

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

**ROUNDTABLE ON THE QUANTIFICATION OF HARM TO COMPETITION BY NATIONAL
COURTS AND COMPETITION AGENCIES**

-- Note by the Delegation of Sweden --

This note is submitted by the delegation of Sweden to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 16 February 2011.

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ROUNDTABLE ON THE QUANTIFICATION OF HARM TO COMPETITION BY NATIONAL COURTS AND COMPETITION AGENCIES

Quantification of Harm in Swedish Cartel Cases

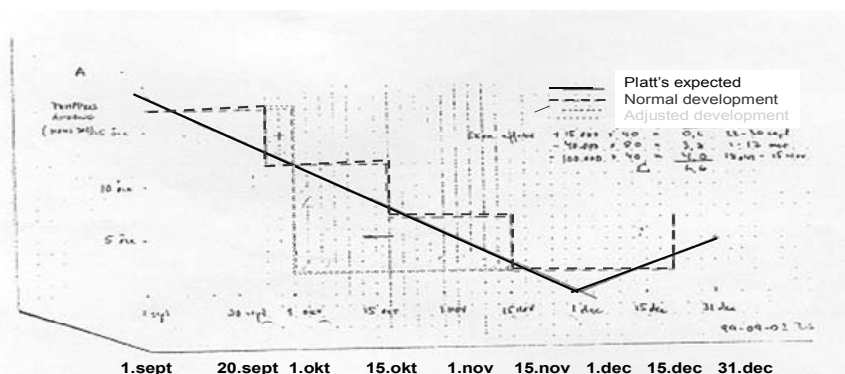
-- Note by Sweden --

1. The Swedish Competition Authority (SCA) is not legally required to quantify the harm to competition in competition law cases. We typically consider cartel cases to be restrictions by object where the harmful effects can be presumed. Our experience however is that in all major cartel cases we bring to court, we are faced with claims from parties that the alleged cartel did not raise prices. We will in the following describe the quantifications done in the three major cartel cases we have brought to court, the petrol cartel case, the asphalt cartel case and the Volvo car dealer cartel case. We will also describe the strategies used by the SCA in order to refute the claims of the parties.

2. The SCA has to apply to the Stockholm City Court for a company to be fined and forced to pay an administrative fine. The judgement of the Stockholm City Court may be appealed to the Market Court which is the final court. In competition law cases, both courts consist of at least two judges and two economic experts. The economic experts come from academia or the business sector. Some are trained in microeconomics but few have knowledge of econometrics.

1. The petrol cartel case

3. In the autumn of 1999, representatives of the five largest oil companies in Sweden (Statoil, OKQ8, Shell, Preem and Hydro) held secret meetings, ostensibly to discuss collaboration on environmental matters. Instead, they colluded on a rebate adjustment. They cut the rebates on fidelity cards while at the same time lowering the announced price at the pump. In letters to customers, the companies claimed that the net effect would be zero. The plan was however to return to the normal price after a while as illustrated in the figure below found at one of the firms premises.



4. In December 1999, the SCA visited the companies' offices unannounced, in "dawn raids", in order to secure evidence. As a result of its investigation, the SCA called on the Stockholm City Court to impose administrative fines on the five companies. The court's ruling in December 2002 with fines of SEK

52 million was appealed by both the SCA and the five companies to the Market Court. The Market Court reached a decision in February 2005 with fines of SEK 112 million.

1.1 *The SEK 500 million money transfer*

5. The petrol cartel differs from classic cartels in some aspects. First, the meetings were held over a short time period (three months). Secondly, the visible price change was downward. However, the negative effects of the coordinated rebate adjustment could last a long time. Rebate adjustments on the Swedish petrol market typically take place every five years. In order to illustrate the size of the money transfer from customers to the oil companies, the SCA calculated that, given that the announced price at the pump returned to the normal one month after the rebate adjustment, the customers would lose SEK 500 million over the following five years. This figure was mainly used in speeches and press. It was officially taken out of the SCA's claims early on in the court process, but may have triggered the arms race of economics.

1.2 *The (near) return to normal price*

6. The announced price at the pump was lowered by SEK 0.15 at the same time as the rebate adjustment was made. The SCA claimed that the price returned to the normal price after the rebate adjustment. The SCA hired two external economic experts to give expert reports on the pricing on the Swedish petrol market. Shell hired one external economic expert to perform a similar analysis, Hydro hired another external economic expert to perform a similar analysis and Statoil, OKQ8, Preem and Hydro hired jointly two external economic experts to criticise the works of the SCA's external economic experts. Daily data on costs and prices was easily available and shared between the experts. Almost all of the variation in the price was found to be determined by the spot price, the exchange rate and the tax rate. The explanatory value in the regressions was well over 99%. After several rounds of reports, the experts' analyses nearly converged with one showing a full return of SEK 0.15 and two rejecting a full return of SEK 0.15 and arriving at a return of SEK 0.12-0.13.

1.3 *The courts' assessment of the effect analyses*

7. The Stockholm City Court basically denounced the value of all of the econometric studies (and the theory of econometrics) by stating in the verdict that it is not possible to observe a "normal price" and determine which factors influence the price.

8. The Market Court did not comment on the econometric studies in its verdict.

1.4 *Conclusion*

9. In hindsight, the decision of the SCA to present the calculation of customer loss shifted the focus in the court process away from the infringement. On the other hand, it is hard to see that the parties gained much from the use of econometric studies.

2. *The asphalt cartel case*

10. The cartel was detected in the autumn of 2001 when three persons who had previously been employed at one of the companies contacted the SCA and reported that unlawful collusion was taking place between several companies in the asphalt surfacing industry. On 21 March 2003, the SCA applied for a summons against eleven companies, later changed to nine companies. The companies were suspected of having divided up the market between them and of having agreed on prices, at least since 1993. The SCA demanded that the companies be given administrative fines totalling SEK 1.6 billion, later reduced to 1.2 billion. Nine municipalities sued the companies for damages.

11. In 2007, the Stockholm City Court ordered nine asphalt companies to pay more than SEK 500 million in administrative fines. Some parties appealed to the Market Court.

12. In 2009, the Market Court ruled in favour of the SCA and found the companies in the asphalt cartel guilty of anti-competitive behaviour. The Market Court imposed the heaviest fines ever in a cartel case in Sweden. The Market Court increased the original fine imposed on one firm by SEK 50 million to SEK 200 million.

2.1 *The economic reports commissioned by NCC*

13. NCC hired one external economic expert to perform a statistical analysis of the bids in the public procurements by the Swedish Road Administration. The expert found no statistically significant difference in winning bids in allegedly cartelised public procurements compared to the winning bids in the control group (of which we had no information regarding cartel behaviour).

14. NCC also hired a consultancy firm to analyse the economic effects of the alleged cartel in the municipalities that had sued NCC for damages. The latter report was meant to be used both in the court process against the SCA and in the damages proceedings. The consultancy firm looked at international price and profitability comparisons and concluded that the price level and the profitability in Sweden were low, something they saw as indicating that the alleged cartel did not have any economic effects. The consultancy firm then used three methods in order to analyse the economic effects of the alleged cartel. First they compared the price during the duration of the cartel with the price after the cartel had been disclosed. Secondly they compared prices in municipalities where the cartel allegedly operated with the price in municipalities where there was no claim of cartel presence. Thirdly they calculated the contribution margin during and after the duration of the cartel. They reported no statistically significant effects of the alleged cartel.

2.2 *The request for data*

15. The reports of the consultancy firm and the external economic expert were presented after the court proceedings had been initiated. They did not disclose the data. The SCA asked NCC for the data that the consultancy firm and the external economic expert used. NCC claimed that they did not have the data and when the SCA asked the consultancy firm and the external economic expert for the data they referred the question to NCC. The SCA also tried to get the Stockholm City Court to issue a court order forcing the consultancy firm and the external economic expert to submit the data. The Stockholm City Court did however not rule in favour of the SCA. As no data was disclosed, the SCA was not able to check and replicate the analyses.

2.3 *The strategy of the SCA*

16. The SCA argued that there is no need to prove any actual effects of hard core cartels as the effects are presumed when the object of the cartel is to distort competition. In court, the SCA cross-examined NCC's economic experts. Questions were asked to show that the reports contained faults and that some conclusions were not based on the findings of the report. The SCA further questioned the methodology used by the experts in order to show the court that there were problems.

2.4 *The courts' assessment of the effect analyses*

17. The Stockholm City Court did not comment on the analysis of the external economic expert and the consultancy firm. They did however state that the SCA had not proven that the cartel had raised prices.

18. The Market Court, on the other hand, commented on the economic studies. They first stated that the international price and profitability comparisons made by the consultancy firm were hard to interpret due to methodological problems. The Market Court went on to state that the consultancy firm's other methods and the external economic expert's econometric studies were all based on comparisons between two categories of public procurements, those that are allegedly cartelised and those that are not. Since the spread in bids was high and the number of observations low, one must have very large price differences to get statistically significant results. A further problem was that there may be cartelised public procurements in the control group. According to the Market Court, the economic reports could therefore not be accorded significant importance when assessing cartel cooperation and the effects thereof.

2.5 Conclusion

19. NCC was not helped by the economic experts showing that the cartel had no statistically significant price-raising effect. The Market Court's findings on the economic reports can however not be generalised to say that there is no value in such evidence. The findings of the Market Court were rather that the specific economic reports in the case were of poor quality. We do not know which value the report of the consultancy firm had in the damages cases, which have subsequently been settled, between the nine municipalities and the asphalt companies. The municipalities sued the companies for damages of SEK 57 million and reached a settlement of SEK 35.5 million.

3. The Volvo car dealer cartel case

20. In 2002, a dealer in Volvo and Renault cars sent an e-mail to seven competitors. He suggested in the message that they should add SEK 3 000 to Volvo's recommended price "as usual". When this was brought to the attention of the SCA, unannounced visits "dawn raids" were made to the dealers' premises to secure evidence. The dealers had, for instance, met regularly in the 'Skåne Group', a local group within the Volvo Car Dealers' Association. Both at such meetings and in e-mail exchanges, the dealers had concluded agreements on prices (part of price) and discounts.

21. The SCA argued in the Stockholm City Court that the eight dealers had engaged in price collusion, which is prohibited under the Swedish Competition Act and Article 81 of the EC Treaty. The Stockholm City Court did not agree with the SCA. They concluded that there was an agreement that had as its object the restriction of competition but that this restriction of competition did not satisfy the criterion of "appreciable extent". The SCA appealed the ruling. In 2008, the Market Court agreed with the SCA and the dealers were ordered to pay fines of over SEK 21 million in total.

3.1 The economic reports commissioned by Bilia

22. Bilia hired two external economic experts to perform a theoretical analysis of the car dealer market. They wrote a report with a theoretical model showing that dealer collusion would not hurt consumers as long as the producer accepts the fact that dealers are colluding. Bilia also hired two external economic experts to perform an econometric analysis in order to see if the alleged collusion had any price-raising effects. They produced a report showing that there was no statistically significant difference in prices and margins at Bilia's dealership in the allegedly cartelised region compared to prices and margins at Bilia's dealership in another region.

3.2 Why the SCA lost in the Stockholm city court

23. A cartel among dealers of the same brand is not a classical cartel. First, there is still the inter-brand competition between cars of different brands. Secondly, car dealers are subject to vertical restraints by the manufacturers. Both these aspects were brought forward by the parties. The court was not convinced that collusion and market sharing between retail companies should not be allowed, even when they sell the

same brands. Further, the court found that the SCA had not proven that the relevant geographical market for car-selling is regional rather than national. The court noted that on a national basis the market shares of the parties were only three per cent.

3.3 *What the SCA did to win in the Market Court*

24. The SCA presented new analyses supporting the market delineation. The SCA hired economic experts to refute the claims by the parties on the lack of intra-brand competition and the effects of the vertical restraints. In this note we will not elaborate on all aspects but focus on the claim of no price-raising effect. The SCA hired an external economic expert to scrutinise the econometric analysis presented by Bilia's economic experts. He noted several peculiarities and reasons to question the results. Since neither he nor the SCA had access to the data used in the analysis, he could not replicate the results. The SCA handed in the external economic expert's comments in the appeal and Bilia asked their experts to respond. They produced a report which took care of most of the comments. This new report still showed a lack of statistically significant difference in prices and margins at Bilia's dealership in the allegedly cartelised region compared to prices and margins at Bilia's dealership in another region.

25. The SCA's focus in the Market Court process was to show that the dealers used to compete with each other and that a cartel between dealers of the same brand would reduce that competition. The SCA argued that a cartel is a restriction by object and there is no need to show a price effect.

3.4 *The courts' assessment of the effect analysis*

26. The Stockholm City Court stated in its decision that the econometric analysis indicated that there was no effect of the agreement.

27. The Market Court stated on the other hand that the empirical evidence in itself gave some support for the claim that there was no effect on pricing, but that this did not affect the court's assessment.

3.5 *Conclusion*

28. Six of the eight companies were required to pay the fines the SCA called for¹. This would indicate that showing a no-effects result did not help in reducing the fine in this case.

4. *Concluding remarks*

29. Even though the SCA is not required by law to quantify the harm to competition in competition law cases, such quantifications (showing that the cartel had no statistically significant price-raising effect) have been presented by the parties. In those cases, the SCA faces severe data disclosure problems. Whereas the SCA is legally obliged to give access to its files and has a policy to disclose the data used in analyses, the parties and their economic experts are not obliged to disclose the data used.

30. On the basis of these three cases, it is difficult to draw a firm conclusion that the parties do not gain by presenting quantifications showing that the cartel had no statistically significant price-raising effect. There are however clear indications in that direction in the Market Courts' judgements in the asphalt cartel case and the Volvo car dealer cartel case.

¹ Bilia got a reduced fine due to the fact that the SCA's original claim was based on Bilia's national turnover rather than the turnover on the relevant market.