

# Swedish Competition Authority

## Code of Statutes



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### **The General Guidelines of the Swedish Competition Authority on trading prohibition in the event of infringements of the rules on competition**

**KKVFS 2010:1**

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(Only the Swedish version is authentic)

decided on 24 February 2010.

#### **Introduction**

1. The Swedish Competition Authority (Konkurrensverket) may, in accordance with Chapter 3, Article 24 of the Swedish Competition Act (2008:579) and Section 8 b of the Trading Prohibition Act (1986:436), in conjunction with cases concerning competition administrative fines according to Chapter 3, Article 5 of the Swedish Competition Act, bring proceedings concerning a trading prohibition or, without such proceedings being brought, apply for a trading prohibition.
2. The Swedish Competition Authority is empowered to apply for a trading prohibition when another competition authority within the European Union or the European Commission has considered the infringement of the rules on competition. This is possible if the infringement has effects in the Swedish market and the undertaking's operation may be deemed to be conducted in Sweden.
3. A person on whom a trading prohibition is imposed may not run business operations. Furthermore, according to Section 6 of the Trading Prohibition Act it is prohibited among other things to hold a senior position in an undertaking. Nor may such person, according to Section 7 of the Trading Prohibition Act, be employed by or have regular assignments from a closely related party or from the business operation where the person has previously failed to fulfil his or her obligations. A trading prohibition is issued for at least three years and at most ten years. A person who breaches a trading prohibition may be sentenced to imprisonment for at most two years.

4. In order for a trading prohibition to come into question, it is required that the matter involves a cartel. In these General Guidelines the concept of cartel includes undertakings in the same line of trade or production fixing selling prices, limiting or controlling production or share up markets.
5. In these General Guidelines the Competition Authority provides information about how the Authority interprets and applies Section 2 a, Section 3, first and third paragraphs and Section 4 of the Trading Prohibition Act.

### **Trading prohibition – Section 2 a, Section 3, first paragraph and Section 4**

#### *Section 2 a the Trading Prohibition Act*

*A trading prohibition may, if called for in the public interest, be issued against a person who in the capacity of a private business operator has seriously failed to fulfil his or her obligations in the business operation and thereby infringed the prohibition contained in Chapter 2, Article 1 of the Swedish Competition Act (2008:579) or in Article 81 of the EC Treaty<sup>1</sup>. However, this only applies if the infringement involved undertakings in the same line of trade or production fixing selling prices, limiting or controlling production or sharing up markets.*

#### *Section 3 the Trading Prohibition Act*

*When considering whether a trading prohibition is called for in the public interest, particular regard shall be taken to whether the breach was systematic or aimed at generating substantial gains, or if it involved or was likely to involve substantial harm or if the business operator has previously been sentenced for an offence in business operations. In cases referred to in Section 2 a, particular regard shall also be taken to whether the practice was likely to seriously prevent, restrict or distort competition.*

#### *Section 4 the Trading Prohibition Act*

*If the business operations were conducted by a legal person, a trading prohibition may be issued, subject to the preconditions prescribed in Sections 1 to 3, as regards  
a limited partnership: general partner,  
another trading partnership: partner,*

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<sup>1</sup> Now Article 101 of the Treaty on the Functioning of the European Union

*a limited liability company and insurance company: members and deputies of the board and managing director and vice managing director,*

*a limited banking company, savings bank and economic (co-operative) association: members and deputies of the board,*

*a European Economic Interest Grouping (EEIG) based in Sweden: managers,*

*a European company (SE) and European cooperative association based in Sweden: members and deputies of the administration, management or supervisory body and managing director and vice managing director,*

*provided: such person has committed the breach in the business operation or held his or her post when the payment of tax, customs or charges was neglected; the legal person was put into bankruptcy; or the prohibition contained in Chapter 2, Article 1 of the Swedish Competition Act (2008:579) or contained in Article 81 of the EC Treaty<sup>2</sup> was infringed.*

*The first paragraph also applies to a person who in some other capacity than referred to there has actually exercised the management of a business operation or has outwardly appeared to be responsible for a private business operation.*

*Subject to the preconditions prescribed by Section 2, a trading prohibition may also be issued to a person who held his or her position as referred to in the first paragraph later than one year before the bankruptcy petition was submitted to the district court.*

#### **Group of persons – Sections 2 a and 4**

6. A trading prohibition may be issued for the following persons:
  - a) private business operators, that is to say, natural persons who professionally conduct operations of an economic nature, regardless of whether or not the operation is oriented towards profit;
  - b) formal representatives of the legal persons as referred to in Section 4;
  - c) a person who has in purely practical terms exercised the management of a business operation or has outwardly appeared to be responsible for a private business operation. If several persons together have jointly exercised the actual management, they may all be subject to a trading prohibition.
  
7. An intermediate manager, regional manager, marketing manager or another who is only responsible for a particular part of the operation

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<sup>2</sup> Now Article 101 of the Treaty on the Functioning of the European Union

can consequently only have a trading prohibition imposed if he or she in actual fact exercised the management of the business operation as referred to in sub-clause 6 (c) above.

8. A trading prohibition may be imposed upon a representative of a trade association that is operated as an economic (co-operative) association. However, a trading prohibition may not be imposed on a representative of a trade association that is operated as a not-for-profit association. In these General Guidelines the concept of undertaking includes trade associations which are operated as an economic association
9. The fact that a person has left his or her post does not constitute an impediment to the Competition Authority bringing proceedings for a trading prohibition or applying for a trading prohibition.

**Seriously failed – Section 2 a**

10. The Competition Authority will, when considering whether a person has seriously failed to fulfil his or her obligations in business operations, take into consideration whether:
  - a) such person has personally participated in a cartel collaboration, or
  - b) such person has instructed co-workers in the organisation to participate in a cartel collaboration, or
  - c) such person has omitted to implement remedial measures, when it came to his or her notice that cartel collaboration occurs within the organisation.
11. As regards sub-clause 10 (c), it ought to be observed that if there have been flagrant inadequacies in monitoring, this may also mean that an omission to remedy irregularities that the person ought to have known about may be taken into account when considering the matter. In other cases it may also be observed that it is only infringements that took place after the person became aware of irregularities yet nonetheless did not take any remedial measures that will be held against such person when considering the matter.

**Called for in the public interest – Section 3, first paragraph**

12. Cartel collaboration involves systematic failure to observe the system of rules, and cartels often aim to produce substantial gains. Cartels entail or are likely to entail substantial harm.
13. In order for a prohibition to be deemed to be called for in the public interest, the matter should involve a rather long-standing cartel that was likely to seriously damage competition in the market. A cartel is

in any case deemed to be 'rather long-standing' when it has endured for four years.

14. The Competition Authority will adopt a more serious view on cases where the person has previously participated in infringements of the rules on competition or been sentenced for an offence in business operations.
15. The Competition Authority will, when assessing whether a prohibition is deemed to be called for in the public interest, also take into account what has taken place before 1 November 2008, when the rule on trading prohibition was introduced into the Swedish Competition Act.

### **Grant of immunity from a trading prohibition – Section 3, third paragraph**

#### *Section 3, third paragraph the Trading Prohibition Act*

*In cases referred to in Section 2 a, a trading prohibition shall not be deemed to be called for in the public interest if the person who may come into question for such a prohibition has personally, or within the framework of the business operation conducted, cooperated to a significant extent in facilitating the Swedish Competition Authority's investigation of the infringement. The same will apply for cooperation in investigations conducted by a competition authority in another Member State of the European Union or the Commission of the European Communities.*

16. The Competition Authority may grant immunity from a trading prohibition (trading prohibition immunity). This means that the Competition Authority will refrain from bringing proceedings or applying for a trading prohibition and that the person thereby avoids a trading prohibition. It is possible to obtain trading prohibition immunity in the following two situations:
  - a) the person has a position at an undertaking that has been granted immunity or reduction of the competition administrative fine, or
  - b) the person has personally cooperated to a significant extent in facilitating the Competition Authority's investigation of the infringement.
17. There are no restrictions on how many persons may be granted trading prohibition immunity for the same infringement. This means for instance that if one or more persons have already been granted trading prohibition immunity as a consequence of an undertaking having been granted immunity or reduction of the competition

administrative fine, this does not constitute an impediment to further persons who have participated in the cartel themselves applying for and being granted immunity from a trading prohibition. Trading prohibition immunity is granted in these cases subject to the precondition that the person satisfies the requirements for trading prohibition immunity referred to in these General Guidelines.

18. A person who, by a threat or pressure, has compelled other undertakings or persons to participate in the infringement may also be granted trading prohibition immunity. Trading prohibition immunity is granted in this case subject to the precondition that the undertaking where the person holds a post or the person him or herself satisfies the requirements for trading prohibition immunity referred to in these General Guidelines.

**Within the framework of the business operation – according to sub-clause 16 (a) above**

19. Persons who hold a position at an undertaking that is granted immunity from or reduction of a competition administrative fine will be granted trading prohibition immunity. This also applies if the immunity or reduction has been granted by another competition authority within the European Union or by the European Commission. Information about the preconditions for immunity or reduction for undertakings is contained in the Competition Authority's 'General Guidelines KKVFS 2009:2 on immunity from fines and reduction of fines'.
20. A person who holds a position at an undertaking that has been granted immunity or reduction of the competition administrative fine is automatically subject to the undertaking's application and does not need to make a personal application for trading prohibition immunity. If the undertaking is granted immunity or reduction, these persons are automatically granted trading prohibition immunity. The undertaking does not need to specify which persons it wishes to be covered by its application.
21. However, the Competition Authority may bring proceedings for a trading prohibition or apply for a trading prohibition if such person:
  - a) has actively opposed the undertaking where he or she holds a position, applying for immunity or the submission by the undertaking of information to the Competition Authority with the aim of obtaining immunity or reduction, or
  - b) has left his or her position and thereby is not subject to the undertaking's application for immunity.

**The person who has personally cooperated in the investigation – according to sub-clause 16 (b) above**

22. A person who has personally cooperated to a significant extent in facilitating the investigation of the infringement will be granted trading prohibition immunity. The same assessment is made regardless of whether or not such person is still employed by the undertaking that participated in the infringement. Trading prohibition immunity can also be granted if he or she has been summarily dismissed as a result of his or her participation in the cartel. The same applies if he or she has actively opposed his or her undertaking's application for immunity or the submission by the undertaking of information to the Competition Authority with the aim of obtaining immunity or reduction of the competition administrative fine.
23. The Competition Authority can also grant trading prohibition immunity to a person even if the undertaking has not been granted immunity from or reduction of the competition administrative fine.

***The person has facilitated the investigation to a significant extent***

24. A person who provides the Competition Authority with a sufficient information base to intervene against the infringement, that is to say, conduct an investigation according to Chapter 5, Articles 3 to 5 of the Swedish Competition Act (2008:579), shall be deemed to have facilitated the investigation to a significant extent provided that the requirements contained in Clauses 27 to 32 below are satisfied.
25. A person may be deemed to have facilitated the investigation to a significant extent also when the Competition Authority has a sufficient information base to intervene against the infringement. The requirement is that the person by his or her own volition has provided the Competition Authority with such evidence of the infringement that is of more value compared with evidence to which the Authority already had access and that the requirements contained in Clauses 27 to 32 below are satisfied. Such evidence shall help to establish the circumstances concerning the infringement. 'Evidence' means verbal information or written documents, for instance notes of meetings and minutes to which the person has access.
26. The requirement that the investigation must have been facilitated to a significant extent cannot be deemed to be satisfied by the person attending at the appointed time for questioning.

***The person provides all information regarding the infringement***

27. In order to be granted trading prohibition immunity, the person must provide the Competition Authority with all information about the

infringement to which he or she has access. This means that such person shall as far as possible state

- a) what the anti-competitive cooperation involves,
- b) which goods or services and which geographical area the cooperation covers,
- c) which undertakings have participated in the cooperation,
- d) when the cooperation was commenced and when, if it has been, concluded,
- e) which contacts have taken place between the undertakings that participated in the cooperation and the nature of these contacts,
- f) times at which the contacts between the undertakings have taken place,
- g) what the participating undertakings did to enable and implement the cooperation,
- h) which persons within the undertaking are probably able to provide information about the cooperation, and
- i) which persons in competing undertakings have participated in the cooperation.

*The person cooperates fully*

28. The person must cooperate on an on-going basis with the Competition Authority during the investigation of the infringement. This means that the person should be able to rapidly answer questions about the anti-competitive cooperation. The person shall also of his or her own volition and without delay provide such information and documents relating to the infringement that the person becomes aware of after the application has been made. This requirement for cooperation also relates to court proceedings.

*The person does not destroy evidence or hinder the investigation*

29. The person must not implement measures that hinder the investigation of the Competition Authority. The person must not disclose to anyone that the infringement has been reported to the Competition Authority before the infringement has become known through action taken by the Competition Authority. Nor may the person disclose the content of his or her report or the further information that such person provides to the Competition Authority during the on-going investigation of the infringement.
30. This requirement covers action taken both before and after the time when such person for the first time provided information about the infringement to the Competition Authority. Such person consequently has an obligation, already with effect as of the time when such person deliberates upon reporting the infringement, to ensure that evidence is not destroyed or that the investigation is in any other way hindered.

31. If the person intentionally or by negligence provides erroneous or misleading information to the Competition Authority, this may mean that the possibility of trading prohibition immunity lapses.

*The person stops his or her participation in the infringement*

32. In order to be granted immunity, it is required that the person has stopped his or her participation in the infringement or that such person as soon as possible after the report stops his or her participation. In those cases where the infringement is still in progress, the person ought to consult with the Competition Authority regarding how he or she should withdraw his or her participation in the infringement.

**The Competition Authority's processing of trading prohibition immunity**

33. The processing of trading prohibition immunity in conjunction with an undertaking being granted immunity or a reduction will be conducted within the framework of the processing of the undertaking's application for immunity or reduction. Information concerning immunity and reduction of a competition administrative fine is contained in the Competition Authority's 'General Guidelines KKVFS 2009:2. In these cases, no individual notice is given concerning trading prohibition immunity for officers of the undertaking. However, it is a precondition for trading prohibition immunity linked to immunity or reduction for the undertaking that Clause 21 above does not apply.
34. Clauses 35 to 43 below relates to the Competition Authority's processing when a person refers to the Authority to report an infringement and applies for trading prohibition immunity.

*Anonymous contacts*

35. The person can contact the Competition Authority anonymously and describe in hypothetical terms the infringement, his or her own status in the undertaking and any participation in the infringement. The Competition Authority's contact details are contained on the Competition Authority's website, [www.konkurrensverket.se](http://www.konkurrensverket.se).
36. In the case of anonymous contact, the person chooses which information is to be provided.
37. If the information is insufficient for the Competition Authority to be able to assess whether the person satisfies the preconditions for trading prohibition immunity contained in Section 3, third paragraph of the Trading Prohibition Act the Authority will notify such person accordingly. The person must thereafter decide whether he or she wishes to elaborate on the information he or she provided.

### ***Report of infringement***

38. A report may be made in writing or verbally. The Competition Authority's address and contact details are contained on the Competition Authority's website, [www.konkurrensverket.se](http://www.konkurrensverket.se).
39. If a report is made by a representative, a power of attorney must be provided as soon as possible.
40. The person must state in the report his or her contact details such as name, address and telephone number. The person should also state whether he or she has also made a report of the infringement to any other competition authority within the European Union or to the European Commission.

### ***Notice of conditional trading prohibition immunity***

41. The Competition Authority can, upon request by a person applying for trading prohibition immunity, before the Authority has a sufficient information base to intervene against the infringement according to Clause 24 above, give notice of conditional trading prohibition immunity.
42. Notice of conditional trading prohibition immunity means that the Competition Authority will not bring proceedings for a trading prohibition or apply for a trading prohibition against the person providing he or she satisfies the other conditions for trading prohibition immunity according to Clauses 27 to 32 above.

### ***Notice of trading prohibition immunity***

43. Notice of trading prohibition immunity will be given no later than in conjunction with the Competition Authority instituting proceedings for a competition administrative fine or instituting proceedings for, alternatively applying for, a trading prohibition against some other person than the one who is granted trading prohibition immunity. However, the requirement for the person to cooperate as regards the court proceedings will still continue; see Clause 28 above.

### **Other**

44. The consent of an undertaking to a fine order does not mean that the Competition Authority refrains from the right to bring proceedings concerning a trading prohibition or to apply for a trading prohibition.
45. In the event that the Competition Authority can no longer, owing to a time limit, bring proceedings for a competition administrative fine regarding the infringement of the competition rules, the Authority will not bring proceedings for a trading prohibition or apply for a trading prohibition.

46. The provisions of the Trading Prohibition Act regarding trading prohibition immunity do not entail any restriction on the Competition Authority's powers to, for reasons other than those referred to in the Act, refrain from bringing proceedings for a trading prohibition or applying for a trading prohibition.
47. These General Guidelines does not pre-empt the interpretation that courts may make concerning the provisions on trading prohibitions.
48. Certain details contained in the Competition Authority's investigations are subject to secrecy according to the Public Access to Information and Secrecy Act (2009:400). Secrecy may be imposed on investigations relating to trading prohibitions (Chapter 18, Section 1). Secrecy may be imposed regarding business secrets (Chapter 30, Section 1). Secrecy may also be imposed on a statement made by an individual (Chapter 30, Section 3). The parties in the matter are entitled to gain access to information subject to secrecy provided there are no extraordinary reasons against allowing such access (Chapter 10, Section 3).

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These General Guidelines apply from and including 1 April 2010.