Commission's practice, the SCA tends not to take account of the infringing group's turnover when setting the cap, but rather only that of the infringing entity (although see 'Joint and Several Liability', below).

When setting the level of a fine, the SCA will evaluate the gravity of the infringement (up to 10% of the value of sales in the relevant market), which is then multiplied for duration. Factors affecting the gravity assessment include the harmful effects of the infringement on price and competition in the market, and its impact on third parties. This base level is then adjusted for aggravating or mitigating circumstances (5-15% per circumstance). Deterrent effect and recidivism may be taken into account. There is some scope for inability to pay reductions. Compliance programmes are not explicitly seen as a mitigating circumstance. It is only the turnover of the concerned undertaking itself that is considered, not the aggregated turnover of the company group to which it belongs.

The highest individual fine yet imposed in Sweden under the Act was in 2009, in a cross-appeal by the SCA of the 2007 Asphalt judgment; the Market Court increased NCC's fine to SEK200 million. Following the various appeals, total fines for all parties amounted to approximately SEK500 million, which is certainly notable in the context of the general level of fines in Sweden but still significantly less than the SEK1.2 billion originally sought by the SCA.

A more recent case from 2014 concerned a co-operation between two tyre companies (Däckia and Euromaster). The court considered this to be an infringement by object due to the submission of a joint tender in a public procurement in circumstances where each could have tendered separately. Fines totalling just under SEK2.5 million were imposed on the companies (around one quarter of the amount sought by the SCA). By contrast, in a case against Telia and Gothnet for bidding co-operation, the SCA sought fines of SEK35 million. At first instance in 2016, SEK16 million was imposed. In 2018, however, on appeal by one party only, the case (and fine) against Telia was overturned as the court of appeal disagreed with the SCA's claim that an infringement by object had occurred.

As a result of this case and others like it (where an object infringement was not upheld in court), the SCA noted in its Annual Report 2018 that there is an increasing demand on effects analysis in its investigations and any ensuing court processes (eg, in order to succeed in imposing fines).

Joint and Several Liability

Under certain circumstances, liability for payment of fines may be attributed to an infringing subsidiary's parent company. This may be the case if the subsidiary does not decide independently upon its own conduct in the market, despite having a separate legal identity, but in all material aspects carries out the instructions given to it by the parent company. In this respect, the SCA would pay particular regard to the economic, organisational and legal links that tie the legal entities.

In cases where the parent company holds 100% ownership of the infringing subsidiary, there is a rebuttable presumption that the subsidiary does not act independently. When the conduct of the subsidiary may be imputed to the parent company, the latter's turnover may be included in applying the 10% cap described above. However, the basic principle is still that only turnover of the infringing entities is relevant for the calculation of the cap. Therefore, the relevant turnover may include that of the parent company as well as one or several of its subsidiaries, but not the company group's turnover as a whole.

Trading Prohibition

In addition to fines, the SCA can also apply to impose trading prohibitions on individuals who are involved in particularly serious infringements of Chapter 2, Section 1 of the Act (ie, hardcore horizontal infringements such as price-fixing, limiting or controlling production or market-sharing). The SCA will only seek a trading prohibition where it is considered to be in the public interest to do so, and the individual has seriously failed to fulfil his or her obligations. Negligence in supervision is not generally sufficient to justify a trading prohibition. However, managers and board members have the responsibility to take corrective action if they learn of infringing conduct, with failure to take such timely action being considered relevant to the SCA's assessment.

The prohibition must be in the public interest. For this assessment it must be considered if the behaviour has been of a systematic nature, if it was intended to produce significant gains, if it has or could have inflicted significant harm, if the person has been previously convicted of other financial crimes, and if the conduct was intended to seriously prevent, restrict or distort competition.

Factors that can affect the public interest assessment include if the person has assisted the SCA, another EU NCA or the European Commission in investigating the infringement, in a significant way. Being the first company to report an infringement will be considered as giving particularly significant assistance. An individual risking a trading prohibition may also apply for individual leniency.

Guidelines have been published by the SCA (KKVFS 2015:2) on how it interprets the Trading Prohibition Act (revised in

2014), which widens the scope of persons that can be the target for such injunctions. Prohibitions can now be imposed on all persons in a business with managerial roles, including members and alternate members of the board of directors, the managing director, the deputy managing director, persons who in other capacities have managed the business, or persons who have held themselves out to third persons as being responsible for a business.

An individual on whom a trading prohibition is imposed may not run business operations or hold a senior position in a company for a period of between three and ten years. Furthermore, failure to abide by a trading prohibition risks imprisonment of up to two years. The fact that an individual has left (or been removed from) a post does not prevent the SCA from seeking a trading prohibition.

The SCA may grant immunity from a trading prohibition where either the connected company benefits from leniency (automatic protection) or the individual has personally co-operated to a significant extent. The SCA has not yet imposed a trading prohibition.

Cease and Desist Order

The SCA can also issue injunctions, to the effect that companies are to cease a behaviour that is deemed to infringe Chapter 2 Section 1 of the Act or Article 101 of the TFEU. The order can be combined with the imposition of a conditional fine.

The purpose is to restore competition to a non-distorted state, and the injunction cannot be more far-reaching than necessary to achieve this. It can, for example, include the discontinuation of the execution of an agreement or of a specific clause in an agreement. The relevant court will impose the conditional fine if the order is not followed, or try the injunction on the merits if it is appealed.

4.6 Relevance of ‘Effective Compliance Programmes’

Whether or not a company has a compliance programme to prevent competition infringements from occurring is not a factor when the SCA or the Patent and Market Court decides on the level of a fine.

4.7 Mandatory Consumer Redress

Other than the related possibility for the Consumer Ombudsman to represent consumers in group actions (see **5.2 Collective Action**, below), the SCA's proceeding or the Patent and Market Court's judgments do not result in any form of mandatory consumer redress.

4.8 Available Forms of Judicial Review or Appeal

Decisions by the Patent and Market Court in fining matters can be appealed to the Patent and Market Court of Appeal.

Leave to appeal is required and will be granted in the following circumstances:

- if there are reasons to question the accuracy of the appealed decision;
- if it is necessary to determine the accuracy of the appealed decision;
- if the case involves questions for which the determinations of the superior court can be important to set a precedent; or
- if other extraordinary reasons exist.

To appeal a case further, the Patent and Market Court of Appeal may give leave to appeal to the Supreme Court, which must then provide leave to appeal. This is rare and only granted if the Supreme Court's determination would be important as a precedent.

The Patent and Market Court of Appeal and the Supreme Court will review a case on its merits.

5. Private Civil Litigation Involving Alleged Cartels

5.1 Private Right of Action

The prerequisites for an action for damages, as described in the Competition Damages Act, are that an infringement of Chapter 2 Sections 1 or 7 of the Act or of Articles 101 or 102 of the TFEU can be shown, that it has been committed with intent or negligence, and that proximate cause can be shown between the infringement and the injuries sustained by the claimant. In the case of cartels, Chapter 3 Section 4 of the Competition Damages Act provides a rebuttable presumption that the infringement has caused loss. However, the claimant will still need to show the degree of loss sustained.

The Patent and Market Courts hold the exclusive competence to hear antitrust damages actions. The procedural rules for such actions are the same as in other civil proceedings, with some exceptions.

A case must be brought before the court within five years of the infringing behaviour ending and the injured party gaining knowledge, or when they could have been expected to have gained knowledge, of the infringement, the injuries it caused and the identities of the concerned companies.

Claimants can seek compensation for their losses. Being compensatory in nature, damages do not involve punitive elements. Pure economic loss is recoverable, such as losses and foregone profits caused by the infringement. Claimants can also seek an injunction to stop the infringing behaviour from continuing.

Standards for relief in private civil actions and governmental proceedings do not differ under Swedish rules.

5.2 Collective Action

Group actions are a form of class action and can be brought under the Group Proceedings Act (2002:599, as amended), which applies beyond the field of competition law. These actions involve a case being brought by a representative of a group, where the outcome has legal effects for members of that group even if they are not parties to the case itself.

There are three forms of group action:

- private, which can be brought by a natural person or legal entity;
- public, involving bodies expressly permitted to take forward such actions (which does not include the SCA); and
- organisational, which may be brought by not-for-profit organisations to protect consumers' or employees' interests.

In contrast to the standard rules for standing in Sweden, the organisational and public group actions involve cases where the claimant has standing to sue without the dispute in any way affecting their own legal interests (a form of representative function). To take forward any form of group action, a number of conditions must be fulfilled, such as it being founded on circumstances that are common or similar to all group members, and the appropriate definition of that group.

The procedural rules for such actions are the same as in other civil proceedings, with only minor exceptions.

5.3 Indirect Purchasers and 'Passing-on' Defences

Indirect purchasers that have suffered loss caused by an infringement will, in principle, have standing to claim damages, because of the compensatory principles of the Swedish rules. Chapter 3 Section 5 of the Competition Damages Act also provides a rebuttable presumption that cartelised prices are passed on to indirect purchasers. The corollary of this is that defendants will be permitted to argue *vis-à-vis* direct purchasers that their losses have been passed on downstream.

5.4 Admissibility of Evidence Obtained from Governmental Investigations/Proceedings

In Sweden, virtually all evidence is generally admissible in court, which means that parties generally cannot argue that certain forms of evidence should be inadmissible. Parties are thus usually free to present information stemming from any source as evidence, although the Competition Damages Act provides for some specific exemptions.

Investigative Powers

The scope for discovery in Swedish legal proceedings is not as broad as in some other jurisdictions, such as the USA. A Swedish court may issue an order to require a party to

produce potentially relevant material, but in practice this is a somewhat limited tool as it is necessary to specify which document is sought and what it is intended to prove. This is reinforced by a special exemption in Chapter 5 Section 4 Paragraph 1 of the Competition Damages Act, according to which such orders can only be issued if a document cannot be procured from another source without inconvenience. In addition, such an order will not be issued if its execution could seriously hamper the SCA's abilities to carry out its tasks. Documents held by the SCA that constitute a leniency applicant's explanation of cartel conduct or written settlement pleas cannot be subject to such orders at all.

An alternative route is to request access directly from the SCA through the right of public access to official documents. However, the SCA would no doubt seek to resist the most sensitive of such requests (ie, in relation to leniency materials), relying as far as possible on the various forms of protection available under the Swedish Secrecy Act.

Leniency Programme

The confidentiality protection generally afforded to the SCA's file (including certain leniency materials) ceases to be absolute when the investigation ends, which provides the opportunity for private claimants to seek access to at least some of the information on the SCA's file. The SCA can seek to refuse access to leniency applications or statements made by a company, for example, if it can successfully argue that considerable harm or significant injury would otherwise result. The situation is somewhat ambiguous but the risk of discovery of (at least, parts of) leniency applications cannot be entirely excluded, given the generous nature of access to documents in Sweden, although this would be balanced against the importance of the leniency regime to the work of the SCA. In practice, this risk has not yet been explored in a private court action in Sweden. Explanations of cartel conduct that a leniency applicant has provided to the SCA, the European Commission or another NCA within the EU are, however, excluded from discovery in antitrust damages cases, even if the authorities' investigation in question has come to an end (see below).

Inadmissible Evidence

Chapter 5 Section 8 of the Competition Damages Act provides that certain documents kept by the SCA, the European Commission or another NCA within the EU for the purposes of ongoing cartel infringement investigations may not be presented as evidence in a private damages case. These are documents that contain explanations of cartel conduct provided by leniency applicants, written settlement pleas, information provided to the authority by natural or legal persons in the course of the investigation, and information that the authority has collected and handed over to the parties of an investigation.

If an investigation has come to an end, documents held by the SCA containing information provided by a natural or legal person in the course of the investigation and documents containing information that the authority has collected and handed over to the parties concerned by the investigation can be accepted as evidence. However, documents containing explanations of infringing behaviour provided by leniency applicants and written settlement pleas may not be accepted as evidence, even after the SCA has ended its investigation.

5.5 Frequency of Completion of Litigation

Swedish case law relating to antitrust damages is relatively limited compared to certain other jurisdictions. The introduction of the Competition Damages Act may lead to an increase, but this has not yet been realised.

The timeframe from filing to judgment can vary significantly, but processes tend to be somewhat lengthy. The case of TeliaSport/TeliaSonera, in which damages were denied, ended after almost four years of proceedings. Another case, Net at Once/Gothnet, also ended without an award of damages, and required slightly more than two years before judgment. Procedures spanning several years should be considered normal.

5.6 Compensation of Legal Representatives

Specification of costs is achieved in the same way as in other civil procedures under Swedish rules. Both parties specify their costs and the successful party is reimbursed by the other side. A party can dispute the other side's cost, and the court will then consider if the cost specification can be considered reasonable in the context of the length of time a case has required and its complexity.

In Sweden, lawyers are normally not permitted to charge fees dependent on, for example, the size of reparation awarded or the degree of success in a case. In cases based on group actions, this general rule may not always apply, permitting compensation based on a quota of an award.

5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

See 5.6 Compensation of Legal Representatives, above.

Mannheimer Swartling

Norrlandsgatan 21
Box 1711
111 87 Stockholm

Tel: +46 8 595 060 00
Fax: +46 8 595 060 01
Email: johan.carle@msa.se
Web: www.mannheimerswartling.se



5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

The Patent and Market Court's decisions may be appealed to the Patent and Market Court of Appeal. Leave to appeal is required to appeal, and the Patent and Market Court of Appeal can rule on points of fact and/or law.

During 2017, two damages cases where the claimants had achieved success at first instance were overturned on appeal, both concerning abuse of dominance. In Yarps/Telia, Yarps was initially awarded SEK65 million (circa EUR6.5 million) in 2016, but this was overturned on appeal as Yarps could not show that Telia's conduct had anti-competitive effects on the market. In Tele2/Telia, Tele2 was initially awarded SEK240 million (circa EUR24 million) in 2016, but this was overturned on appeal as Tele2 had failed to establish causation.

6. Supplementary Information

6.1 Other Pertinent Information

There are no other items of information that are pertinent to an understanding of the process, scope and adjudication of claims involving alleged cartel conduct in Sweden.

6.2 Guides Published by Governmental Authorities

The SCA has published general descriptions of horizontal and vertical agreements that are more likely to be considered as violations of the Act on its website, in English. These are available at:

- www.konkurrensverket.se/en/Competition/Aboutthecompetitionrules/Prohibitionagainstanti-competitivecooperation/
- www.konkurrensverket.se/en/Competition/Aboutthecompetitionrules/Prohibitionagainstanti-competitivecooperation/vertical-agreements/

The SCA has also published somewhat more detailed descriptions on competition-infringing agreements in general, horizontal agreements, vertical agreements and cartels, in Swedish. These are available at:

- www.konkurrensverket.se/konkurrens/om-konkurrensreglerna/samarbete-som-begransar-konkurrensen/
- www.konkurrensverket.se/konkurrens/om-konkurrensreglerna/samarbete-som-begransar-konkurrensen/horisontella-samarbeten/
- www.konkurrensverket.se/konkurrens/om-konkurrensreglerna/samarbete-som-begransar-konkurrensen/vertikala-samarbeten/
- www.konkurrensverket.se/konkurrens/om-konkurrensreglerna/samarbete-som-begransar-konkurrensen/karteller/