Cartels

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Overview of the law and enforcement regime relating to cartels

The current Swedish Competition Act (Competition Act) entered into force on 1 November 2008 and governs all types of actions that may distort competition. The Competition Act aims to, as far as possible, incorporate EU competition law. It is therefore interpreted in accordance with the case law of the Court of Justice of the European Union.

Chapter 2 of the Competition Act holds the substantive provisions relevant for cartels and other anti-competitive agreements. Chapter 2, Sections 1 and 2 of the Competition Act, are modelled on Article 101(1) and 101(3) of the Treaty on the Functioning of the European Union. Section 1 prohibits the cooperation between undertakings that has as its object or effect the prevention, restriction or distortion of competition in the market to an appreciable extent, whereas Section 2 sets out the possible exemptions to the prohibition found in Section 1.

The Competition Act also includes exemptions from the prohibition against anticompetitive agreements, such as certain arrangements relating to the agriculture, forestry and horticulture sectors and taxi services. In addition, there are block exemptions that are equivalent to those that apply at the EU level. However, "hard core" cartels (price-fixing, bid rigging, output restrictions and market sharing) are highly unlikely to satisfy the abovementioned exemptions.

Enforcement is civil, not criminal. The Swedish Competition Authority (SCA) is the central administrative authority of competition law in Sweden. The SCA has powers to investigate potential breaches of the cartel prohibition and can seek penalties (corporate fines and director disqualification) in court where it believes parties have engaged in cartel conduct. However, the SCA may itself impose an interim injunction to stop ongoing infringements.

The Patent and Market Court (PMC) is the competition court of first instance. Decisions and judgments by the PMC can be appealed to the Patent and Market Court of Appeal (PMCA). A leave of appeal is required if the PMCA is to hear a case. The PMCA is, in general, the court of last instance. However, in certain instances, the PMCA can grant leave for a judgment or decision to be appealed to the Supreme Court. If that were to happen, the Supreme Court would also need to grant a leave to appeal before the case could be heard.

In December 2016, Sweden implemented the EU Directive on Antitrust Damages Actions by enacting a new Antitrust Damages Act. The purpose is to facilitate injured parties in litigating their competition damages claims.

Overview of investigative powers in Sweden

The SCA has investigative powers broadly similar to those of the European Commission and include:

Requests for information. The Competition Act provides the SCA with extensive powers

to require information, documents and other materials from undertakings that are suspected of an infringement, as well as third parties.

The SCA may also perform trade or sector-specific investigations by requesting information from customers, competitors and other undertakings to assess and highlight potential competition concerns in both the private and public sector. Such a request may be imposed under penalty of an administrative fine for failure to comply with the SCA's request for information.

Call in for questioning. Individuals who are believed to be able to provide relevant information may be called in for questioning by the SCA. Orders to provide information and appear for questioning may be imposed under penalty of an administrative fine for non-compliance. However, privilege against self-incrimination applies and the individual does not have to disclose information that may implicate the individual.

Unannounced on-site inspection of the business premises – "dawn raids". In order for the SCA to carry out a dawn raid, the PMC must first grant authorisation by a court order. However, the standard of proof required is rather low. In the case law, the SCA has been allowed to perform dawn raids due to indications of parallel behaviour of competitors, which was based on statistical analysis of tenders in public procurements. The undertaking will, as a routine, not be heard before the PMC has taken its decision and not be informed until the investigation has been initiated.

During dawn raids, the SCA has the right to enter any premises, land and means of transport used for the business, as well as the residential premises of employees (the latter applies in cases where the alleged infringement is considered to be sufficiently serious). Moreover, the SCA's dawn raid powers include:

- examining business books and other company records;
- taking or obtaining copies of, or extracts from, books and company records (including electronic records); and
- ordering oral explanations "on the spot".

The SCA is often accompanied by the Swedish Enforcement Authority, which assists in gaining access to premises and applying official seals.

Seizure of evidence. In order for the SCA to "mirror" electronically stored data to be reviewed at its own premises, the undertaking or individual subject to the inspection must give its consent. Legal counsels are entitled to be present while the SCA investigates the data. And according to established case law, the SCA should not use dawn raids to conduct broad "fishing expeditions" (*i.e.*, using previously mirrored material relating to another alleged violation).

Interviews with company employees. The SCA may, as part of dawn raid, order oral explanations from representatives or employees of the undertaking involved about documents found at the business premises, or about what role a particular individual of interest has in the organisation. However, the interviewee is not required to provide any incriminating information.

Furthermore, individuals who are believed to be able to provide relevant information in an investigation can be required to attend hearings at the SCA's premises. The hearings will be recorded in writing and the interviewee will be given the opportunity to examine that record for accuracy.

Legal privilege. During a dawn raid, the SCA does not have the legal right to confiscate documents or storage devices containing information covered by legal privilege. In the event of a dispute of whether a particular document is legally privileged, the document is

to be immediately sealed and sent by the SCA to the PMC for the issue to be determined without delay.

In practice, the bar to show that a particular document is protected by legal privilege is set quite low. In *Posten AB.*, the company claimed that a memorandum found by the SCA during a dawn raid, written by the in-house legal counsel for the purpose of obtaining external legal counsel, should be covered by legal privilege. The PMC agreed with the company and consequently considered that every written document, which has been entrusted to a lawyer within its profession, is protected under legal privilege. Similarly, in *Geberit*, the PMC accepted a company's argument that a handwritten memorandum had been prepared by a company manager to be used at a meeting with the company's external legal counsel, even though that was not evident from the document itself. Consequently, the court held that the document should not be disclosed.

Privilege against self-incrimination. The protection against self-incrimination under Swedish law reflects the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights. It is up to the SCA to prove that an infringement of the Competition Act has been conducted. Although the SCA may require an individual or an undertaking to provide certain documents or information under the Competition Act, the SCA may not compel answers that might involve an admission of the existence of a competition law infringement which the SCA has to prove in court.

Overview of cartel enforcement activity during the last 12 months

For the past few years, the SCA has devoted greater resources to develop its cartel detection methods. On average, the SCA conducts a handful of dawn raids per year, and it receives approximately five leniency applications per year, of which approximately half are summary applications. Sectors that have investigated more recently include construction, electronic equipment, insurance, and retail.

In December 2018, the SCA conducted a questionnaire survey of the level of corruption in the construction industry. Among the responding firms, 49 per cent believed that there were cartels in the industry, and 29 per cent of those believed that cartels operated on a regular basis.

The fight against cartels is one of the main priorities of the SCA, and measures relating to the detection of cartels has increased, especially concerning bid rigging cartels in public procurement procedures. There are several ongoing investigations at the SCA of companies suspected of having colluded at the bidding stage.

Data communications services – bid rigging? The SCA sued *TeliaSonera*, Sweden's largest telecommunications operator, and GothNet, a local network operator in Gothenburg, and requested a total fine of SEK 35 million for having formed a bid-rigging cartel during a public procurement procedure by the City of Gothenburg in 2009. The SCA claimed that when the City of Gothenburg procured data communication services, TeliaSonera and GothNet agreed that TeliaSonera would refrain from submitting a tender in the procurement, even though GothNet and TeliaSonera were competitors. Subsequently winning the bid, GothNet contracted TeliaSonera as a subcontractor. The PMC ruled in favour of the SCA's claim and ordered each of the parties to pay SEK 8 million in fines. TeliaSonera appealed the judgment, which was reversed by the PMCA. In its judgment from February 2018, the PMCA stated that the nature of the information provided by TeliaSonera to GothNet entailing that TeliaSonera would not be submitting a bid in the procurement was a concerted practice within the meaning of the competition rules. However, considering the economic and legal

context of the procurement in which the coordination took place, the court held that the information exchange could not be regarded anticompetitive by object. Since there was not sufficient evidence of anticompetitive effects, the SCA's claim was rejected.

Moving companies – market sharing? The SCA sued three moving companies (*Alfa Quality Moving et al.*) for a total fine of SEK 42 million. The companies had in two merger transactions included non-compete clauses of five years, which, according to the SCA, were too far-reaching. The SCA claimed that the clauses constituted illegal market sharing agreements. However, the PMC held that the clauses were not anticompetitive by object and that the SCA had not shown any anticompetitive effects. In November 2017, the PMCA affirmed the judgment on appeal. The court pointed out that non-compete clauses may be necessary for the successful implementation of a merger transaction, since such clauses provide the buyer with a certain degree of security. The SCA had argued that the moving companies knowingly had exceeded the three-year period outlined in the Commission's guiding notice on ancillary restraints. However, the PMCA found that the three-year period reflects the duration under which companies normally can assume to be protected under the Commission notice rather than the maximum duration allowed for a non-compete clause. Accordingly, the court did not hold the non-compete clauses to be anticompetitive by object. The PMCA further concluded that the SCA did not provide evidence of any anticompetitive effects.

Health care providers – bid rigging? The SCA sued three health care (*Aleris et al.*) providers for alleged collusion during a public tender of clinical physiology. Aleris had, prior to the companies submitting their respective tender offers, agreed to share the contract with the other two, regardless of which company eventually would be awarded the contract. The lower court found that the practice was anticompetitive by object and imposed fines of in total SEK 28 million. The case was appealed to the PMCA, which in April 2017 reversed the lower court's judgment. According to the PMCA, the agreements between the companies imposed an obligation on the winning party to, on request, appoint a losing party as subcontractor. The PMCA established that the agreements did not stipulate which volume a subcontractor would be awarded which meant that the parties had not agreed to share a certain volume of the market. The PMCA also pointed out that the decisive criteria to award the winner in the public tender had been the lowest price. Under those circumstances, the PMCA concluded that the agreements could not be considered anticompetitive by object and that the SCA had not presented sufficient evidence to establish that the agreements had anticompetitive effects.

Key issues in relation to enforcement policy

In the past, the SCA has been successful in obtaining large fines in cartel cases against companies in, *inter alia,* the asphalt and petrol businesses. However, since the reorganisation of the competition court system in 2016 (see below), the SCA has so far lost all cases that have reached the PMCA. As a result, the SCA has indicated that it will take a more lax stance on litigation in the future. For instance, in November 2019, the SCA concluded an investigation of information exchange of production volumes in the asphalt sector, by accepting commitments from three competitors rather taking the case to court.

Indeed, the SCA has become more active in using alternative enforcement methods such as communication in media. In particular, the SCA has emphasised the potential risks an undertaking may be exposed to by participating in a cartel, such as heavy fines, incurring a bad reputation and exclusion from participation in public procurement. Through intensified activity in the media, the SCA aims to increase awareness of the competition rules and the leniency programme.

Key issues in relation to investigation and decision-making procedures

Enhanced decision-making powers for the SCA. Currently, the SCA lacks the administrative power to issue fines for competition law breaches. Instead, in behavioural cases (*i.e.*, anticompetitive agreements and dominant market positions), the SCA acts as a prosecutor and will have to make its case before a court.

However, In June 2016, a legislative initiative proposed that the SCA should be granted enhanced decision-making powers in both behavioural and merger control cases. It was said that this would, *inter alia*, cut the lead times for competition procedures and harmonise Sweden's procedural order with that of the EU and other Member States. One of the key issues was whether the SCA should be granted penalty powers. However, due to legal certainty concerns (the SCA would be granted double-edged roles as both prosecutor and judge, which would be a novelty in the Swedish legal system), the bill ultimately only extended the SCA's decision-making powers in relation to merger control cases. This reform entered into force on 1 January 2018.

Mirroring. The issue of mirroring has been a much-debated topic in Sweden for the past few years due to the legal uncertainties surrounding the practice. Prior to the amendments to the Competition Act in 1 January 2016, there was no express legal basis allowing the SCA to carry out indexing and searching of digital material at its own premises in connection with a dawn raid. After the legislative reform, the Competition Act now grants the SCA express authority to mirror materials found during dawn raids, although that requires the consent of the company concerned.

In November 2018, the Supreme Court gave a judgment on the reviewability of mirroring during dawn raids. In April and June 2017, the SCA had conducted a dawn raid against a number of insurance companies (*Söderberg & Partners et al.*) for suspected bid rigging in public tenders. This was done after a prior decision by the PMC allowing the raid. During the raid the SCA 'mirrored' several hard drives and, with the consent of the companies, brought and reviewed them at the premises of the SCA. However, when the SCA copied certain documents from the hard drives and included them in the case file, one company appealed the measure to copy the documents, arguing that the documents were outside the scope of the PMC's dawn raid decision. After both the PMC and the PMCA had rejected the appeal, the Supreme Court heard the case. The Court stated that if a company contests the SCA's right to review or copy certain material on the grounds that the measure is out of scope of the original dawn raid decision, the SCA must refer the dispute to the Swedish Enforcement Agency and request its assistance in order to review or copy the contested material. In this case, the SCA had not requested such assistance, which the Supreme Court found to be a violation of the company's right to a fair trial under the European Convention on Human Rights. The Court stated, however, that the appropriate remedy for such a violation was economic compensation, rather than to create a new right of review before the PMC. The decisions of the lower courts were thus affirmed.

Fishing expeditions. The debate has further been focused on the excess information that becomes available to the SCA through mirroring. The concern is that the SCA may go beyond its original authority and use the excess information for future investigations. In 2014, a court held that the SCA did not have the authority to use previously mirrored material to investigate a potentially new competition infringement, hence clarifying that "fishing expeditions" are not lawful.

Leniency/amnesty regime

The Swedish leniency programme was amended in 2014 to better reflect the EU leniency system. The new leniency regime introduced a marker system whereby a company may

apply for a marker and submit limited information about an ongoing cartel. The minimum requirement in order to obtain a marker is to submit information on the market affected by the infringement, the other companies involved and the nature of the infringement. In order to secure the marker, the company must submit a complete notification within a specified time period. Unless the company with the marker fails to submit the outstanding information, another company cannot jump the queue for immunity.

The first company to provide the SCA with sufficient information of the existence of a cartel may be granted immunity. Alternatively, in situations where the SCA already has sufficient information to act without the applicant's contribution, the company may still receive immunity if it is first to provide information which allows an infringement to be established or contributes in some other way to a very significant extent to facilitate the investigation.

Additionally, a company seeking immunity must also provide all relevant information available, actively cooperate with the SCA throughout the investigation, ensure that no evidence is destroyed, refrain from hindering the SCA's investigation in any other way, and cease participating in the infringement as soon as possible.

In situations where a company has compelled other undertakings to participate in the infringement, immunity will not be available.

Where another company has already secured immunity, an undertaking applying for leniency can still benefit from a reduction of fines. The Competition Act provides that a company may benefit from a reduction of fines if the undertaking provides the SCA with information that facilitates the investigation to a significant extent as well as satisfying the requirements for immunity set out above.

According to the SCA's guidelines, the first company to satisfy the relevant conditions will be eligible for a reduction of the fine, which will be dependent on the timing of the information, the added value that the information may contribute, and the company's cooperation throughout the investigation.

Undertaking	Maximum reduction of fines
1	50%
2	30%
3 and subsequent	20%

Administrative settlement of cases

In cases where the facts are uncontested and can be considered clear-cut infringements, the SCA may issue a fine order, which is a form of binding settlement. The system of fine orders is built on voluntariness, where the company under investigation may choose to accept the SCA's settlement terms or not. A fine order is binding and a simplified decision on liability is issued. However, the settlement can be appealed to the PMC within a year of written confirmation.

It is worth noting that there is no possibility for fine orders to receive any reductions or discounts – the advantages of fine orders are the simplified and expedited processes. Generally, fine orders have most often been used in bid rigging cases.

Third party complaints

The SCA may open an investigation based on information from the public. Indeed, many cases

are brought to the SCA by third parties. Whether a tip-off leads to any further investigation often depends on whether the SCA believes there is consumer harm, the importance of a precedent and the measures required for the investigation. The SCA has wide investigative discretion and restraints on the capacity for investigations, and resources available, which may influence whether an investigation is opened or not. Normally a decision on whether a matter should be further investigated or written off will be made within one to four months.

Undertakings concerned have the possibility, in the event that the SCA decides not to proceed with an alleged infringement, to initiate a private action in the matter.

Civil penalties and sanctions

If the SCA can prove a violation, a court may impose a civil corporate fine of up to 10 per cent of company turnover (calculated on a corporate group basis).

However, like the European Commission, the SCA has provided guidance on the setting of fines. The base level of the fine is set by considering various factors such as the type and the scope of the infringement and the harmful effect on the market, both actual and potential harm. The base level is then adjusted for aggravating or mitigating circumstances. Factors such as having a ring-leading role or relapsing in anticompetitive behaviour are seen as aggravating circumstances, whereas full cooperation with the SCA and partial participation in the infringement may provide mitigating circumstances. For each circumstance, the level is adjusted by 5% to 15%.

At the request of the SCA, a court may impose director disqualifications for "hard core" cartel conduct. The consequence following such a disqualification is a ban for the individual concerned to run business operations or hold a senior position in a company for a period of three to 10 years. Furthermore, an individual failing to abide by a director disqualification risks imprisonment of up to two years. The SCA does not take into consideration that an individual may have left or been removed from a post when seeking a director disqualification.

In circumstances where either the company benefits from leniency, or the individual has contributed and personally cooperated to a significant extent, the SCA may grant immunity from a director disqualification.

Right of appeal against civil liability and penalties

As of 1 September 2016, a reorganisation of the court system was made effective, where the Market Court, formerly the highest competition court, ceased to exist. The reorganisation was intended to create a more unified and concentrated judicial system for competition cases.

As mentioned above, the competition court of first instance is now the PMC, which is a division within the Stockholm District Court. Its decisions and judgments can be appealed to the PMCA, which is a division within the Svea Court of Appeal in Stockholm. The PMCA has tended to grant leave of appeal in competition law cases. The PMCA performs a review of facts and law, affecting both the legal assessment and possible sanctions.

Criminal sanctions

As stated above, breach of the competition rules is not a criminal offence in Sweden. However, an individual failing to abide by the abovementioned director disqualification risks imprisonment of up to two years.

Cross-border issues

The geographic scope of the Competition Act stretches to behaviours affecting the territory

of Sweden. The ultimate reach of the Competition Act is determined by whether the anticompetitive behaviour has the potential to affect a given market in Sweden. Hence, although an agreement may concern foreign undertakings or be organised outside of Sweden, if it has an appreciable effect on competition in Sweden, the Competition Act is applicable and the undertakings may be held liable. Where trade between EU Member States may also be affected, EU competition law will be concurrently applicable.

In situations where anticompetitive conduct may be subject to enforcement in multiple European jurisdictions, Regulation 1/2003 provides that the SCA and other European National Competition Authorities (NCAs) must cooperate closely for the investigation of a potential infringement. Within the framework of the European Competition Network (ECN), NCAs may assist each other in investigations by sharing information or performing dawn raids on behalf of another NCA. It is not uncommon, for example, for the SCA to assist in an unannounced on-site inspection in Sweden on behalf of another NCA.

Furthermore, a Nordic Cooperation Agreement exists between the NCAs in Denmark, Finland, Iceland, Norway and Sweden. The agreement facilitates information exchange, including non-confidential information, and case assistance between the Nordic NCAs. Besides the Nordic Cooperation Agreement and the ECN, Sweden is part of the International Competition Network and the Organisation for Economic Cooperation and Development.

Developments in private enforcement of antitrust laws

In December 2016, Sweden implemented the EU Directive on Antitrust Damages Actions by enacting an entirely new Act on Antitrust Damages. As stated above, the purpose of the reform is to facilitate for parties that have suffered from a violation of competition law to claim damages. The new Antitrust Damages Act includes provisions that clarify and simplify court proceedings in antitrust damages claims and introduces several new reforms, for instance: a rebuttable presumption that cartels cause harm; a final infringement decision that will constitute full proof of the occurrence of a competition law violation in a follow-on damages case; as well as clearer limitation periods.

The scope of those entitled to claim damages is not defined in the Antitrust Damages Act but can in general be described as "victims of competition law violations". In principle, the victim is entitled to full compensation for damages suffered. The victim is therefore not only to be compensated for actual loss suffered, but also for any loss of profit resulting from the infringement, including interest from the time the harm occurred until compensation is paid.

Case law on private enforcement is very limited. To date, there have been few actions brought before Swedish courts. One example of private enforcement follows the Swedish Asphalt Cartel, where damage claims were brought by several municipalities which had been customers of the cartel members. However, all the claims were finally settled out of court.

The Swedish law on collective redress is not restricted to a certain type of claim or area of law, and can thus be applicable when two or more victims of the same competition law violation want to bring action against any undertaking participating in a cartel. Collective redress has not yet been used in the field of competition law.

Reform proposals

As mentioned above, several reforms have recently been undertaken, including the reorganisation of the competition court system, the implementation of the EU Directive on Antitrust Damages, and new decision-making powers for the SCA in merger cases. Additional reforms are not expected in the coming years.

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