

# Cartels

## Enforcement, Appeals & Damages Actions

Fourth Edition

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# Sweden

Peter Forsberg & Xandra Carlsson  
Hannes Snellman Attorneys Ltd

## Overview of the law and enforcement regime relating to cartels

The Swedish law applicable to anti-competitive agreements is in large part equivalent to EU competition law and Article 101(1) of the Treaty on the Functioning of the European Union (“**TFEU**”).

The Swedish Competition Act (“**Act**”) came into force on 1 November 2008. The Act governs all types of actions that may distort effective competition and has as its aim to assimilate EU competition law, as far as possible. The Act is therefore interpreted in accordance with practice from the European Commission (“**Commission**”) and the Court of Justice of the European Union (“**ECJ**”). The substantive provision of relevance to cartel enforcement is found in Chapter 2 of the Act, which covers anti-competitive agreements.

The substantive provisions for anti-competitive agreements are set out in Chapter 2, Article 1 and Chapter 2, Article 2, which are modelled after Article 101(1) and 101(3) of the TFEU. Article 1 strictly prohibits cooperation between undertakings which has as its object or effect the prevention, restriction or distortion of competition in the market to an appreciable extent, whereas Article 2 sets out the possible exemptions to the prohibition found in Article 1.

The geographic scope of the Act stretches to behaviours affecting Sweden. The ultimate reach of the Act is determined by whether the anti-competitive behaviour has potential or actual effects in Sweden. Hence, although an agreement concerns non-Swedish undertakings or is organised from outside of Sweden, if it has an appreciable effect on competition in Sweden, the Act is applicable and the undertaking may be held liable. However, where trade between member states may also be affected, EU competition law will correspondingly be applicable.

The Swedish Competition Authority (“**SCA**”) is the central administrative authority for the administration and enforcement of competition law in Sweden. The SCA plays a key role in the competition field and is entrusted with investigative powers as well as intervention and – to some extent – decision-making powers. The SCA’s powers stem from the provisions in Chapter 5 of the Act.

The SCA investigates possible infringements of the Act and may require an undertaking to terminate practices that are found to be contrary to competition law. If the undertaking fails to comply with an order from the SCA, an administrative fine may be imposed on the undertaking for non-compliance. In situations where the SCA has established the existence of an infringement of the Act, it is the Stockholm District Court (“**SDC**”), contrary to the practice of the Commission, and not the SCA that may impose fines of up to 10% of the infringing companies’ aggregate worldwide group turnover.

The consequence of an agreement found to fall within the provisions of Chapter 2, Article 1, is that such agreements are unenforceable.<sup>1</sup>

In cases where the undertakings' market shares and turnover are below certain specific thresholds on the relevant market, the agreement will fall outside the competition rules, in line with the SCA's guidance on Agreements of Minor Importance.<sup>2</sup> The *de minimis* rules do not however, apply to hardcore restrictions, such as cartel-like behaviour.

### Overview of investigative powers in Sweden

The SCA has investigative powers which are broadly similar to those of the Commission. The investigative powers are set out in the Act and include:

**Requests for information:** The Act provides the SCA with extensive powers to require information, documents and other materials from undertakings which are suspected of an infringement, but also third parties. The SCA may require such information when necessary for the performance of its duties under the Act by issuing a request for information under Chapter 5, Article 1(1) of the Act.

The SCA may also perform trade- or sector-specific investigations by requesting information from customers, competitors and other undertakings to further competition in the private and public sector.<sup>3</sup> Such a request may be imposed under penalty of an administrative fine for failure to adhere to the SCA's request for information.

The SCA may also request information at the request of another National Competition Authority ("NCA") in the EU.

**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 divulge information that may implicate the individual.

**Inspection of the business premises – "dawn raids":** In order for the SCA to carry out a dawn raid, the SDC must first grant authorisation by a court order. Where the SCA has reasonable grounds to assume that the Act has been infringed, or when it is necessary in order to meet Sweden's obligations to the Commission or another NCA, the SCA can apply to the SDC for authorisation to conduct a surprise visit at locations relevant to the suspected infringement, for example, company premises.

In order to be afforded the right to perform a dawn raid, the SCA has to show reasonable grounds to assume that the Act has been infringed. The standard of proof set out in Chapter 5, Article 3 is set low, examples of which can be seen in previous cases such as *PEAB Sverige et al* and *Brunswick Marine in Sweden AB et al*. There the SCA was granted permission to enter and seize materials on the business premises on statistical analysis of tenders in public procurements and indications of parallel behaviours.<sup>4</sup>

Upon successful application to the SDC,<sup>5</sup> the SCA is granted inspection powers similar to the Commission, during dawn raids. Such powers include the right to enter any premises, land and means of transport used for the business, but also to carry out a surprise visit at the homes or other premises of the board and employees of the undertaking under investigation (in cases where the behaviour subject to scrutiny is considered to be sufficiently serious). The undertaking will not be informed about the SDC's decision until the investigation is initiated.

During a surprise visit, the SCA has wide powers to conduct necessary inspections for the purpose of enforcing the prohibition contained in the Act. Those 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
- asking for oral explanations

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

If the SDC denies the application, the SCA may appeal the decision to the Market Court.

**Seizure of evidence:** In the course of conducting a dawn raid, the SCA will do a physical search of the premises in question. The SCA has the power to examine any kind of company records, including taking copies or extracts from such records (electronic records included) as well as ‘mirroring’ digitally stored material for in-depth search. The SCA is not authorised to review mirrored information off business premises without prior consent from the company. From a practical perspective, agreeing to off-premises review of mirrored material may mitigate long-term disturbances of the daily work by the SCA’s presence. When the SCA reviews mirrored material at the SCA’s premises, the company will be invited to have a representative present throughout the process to supervise. The question of mirroring has been up for discussion lately, for more information on mirroring of digitally stored material, please see below.

**Inspection of non-business premises:** The SCA may be authorised by the SDC to inspect other premises, land or other means of transport, including homes by directors, managers and other members of staff, where the criteria in Chapter 5 Article 3 is fulfilled and the SCA has reasonable suspicion of a serious violation of the Act.

**Interviews with company employees:** The SCA may, as part of a surprise visit, seek oral explanations from representatives or employees of the undertaking involved about documents found at the business premises or 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 on an investigation can be required to attend a hearing at the SCA’s premises. The hearing will be recorded in writing and the interviewee given the opportunity to examine that record for accuracy.

**Legal privilege:** During a surprise visit, 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 about whether a particular document is legally privileged, the document in question is immediately to be sealed and sent by the SCA to the SDC for the issue to be determined without delay. Legal privilege only pertains to outside legal counsels obtained for legal advice.

In practice, the bar to showing that a particular document is protected by legal privilege in Sweden is set quite low. In *Posten AB et al*, a memorandum written by the company Posten’s in-house legal advice was found by the SCA during a dawn raid; Posten claimed that the document was written for the purpose of obtaining outside legal counsel and, as such, should be covered by legal privilege. The document was sealed and sent for review to the SDC, which determined that Swedish law may grant a higher protection than is offered by EU law. The court held that every written document which has been entrusted to a lawyer within its profession is protected under legal privilege.

**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 Act has been conducted. Although the SCA may require an individual or an undertaking to provide certain documents or information under the Act, the SCA may not compel answers which 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

The SCA has for the past few years prioritised cartel detection by devoting greater resources to develop SCA's *ex officio* cartel detection methods. Additionally, the SCA has become more proactive in using media to convey its activities against anti-competitive behaviour. In particular, the SCA has emphasised the potential risks an undertaking may be exposed to by participating in a cartel, such as heavy fines, bad goodwill and exclusion from participation in public procurement. Through intensified activity in the media, the SCA aims at increasing awareness of the Act and the leniency programme.

Although it varies, on average the SCA performs approximately two dawn raids per year. It is, however, suspected that 10 cartel investigations are ongoing at the moment. Looking at which sectors the SCA has analysed in recent years, the SCA tends to prioritise those markets where there is competitive imbalance. Sectors that have been under the SCA's scrutiny in the past are building and construction, the petrol market and the health care sector.

Moreover, the SCA receives approximately five leniency applications per year,<sup>6</sup> whereof approximately half are summary applications.

*TeliaSonera Sverige and Göteborg Energi GothNet* are being sued for close to SEK 35m in penalties for forming a bid-rigging cartel prior to a public procurement conducted by the City of Göteborg in 2009.<sup>7</sup>

*Aleris Diagnostik, Capio S:t Görans Sjukhus et al.* In December 2015, three companies within the health care and nursing sector were fined a total of approximately SEK 28m for collusion during a public procurement. Prior to the public procurement offer, the companies had agreed to share the procurement and commission regardless of the winning bid.

*Alfa Quality Moving, NFB Transport Systems and ICM Kungsholms* are being sued for approximately SEK 42m. The companies had in two subsequent transactions included ancillary restraints which, according to the SCA, were too far-reaching. Instead the competition clauses, according to the SCA, amounted to non-competes and market-sharing. The hearing will be held at the SDC in May 2016. It will be one of the first cases where too far-reaching ancillary restraints have been interpreted as being able to create potential anti-competitive agreements, giving rise to fines.<sup>8</sup>

### Key issues in relation to enforcement policy

**Enhanced decision-making powers for the SCA:** the SCA does not currently have any powers to impose fines on companies infringing the Act, but must go to the SDC to request fines against undertakings that have infringed the competition rules. The Swedish government has launched an inquiry into whether the SCA should be granted enhanced decision-making powers in the enforcement of antitrust and merger control rules.

**Mirroring:** has been among one of the most debated questions for the past few years in Sweden and has recently been subject to an inquiry by the Swedish government.

Presently, the SCA may create an exact copy of digitally stored material and subsequently transfer the information back to SCA headquarters for an in-depth search, given the company's

permission. The debate has been focused on the excess information that becomes available to the SCA through mirroring and whether it is compatible with the Act. The concern is that the SCA may go beyond its original authority and use the excess information for future investigations. Due to the legal uncertainties surrounding mirroring, the new legislation proposed to amend the Act has been welcomed. The proposed amendments grant the SCA express authority to carry out indexing and searching of digital material at its own premises in connection with surprise visits, with the consent of the company.

**Fishing expeditions:** 2014 SDC granted the SCA permission to perform an extended search of previously mirrored material relating to a dawn raid the year before, based on suspicions of an additional infringement of the Act. The company, *Assa AB*, subsequently went to the Market Court which held that the SCA did not have the authority to use previously mirrored material collected at a dawn raid relating to another alleged infringement to investigate a new possible infringement of the Act,<sup>9</sup> hence clarifying that fishing expeditions are not allowed.

### **Key issues in relation to investigation and decision-making procedures**

The SCA currently does not have any powers to impose fines on companies infringing the Act but must go to the SDC to request fines against undertakings that have infringed the competition rules. However, the Swedish government has appointed an inquiry in regard to the question of granting the SCA enhanced decision-making powers in the enforcement of antitrust and merger control rules.

One of the key issues investigated is whether the SCA should have the power to decide on these issues, with the possibility for the undertaking concerned to appeal the SCA's decision to the SDC and further to the Swedish Market Court. The proposed reform is believed to lead to a more efficient system, but could potentially also give rise to concerns in regard to legal certainty aspects, since the SCA would be granted double-edged roles as both prosecutor and judge, which is a novelty within the Swedish legal system.

The results of the inquiry will be published in May 2016.

### **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 infringement. 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, within a specified period, submit a complete notification. Unless the company with the marker fails to submit the outstanding information, another company cannot jump the queue for immunity.

To obtain immunity or reductions of fines, a company must satisfy certain conditions set out in Chapter 3, Articles 11 to 15 of the Act. The first company to provide the SCA with sufficient information of the existence of an infringement which the SCA can act on, 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 no evidence is destroyed, hinder the SCA's investigation in no other way and cease participation 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 in fines. Chapter 3, Article 13 of the Act provides that a company may benefit from a reduction of fines if the undertaking provides the SCA with information which 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, added value the information may contribute, and the company's cooperation throughout the investigation.

Undertaking	Maximum reduction of fines
1	50%
2	30%
3	20%
4	10%

### Administrative settlement of cases

Cartel settlement procedures in Sweden, in cases where the facts are uncontested and can be considered to be clear-cut infringements, the SCA may, in accordance with Chapter 3, Article 16 of the Act, 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 SDC within a year of written confirmation.

Worth noting is 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 bidding collusion cases.

### Third party complaints

Many cases are brought to the SCA by third parties. The SCA may *ex officio* open an investigation based on information from the public. Whether a tip-off leads to any further investigation 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, restraints on the capacity for investigations and resources available may influence whether an investigation is opened. Normally a decision whether a matter should be further investigated or written off will be made in 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

Chapter 3 Articles 5-11 contains the provisions applicable to civil penalties. The SCA has the burden to prove that the conditions under the Act for imposing a fine on an infringing undertaking are fulfilled. According to case law the standard of proof which the SCA will have to satisfy is high, but can to some extent be altered to take into consideration the seriousness of the infringement involved and fines sought in a particular case.

Like the Commission, the SCA has guidance on the setting of fines,<sup>10</sup> but may not fine an undertaking more than 10% of its group turnover during the previous financial year. The SCA tends to look at the turnover generated in a specific market where the infringement took place. When deciding the level of the fine, the SCA evaluates the gravity, and the duration of the infringement.

The base level of the fine is set by considering various factors such as the type of infringement, 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 a ring-leading role or relapse in anti-competitive 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%.

## Right of appeal against civil liability and penalties

In contrast to the Commission, it is the SDC that delivers the infringement judgment and not the SCA. The SCA rather acts as a prosecutor and will be heard in front of the court together with the investigated undertaking. If the decision of the SDC is appealed, the Market Court performs a full review of facts and substance, affecting both the legal assessment and possible sanctions.

As regards damages actions, general procedural rules for civil disputes apply to civil liability claims under the Act. The Swedish court system is organised in a three-tier structure: District Courts, regional Court of Appeal and the Supreme Court of Sweden. District Court judgments relating to private competition law matters can be appealed to the Courts of Appeal on points of fact and/or law. The Court of Appeal's ruling may be appealed to the Supreme Court, but permission is necessary for the case to be reviewed.

## Criminal sanctions

Breach of the competition rules is not a criminal offence in Sweden. However, a trading prohibition may be imposed on an individual in cases of particularly serious infringements. Chapter 2, Article 1 of the Act governs such prohibition. Only in situations where it is considered to be in the public interest and the individual has seriously failed to fulfil the obligations will the SCA seek a trading prohibition.

The consequence following a trading prohibition is a ban for the individual concerned for a period of three to ten years to run business operations or hold a senior position in a company. Furthermore, failure to abide by a trading prohibition 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 trading prohibition.

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 trading prohibition.<sup>11</sup>

## Cross-border issues

In situations where anti-competitive conduct may be subject to enforcement in multiple European jurisdictions, Regulation 1/2003 provides that the SCA and other European 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 surprise visits on the behalf of another NCA. It is not uncommon, for example, for the SCA to assist in an unannounced 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 Nordic countries exchange non-confidential information and information about cases of interest. Beside the Nordic Cooperation Agreement and the ECN, Sweden is also part of the International Competition Network and the Organisation for Economic Cooperation and Development.

## Developments in private enforcement of antitrust laws

It follows from Chapter 3, Article 25 of the Act that if an undertaking intentionally or negligently infringes the prohibition against anti-competitive agreements, the undertaking shall compensate any damage that is caused thereby.

The scope of those entitled to claim damages is not defined in the 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. Each claim was, however, 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 yet not been used in the field of competition law.

## Reform proposals

In 2015, the Ministry of Justice proposed a new legal order for patent, intellectual property and competition law cases to be tried by two specialised courts.

Currently, these cases are divided between administrative courts, public courts and specialised courts. As patent, intellectual property and competition law cases normally are complex and comprehensive in scope, the current system in which companies have to engage in several parallel proceedings in separate court orders, the risk of discrepancies in how the relevant legal provisions are applied, increases.

In the light of the above, many stakeholders have welcomed the proposal of a special court of first instance (Patents and Market Court) and a special court of second instance (Patents and Market Supreme Court). The aim is to create a more unified and concentrated judicial system. The legislative amendments are scheduled to enter into force on September 1, 2016.

## Endnotes

1. Chapter 2, Article 6.
2. KKVFS 2009:1.
3. *Lag (2010:1350) om uppgiftsskyldighet i fråga om marknads – och konkurrensförhållanden.*
4. *PEAB Sverige et al*, economical analysis, indicated a correlation between winning and losing public procurement bids. A tip-off from the public, paired with the analysis, gave the SCA reasonable grounds to perform a dawn raid. Similarly in *Brunswick Marine in Sweden AB et al* – the SCA claims that the companies' parallel behaviour (stopped delivering spare parts to Marinshopen), indicates that information was being leaked, and the fact that there was a trade association which enabled a common meeting ground for discussions between the parties, was enough reasonable grounds for the Stockholm District Court to allow the application of a dawn raid. In both of these cases, the SCA later on removed cause for further investigations.
5. Chapter 5, Section 3 of the Act provides that three cumulative conditions must be fulfilled in order for an application for a dawn raid to be granted: (i) there must be reason to believe that an infringement has taken place/is taking place; (ii) the undertaking has not complied with an obligation to produce information set forth by the SCA, or there is a risk of evidence being withheld or destroyed; and (iii) the measure must be proportional.
6. During the period of 2010-2014.
7. T 17299-14.
8. T 10057-14.
9. MD 2015:15.
10. Dnr 394/2009.
11. KKVFS 2012:2.

**Peter Forsberg****Tel: +46 76 000 00 80 / Email: [peter.forsberg@hannessnellman.com](mailto:peter.forsberg@hannessnellman.com)**

Peter Forsberg is partner and head of the Competition & Procurement practice group at Hannes Snellman in Stockholm. He advises Swedish and international companies on competition law and public procurement issues. In particular, he has solid experience of domestic and international merger control, competition law disputes and compliance work. He regularly represents clients in proceedings before national competition authorities as well as before the European Commission. He has recently been involved in matters in the following sectors: financial services, food & consumer products, forest products, pharmaceuticals and telecommunications.

**Xandra Carlsson****Tel: +46 76 000 00 12 / Email: [xandra.carlsson@hannessnellman.com](mailto:xandra.carlsson@hannessnellman.com)**

Xandra Carlsson is an associate at Hannes Snellman in Stockholm. She is specialised in EU and Swedish competition law and advises on all aspects of competition law.

## Hannes Snellman Attorneys Ltd

Kungsträdgårdsgatan 20, 111 47 Stockholm, Sweden

Tel: +46 760 000 000 / Fax: +46 8 679 85 11 / URL: <http://www.hannessnellman.com>

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