

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

**INSTITUTIONAL AND PROCEDURAL ASPECTS OF THE RELATIONSHIP BETWEEN
COMPETITION AUTHORITIES AND COURTS, AND UPDATE ON DEVELOPMENTS IN
PROCEDURAL FAIRNESS AND TRANSPARENCY**

-- Sweden --

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The attached document is submitted to Working Party No.3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 18 October 2011.

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1. Describe the relationship between the courts and the competition authority in your jurisdiction

1.1. Introduction

1. Swedish competition law basically follows the same principles that apply within the EU. The Swedish Competition Act contains two main provisions: The prohibition of anti-competitive co-operation between undertakings¹ and the prohibition of abuse of a dominant position². These provisions are based on Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) respectively. The Competition Act also contains, inter alia, a prohibition against anti-competitive sales activities by public entities and rules on the control of concentrations. Such infringements are not criminalized, but at the request of the SCA the Stockholm City Court may impose disqualifications from exercising commercial activities on a person who exercises control of an undertaking that participates in cartel activities.³

2. The division of competences to take decisions and impose fines between the SCA and the courts can briefly be described as follows.

3. The SCA may require an undertaking to terminate an infringement of the prohibitions against anti-competitive co-operations between undertakings or abuse of a dominant position in the Competition Act or TFEU. The obligation imposed may be that the undertaking must stop applying a certain agreement, terms of agreement or some other prohibited practice. The order may also relate to an obligation concerning sales, rectification or prices. Such obligations take effect immediately unless other provisions are made, and are normally subject to the penalty of a fine. If particular grounds exist, the SCA may impose such an obligation for the period until a final decision is taken.⁴

4. The SCA is not entitled to decide on financial penalties for infringing competition rules. If an undertaking has, intentionally or negligently, infringed the prohibition against anti-competitive co-operations between undertakings or the prohibition against abuse of a dominant position, the SCA may request the Stockholm City Court to impose an administrative fine on that undertaking in a summons application.⁵ However, if the SCA considers that the material circumstances regarding an infringement are clear, it may issue a fine order in cases that are not contested. If an undertaking consents to a fine order within a specified time, the SCA may not institute proceedings against that undertaking. It is always up to the SCA to decide whether a fine order is considered appropriate in an individual case. A fine order that has been accepted is regarded to be a legally binding judgment, but it can under specific conditions be set aside upon appeal to the Stockholm City Court.⁶

5. The SCA may also institute proceedings at the Stockholm City Court to prohibit anti-competitive sales activities by public entities.⁷ Concentrations between undertakings can be prohibited by the

¹ Chapter 2, Article 1.

² Chapter 2, Article 7.

³ Chapter 3, Article 24, the Competition Act.

⁴ Chapter 3, Articles 1 and 3, and Chapter 6, Article 1, the Competition Act.

⁵ Chapter 3, Article 5, the Competition Act.

⁶ Chapter 3, Articles 16-19, the Competition Act.

⁷ Chapter 3, Articles 27-30, the Competition Act.

Stockholm City Court on the request of the SCA.⁸ Prohibitions are normally subject to the penalty of a fine.

6. If an undertaking that has allegedly infringed any of the prohibitions against anti-competitive co-operations between undertakings or abuse of a dominant position offers to make commitments, the SCA may decide that there are no longer grounds for action. Such decisions may cover a specific period. The SCA's decisions to accept commitments take effect immediately and are as a general rule subject to the penalty of a fine.⁹

7. Appeals against judgments and decisions of the Stockholm City Court relating to competition law issues may be lodged with the Market Court; which is a specialized court and the final instance when it comes to cases regarding competition and marketing law. A leave to appeal is always required for the Market Court to review the Stockholm City Court's rulings.¹⁰ The Market Court has so far only refused leave to appeal regarding various procedural matters. A leave to appeal is not required for the Market Court to review the SCA's decisions.

8. There is no possibility to appeal the SCA's decisions to not give priority to a case and close it. However, if the SCA has decided not to intervene against an alleged infringement, affected undertakings are entitled to institute proceedings before the Market Court.¹¹ Such subsidiary right to legal action does not exist if the SCA's decision to close a case is based on Article 13 of the Council regulation (EC) No 1/2003.¹²

1.2. Anti-competitive sales activities by public entities

9. When municipal authorities, county councils or the central government are engaged in business operations in a competitive market, this may result in competition being restricted. As mentioned above, the SCA may request the Stockholm City Court to prohibit through an injunction sales activities or conducts by public entities, if such activities or conducts, by object or effect, distorts or impedes competition. However, injunctions may not be imposed in relation to conducts that can be justified by public interest considerations or sales activities that are compatible with law. With regard to the central government only conducts and not sales activities as such may be prohibited. Prohibitions take effect immediately, unless decided otherwise, and may be imposed under penalty of a fine. If the SCA decides not to intervene, undertakings that are affected by the alleged anti-competitive sales activities may institute proceedings before the Stockholm City Court.¹³ The City Court's ruling may then be appealed to the Market Court.

10. For further discussion about the provisions regarding anti-competitive sales activities by public entities see, e.g. Sweden's contribution to the WP3 Discussion on corporate governance, SOEs and Competitive neutrality.¹⁴

⁸ Chapter 4, Article 1, the Competition Act.

⁹ Chapter 3, Article 4, and Chapter 6, Article 1, the Competition Act.

¹⁰ Chapter 8, Article 3, the Competition Act.

¹¹ With regard to infringements of the prohibition against anti-competitive sales activities by public entities such actions are brought before the Stockholm City Court, see Chapter 3, Article 32, the Competition Act.

¹² Chapter 3, Article 2, the Competition Act.

¹³ Chapter 3, Articles 27-32, and Chapter 6, Article 1, the Competition Act.

¹⁴ [DAF/COMP/WP3/WD\(2010\)12](#).

1.3. Concentrations between undertakings

11. The SCA shall be notified of a concentration if the aggregate annual turnover in Sweden of the undertakings concerned exceeds SEK 1 billion (approximately EUR 110 million) and at least two of the undertakings concerned have a turnover in Sweden that exceeds SEK 200 million (approximately EUR 22 million) for each of the undertakings. The SCA may request the Stockholm City Court to prohibit a concentration between undertakings when the concentration would seriously impede effective competition (SIEC-test) or would result in the total elimination of competition. If it is sufficient to eliminate the adverse effects of a concentration, a party to a concentration may, instead of being subject to a prohibition of the concentration, be required to divest an undertaking or a part of an undertaking, or to take some other measure having a favorable effect on competition. Such prohibitions are normally subject to the penalty of a fine.¹⁵

12. If an undertaking takes on voluntary commitments to eliminate the anti-competitive effects of the concentration, the SCA may decide to accept these commitments subject to the penalty of a fine.¹⁶

1.4. Imposition of fines

13. Actions for the imposition of fines pursuant to the provisions of the Competition Act may be brought by the SCA before any competent district court (normally where the defendant undertaking has its domicile). However, the Stockholm City Court is always competent to examine such cases, and the SCA has so far never instituted proceedings elsewhere.¹⁷

2. Summarize the procedures applicable to public and private competition cases before the courts in your jurisdiction

2.1. Public competition cases

14. During an investigation, the SCA may require undertakings or other parties to supply necessary information, documents or other material and persons to appear at a hearing. Such obligations may ultimately be imposed under penalty of a fine.¹⁸

15. The SCA may conduct inspections at the premises of undertakings to establish whether they have infringed the prohibitions on anti-competitive co-operations between undertakings and abuse of a dominant position.¹⁹ Such inspections may also under certain conditions refer to homes and other premises of the board and employees of the undertaking which is subject to investigation. Permission must always be granted by the Stockholm City Court.²⁰

16. Public competition cases, i.e. cases where the SCA is a party, are not amenable to out of court settlement. However, as mentioned above undertakings can make commitments. Discussions regarding commitments normally take place before a case is taken to court. Undertakings can also accept fine orders issued by the SCA. It is quite common that cases are settled as just described. The parties' incentive to

¹⁵ Chapter 4, Articles 1-3, and Chapter 6, Article 1, the Competition Act.

¹⁶ Chapter 4, Articles 4-5, and Chapter 6, Article 1, the Competition Act.

¹⁷ Chapter 6, Article 2, the Competition Act.

¹⁸ Chapter 5, Articles 1-2, and Chapter 6, Article 1, the Competition Act.

¹⁹ Chapter 2, Articles 1 and 7, the Competition Act, and Articles 101 and 102 TFEU.

²⁰ Chapter 5, Articles 3-13, the Competition Act.

make commitments or accept fine orders may be to avoid the costs, the uncertainty and the presumptive negative publicity of a procedure before court. It is always up to the SCA to decide in each individual case whether it considers it appropriate to accept a commitment or a fine order. Under certain conditions undertakings that acknowledge their involvement in an illicit cartel may also be granted leniency or reduction of administrative fine.²¹

17. Parties in public competition cases have more extensive rights to invoke new evidence – both documentary and oral – and new circumstances, than in most other civil cases. The SCA always has the option to close a case before it is taken to court and thereafter to withdraw its action. If the SCA decides to withdraw its action or loses a case, the defendant may have its litigation costs reimbursed. The SCA on the other hand may only have its litigation costs reimbursed if a party intentionally or negligently has occasioned unnecessary litigation.²²

2.2. Private competition cases

18. Any anti-competitive agreements or provisions included in such agreements are void.²³ Civil cases regarding nullity are tried by a district court in the first instance.

19. If an undertaking intentionally or negligently infringes any of the prohibitions on anti-competitive co-operations between undertakings or abuse of a dominant position, the undertaking shall compensate the damage that is caused thereby. A party that has been adversely affected by such an infringement may institute an action for damages before a competent district court. The Stockholm City Court is always competent to examine cases relating to such damages.²⁴

20. Nullity and damages cases are amenable to out of court settlement. Appeals in such cases may be lodged with a competent court of appeals where a leave to appeal is required. There are limited possibilities to invoke new evidence and circumstances before the court of appeals. The court of appeals' ruling may be appealed to the Supreme Court, where the terms for leave to appeal are very strict.

21. However, if an action for damages is dealt with alongside an action regarding an administrative fine²⁵, appeals against the judgment of the Stockholm City Court are lodged with The Market Court. Otherwise the Market Court does not have competence over competition law damages cases.

22. According to the Arbitration Act, arbitrators may also rule on the civil law effects of competition law as between the parties, e.g. damages relating to infringements of the Competition Act or the nullity of anti-competitive agreements.²⁶

2.3. Different court hierarchies

23. As described above, competition cases are generally handled by the Stockholm City Court as the first instance. Cases regarding administrative fines are handled by the Market Court as the second and final

²¹ Chapter 3, Articles 12-15, the Competition Act.

²² Chapter 8, Articles 15-17, the Competition Act.

²³ Chapter 2, Article 6, the Competition Act.

²⁴ Chapter 3, Articles 25-26, the Competition Act.

²⁵ Chapter 8, Article 7, the Competition Act. A case concerning damages has so far never been jointly processed with a case concerning administrative fine.

²⁶ Article 1, the Arbitration Act.

instance whereas cases regarding nullity and damages are handled by a court of appeals in the second instance, and then ultimately by the Supreme Court. Theoretically, these different court hierarchies could lead to conflicting case law regarding certain aspects of competition cases and it has been of some debate whether the current court hierarchy is optimal. However, the risk for conflicting case law is reduced by the fact that Swedish competition law is based on EU law and follows the same principles that apply within the EU. Furthermore, the Supreme Court has so far only tried a few cases relating to competition law, mainly concerning the nullity of anti-competitive agreements and what constitutes a dominant position on a relevant market.²⁷

3. Update on recent developments relating to procedural fairness and transparency in your jurisdiction

3.1. Introduction

24. The general Swedish legislation on public access to official documents provides an extensive right of access to documents for the public at large, and an even more extensive right of access to file for parties in e.g. competition cases. However, access to official documents is not unlimited. Firstly, there is no right of access to documents that are internal memoranda, in a preparatory stage etc.²⁸ Secondly, there is no right of access to information which is secret according to the Public Access to Information and Secrecy Act.

25. For a further general discussion regarding procedural fairness and transparency in Sweden, see e.g. Sweden's contribution to the WP3 roundtable on procedural fairness: Transparency issues in civil and administrative proceedings.²⁹

3.2. Prohibitions to disclose information

3.2.1. Cases before the SCA

26. It follows from the Administrative Act that a party in a case before the SCA is in principle entitled to see all information in the case.³⁰ It is only under extraordinary circumstances that the SCA can keep information in a case secret from a party, and such information cannot then be invoked as evidence before a court.³¹ However, if information that is subject to secrecy, e.g. business secrets, is provided to a party, the SCA may make a reservation when the information is provided.³² Such reservations normally include provisions regarding which persons may take part of the information and for what purpose (normally to defend the party's right in the case) and about how the documents shall be kept and that they must be destroyed when a case is finally settled.

27. Third persons may also receive information subject to reservations, e.g. for research purposes. The same rules apply.

²⁷ See e.g. case T 2808-05, judgment of 19 February 2008 (NJA 2008 s. 120) and case T 2280-02, judgment of 23 December 2004 (NJA 2004 s. 804).

²⁸ Chapter 2, Article 9, the Freedom of the Press Act.

²⁹ DAF/COMP/WP3/WD ((2010)12.

³⁰ Article 16.

³¹ Chapter 10, Article 3, the Public Access to Information and Secrecy Act.

³² Chapter 10, Article 4, the Public Access to Information and Secrecy Act.

28. A person who discloses or makes use of information in violation of a reservation under the Public Access to Information and Secrecy Act may be subject to a fine or ultimately one year in prison for breach of confidentiality which is criminalized in the Penal Code.³³

29. A person who requests to obtain an official document need not be satisfied with receiving the document subject to a reservation, but can appeal and have the reservation considered by a superior instance.

3.2.2. *Cases before courts*

30. According to fundamental procedural legal principles parties have a right to take part of all information that is of relevance to a court's ruling. This right is absolute and includes confidential information such as business secrets.

31. It follows from the Code of Judicial Procedure that court hearings are public. However, if it is probable that information which is secret according to the Public Access to Information and Secrecy Act will be disclosed during a hearing and the court finds it to be of extraordinary importance that the information is not revealed, part of the hearing may be held behind closed doors.³⁴ This is not unusual for competition cases where business secrets are often revealed. If confidential information is provided behind closed doors, the court may direct that the information must not be disclosed. Violations are not criminalized according to the Penal Code but are subject to a fine according to the Code of Judicial Procedure.³⁵

3.3. *Current practical issues*

3.3.1. *Parties access to file and reservations*

32. When the SCA investigates a concentration, the parties to the concentration are normally required to supply information about various business secrets. As mentioned above parties have a right to access to file, but during the early stages of an investigation the SCA has a rather wide margin of keeping information secret from parties.³⁶ As mentioned above, the SCA also has the option to provide information subject to reservations. When the SCA sends a statement of objections to a party, all relevant material from the file is generally enclosed.

33. If the SCA makes a summons application to the Stockholm City Court to prohibit a concentration, the supportive evidence normally include business secrets, such as sales margins, regarding the defending parties. In order to meet these parties right to defense, they will have right of access to all information that can reasonably be of relevance to the court's ruling. For these situations there is an obvious need for the court to be able to provide confidential information with reservations such as prohibitions to disclose the information. Even though concentration cases normally contain the most sensitive information, business secrets may sometimes be invoked as evidence in cartel or abuse of dominant position cases as well. However, it is being debated whether a court's prohibition to disclose confidential information etc. is compatible with fundamental principles of the Code of Judicial Procedure and the Supreme Court's case law.

³³ Chapter 20, Article 3.

³⁴ Chapter 5, Articles 1 and 4, the Code of Judicial Procedure.

³⁵ Chapter 9, Article 6.

³⁶ Chapter 17, Article 3, and Chapter 30, Articles 1-3, the Public Access to Information and Secrecy Act.

34. The Department of Justice is currently investigating if an amendment to the Access to Information and Secrecy Act should be made according to which such reservations are expressly allowed.³⁷ The SCA follows this development with interest.

35. The SCA is currently having internal discussions regarding alternative ways of minimizing harmful effects on competition from business secrets being revealed to the parties when a concentration case is being handled at court. One option that is being considered is that the SCA should only invoke an analysis of the economic data as evidence and then provide the underlying economic information concerning e.g. sales margins to the parties with reservations. Another option is to provide a data room at the SCA where the parties can examine the underlying information.³⁸

36. Administrative competition cases are not amenable to out of court settlement and the SCA has the burden of proof. However, if the parties' objections to the SCA's economic analysis only concern the argumentation and not the underlying data, the courts should be able to rely on such analysis without access to that data.

3.3.2. *Subsidiary right of action and access to evidence*

37. As already mentioned, the SCA may require undertakings or other parties to supply necessary information, documents or other material and persons to appear at a hearing.³⁹ The SCA can therefore generally get access to all relevant information before it decides whether to intervene or not against an alleged infringement of the Competition Act. The addressee of an obligation is normally required to indicate which information, if any, is considered confidential.

38. As mentioned above, if the SCA decides to not give priority to a case or closes it without further action an undertaking that is affected by an alleged infringement is entitled to institute proceedings before the Market Court.⁴⁰ Since this is not considered as an appeal against the SCA's decision, the SCA's file is not provided to the Market Court. Also, the affected undertaking is normally not considered a party during the proceedings at the SCA and therefore does not have access to the file. Even though everyone in Sweden has an extensive right of access to official documents, sensitive business information relating to an undertaking that has been under an investigation will generally be kept secret. Furthermore, the SCA's internal memoranda etc. are not considered official documents.

39. During the proceedings at the Market Court the plaintiff may request that the court order the dominant undertaking to provide documentary evidence, but information about business secrets must only be provided if there is extraordinary reason for it.⁴¹ In many cases, the plaintiff will therefore not have access to all relevant economic information concerning the dominant undertaking. This sometimes raises interesting questions.

40. For example, the SCA may close a case after performing an economic analysis, e.g. an "as efficient competitor test" analysis, based on all relevant information regarding a dominant undertaking. That analysis will generally be considered as such internal material that neither the dominant undertaking nor the complainant has a right to take part of. The economic data that the analysis is based on are

³⁷ See e.g. SOU 2010:14 Partsinsyn enligt rättegångsbalken.

³⁸ See also DG Competition Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU, para. 85

³⁹ Chapter 5, Article 1, the Competition Act.

⁴⁰ Chapter 3, Article 2, the Competition Act.

⁴¹ Chapter 36, Article 6, and Chapter 38, Article 2, the Code of Judicial Procedure.

generally considered as official documents but will normally not be disclosed since it contains business secrets. If the plaintiff does not request the Market Court to order the dominant undertaking to provide the economic data, or if the Court dismisses such a request, neither the plaintiff nor the Court will have access to that specific data. Furthermore, the dominant undertaking, may not find it worth to reveal its business secrets in order to defend itself from the accusation of abuse. The Market Court would then have to settle the case without having access to all the relevant economic information as the SCA had.

41. If this situation arises in the future, the SCA will consider submitting a written observation to the Market Court according to Article 15.3 of the Council regulation (EC) No 1/2003.