



Tougher Stance on Cartels in New Swedish Competition Act

A new Swedish Competition Act entered into force on 1 November 2008. The new legislation means further harmonisation with EC competition rules and it also introduces a number of new features in order to enhance cartel enforcement. One of the new features is the introduction of disqualification orders. The rules regarding fines have become both clearer and stricter in an aim to enhance legal certainty. Furthermore, it is now possible for companies to enter into settlement agreements with the Swedish Competition Authority (the "NCA"). As regards merger control, the rules are harmonised with the EC merger regulation through the introduction of the SIEC test. In addition, new turnover thresholds have been implemented. Helene Andersson and Elisabeth Legnerfält, lawyers at Advokatfirman Delphi in Stockholm have summarised the most important developments.

1. Short Background to the New Swedish Competition Act

The Swedish competition rules mirror the rules in Articles 81 and 82 EC and were implemented in Sweden in connection with Sweden's accession to the EEA 16 years ago through the adoption of the Competition Act (1993:20).¹ The Competition Act also introduced provisions on merger control and damages for competition law infringements.

Since 2001 the competition authorities in Sweden, i.e. the NCA, the Stockholm District Court (Sw: "Stockholms tingsrätt") and the Market Court (Sw: "Marknadsdomstolen") may apply Articles 81 and 82 EC. In line with the Modernisation, the possibility of applying for negative clearance or an exemption under the Swedish competition rules was abolished in July 2004.

After more than 15 years of application of the old act, a new Competition Act (2008:579) was adopted in November last year, main-

taining the material rules of the old act, but introducing tougher sanctions for competition law infringements.²

2. The structure of the New Competition Act

In Chapter 1 of the new Competition Act the aims of the Act are stated; i.e. to remove and prevent obstacles to free competition as regards production of and trade with goods, services and other utilities. As stated in the preparatory works³ the aim of the Competition Act is, as previously, to protect the public economy and consumers. The rules on damages also aim at protecting competitors. In Chapter 2 the prohibitions are found; i.e. the prohibition against anti-competitive agreements (Chapter 2, Section 1) and abuse of dominant position (Chapter 2, Section 7). The equivalent to Article 81(3) is found in Chapter 2, Section 2. One new feature is that the Swedish block exemptions are listed (Chapter 2, Section 3) and that these are found in separate acts and not as previously in regulations. The equivalent to Article 81(2) is found in Chapter 2, Section 6. Chapter 3 regulates actions against competition law infringements. These are prohibition decisions (Chapter 3, Sections 1-3), undertakings (Chapter 3, Section 4), fines (Chapter 3, Sections 5-11), disqualification orders (Chapter 3, Section 24) and damages (Chapter 3, Sections 25-26). Chapter 3 also regulates leniency (Chapter 3, Sections 12-15), and settlement of fines (Chapter 3, Sections 16-19). Chapter 4 provides for the rules on merger control whereas Chapter 5 regulates handling of competition law cases. In Chapter 6 the rules on penalty under a fine are provided and in Chapter 7 appeals. The rules regarding court procedures are found in Chapter 8.

3. A More Effective Cartel Enforcement – the News in the Swedish Competition Act in Brief

3.1 New Rules on the Method of Setting Fines

The rules regarding determination of fines are now more precise than previously, as they provide more detailed instructions on the circumstances which are to be taken into consideration when determining the size of the fine. Both courts and parties are hereby enabled to identify more easily which infringements that are considered particularly serious and thus merit higher fines. It is acknowledged that a harmonisation in line with the EC rules will lead to increased legal certainty. However, although the rules on the setting of fines are brought closer to their EC equivalents, they are in no way a blue print of the Commission Guidelines.⁴

Just as under the EC rules, the first step is to determine a basic amount (the sanction value). However, unlike under the EC rules where the basic amount is related to a proportion of the value of sales, Swedish enforcement agencies are only to look at the gravity and the duration of the infringement. When considering the gravity of the infringement the following circumstances shall in particular be taken into consideration: the nature of the infringement; the scope of the market and its importance and the actual or potential effect of the infringement on the competition on the market. Thereafter the amount shall be adjusted upwards or downwards taking into consideration aggravating or mitigating circumstances. An aggravating circumstance is inter alia if the company in question has encouraged other companies to participate in the cartel or if the company has been the ring-leader. If the company's participation in the cartel has been limited, this is seen as a mitigating circumstance

¹ Sw. Konkurrenslag (1993:20).

² Sw. Konkurrenslag (2008:579)

³ Prop. 2007/08:135 p. 67.

⁴ Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, Official Journal C 210, 1.09.2006, p. 2-5

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In addition to circumstances that relate to the infringement, the following shall also be taken into consideration: if the undertaking has previously been found guilty of infringing Swedish or EC competition rules; the economic situation of the undertaking and if it quickly ceased the infringement once the infringement was drawn to the attention of the NCA. It should be stressed that in line with the Commission's Guidelines, a quick termination may not lead to a lower fine for undertakings which have taken part in particularly serious infringements. It should further be underlined that the circumstances stated are examples and that the lists are in no way exhaustive. The maximum fine is still limited to ten percent of the turnover of the undertaking in question. Thus, contrary to the EC rules, the turnover of the whole group of companies is not taken into consideration but only the turnover of the infringing undertaking.

We consider it positive that the Swedish rules regarding fines are brought closer to the EC rules so that, to a larger extent than previously, it is possible to seek guidance in the case law of the Community Courts and the Commission's Guidelines. This in particular since the number of cartel cases which have been brought before Swedish courts is very limited. The case law regarding abuse of dominance is even more limited. There is also the fact that we do not anticipate the number of proceedings to increase in the near future, especially since the new Competition Act introduces an obligation to obtain leave to appeal to the Market Court. It may be noted that a record fine of SEK 500 million (approximately € 50 million) was recently imposed by the Market Court upon a Swedish asphalt-cartel for price-fixing, market sharing and bid rigging.⁵ The fines were however determined under the old Competition Act.

3.2 Clearer Circumstances for Leniency

Leniency provisions are another area where the Swedish rules are harmonised with the EC rules. In the new Competition Act, is the leniency provisions are brought in line with

the ECN Model Leniency Programme.⁶ Full immunity is only possible in relation to cartels and not to abuse of a dominant position, which was actually a possibility under the old Competition Act. Only one undertaking will qualify for full immunity. If an undertaking reports an infringement to the NCA and the authority is thereby enabled to take action, the undertaking in question will be able to qualify for full immunity. An undertaking that provides information which makes it possible for the NCA to establish that an infringement has taken place is also able to qualify for full immunity.

An undertaking which is not the first to report the infringement but which considerably facilitates the investigation of the NCA will receive a reduction in the fine. Additional criteria for both full immunity and a reduction in the fine is that the undertaking provides the NCA with all information accessible, cooperates actively during the investigation and does not destroy evidence or in any other way complicate the investigation. The obligation of the whistleblower not to destroy evidence refers also to the time before filing the leniency application. Thus, it is no longer permissible to destroy evidence and thereafter file a leniency application in order to ensure that the company does not incur damages if it is not the first to file.

Despite the fact that the leniency rules have not thus far had their great breakthrough in Sweden, we are of the view that they play a very important role for companies and we welcome a harmonisation in line with the EC rules in order to improve the possibility of multiple filings of international cartels. In addition, it is positive that certain illogical features of the rules are now cured; such as the possibility of destroying evidence before filing a leniency application. We do, however, regret that the ECN's rules regarding markers are not implemented in Sweden. Such systems enhance the legal certainty and create an increased incentive to file for leniency. The Swedish Government considers the Swedish rules already to be in line with the EC rules – a view which we do not share. In addition,

it states that it does not have enough facts for assessing a marker system. However, the NCA recently presented a series of proposals on how to improve competition in Sweden.⁷ One of the proposals was to introduce a marker system in Sweden. Hopefully, the Government will listen to the NCA and reconsider its standpoint.

3.3 Possibility of Avoiding Trial through a Fee Order

The NCA is not empowered to decide on fines. Instead, it must bring action before the District Court of Stockholm. The decision of the District Court can then be appealed to the Market Court which serves as the last instance. However, through the adoption of the new Competition Act, the NCA has been given the powers to decide on fines in cases which are undisputed.

Cartel proceedings tend to be both lengthy and costly. Undertakings which want to put the infringement behind them, and are willing to confess to the infringement, are now given the opportunity to accept an administrative fine. An undertaking which accepts a fine, within the time period and in the manner which the NCA decides, thereby avoids a trial, since the authority may then no longer bring action against the undertaking.

3.4 Amended Limitation Statutes

Investigating infringements of the competition rules is often a time-consuming enterprise. Under the old Competition Act, the NCA had to bring action within five years of the time when the infringement ended – otherwise the infringement was time barred. In most cases, a five year limitation period does not constitute a problem, but in some situations it may lead to the NCA spending resources on investigating an infringement which is later deemed to be time barred. That can, for example, be the case if an undertaking has entered into, not only one but several restrictive agreements during a particular period of time. If the court deems that the agreements constitute the same infringement (which is often the case), no problem normally arises. If, on the other

⁵ Case MD 2009:11, NCC AB et al. v Konkurrensverket (the NCA).

⁶ See http://ec.europa.eu/comm/competition/ecn/index_en.html.

⁷ Sw. Åtgärder för bättre konkurrens, published by the NCA 31 March 2009.

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hand, each agreement is deemed to be an individual infringement, it can result in several infringements already being time barred on the date when the NCA ends its investigation and brings action before the District Court.

In order to solve this problem, the time limit is no longer interrupted when the NCA brings action against the undertakings. Instead, it is interrupted already on the date on which the authority conducts a dawn raid or sends a draft Statement of Objections. Corresponding to the rules which apply in EC law, an absolute time limit of ten years applies.

3.5 Rules on Disqualification Orders are Introduced

For a number of years, criminalisation of the competition rules has been discussed in Sweden. The Government has now decided against criminalisation. The main argument being that criminalisation would entail that the leniency rules could not be applied to the same extent as today. Company executives would lack the incentive to report cartels to the NCA if they themselves risk imprisonment.

Instead, rules on disqualification orders are introduced for cartel infringements. In order to avoid the problem of conflicting interests – the company's interest in immunity from fines versus its representatives' interest in avoiding a disqualification order – a disqualification order may not be decided if the person who may be subject to a disqualification order himself/herself, or within the framework of the business conducted, to a substantial degree assists in facilitating the NCA's investigation.

According to the Government, the disqualification order will, first and foremost, come into play in relatively long-term cartel collaborations which have been intended to seriously damage competition on the Swedish market. Further, as a main rule the NCA should not only be able to prove that the company management knew of the infringement, but also that they failed to take action in order to make it cease. If the NCA does not succeed in doing this, a disqualification order is not a possible sanction.

4. Amendments to the Rules on Merger Control

4.1 Introduction of the SIEC Test

The criteria for blocking a merger have been amended in order to correspond to the SIEC test under the Merger Regulation. Thus, the question of whether a merger creates or strengthens a dominant position on the market is no longer the sole determining factor. Instead, such concentrations which are intended to substantially impede the existence or development of efficient competition within the country as a whole, or a substantial part of it, are to be prohibited. Upon assessment, it is to be especially taken into consideration if a dominant position is created or strengthened. The Head of Ministry states in this regard that "there are strong reasons for having the same material assessment of a concentration regardless of whether it is assessed under the Swedish Competition Act or under the Merger Regulation."⁸ The underlying reasons mentioned are the fact that the NCA has abolished its guidelines on concentrations and instead refers to the Commission's notices in this respect and the fact that there is hardly any Swedish case law but that relevant case law emanates from the Community Courts. In our view, this is positive since the ECJ case law as well as the Commission's notices may be fully applied with an increased legal certainty for the companies as a result.

It may be noted that in Sweden, the NCA does not have the competence to prohibit a concentration but it has to bring action in the Stockholm District Court. Such judgment may be appealed to the Market Court as last instance. The parties to the concentration may make commitments in order to get the concentration cleared. Such conditions may be subject to penalty of a fine. Such decisions are now to be taken by the Stockholm District Court upon a claim by the NCA.

4.2 New Thresholds

The thresholds for when a merger is to be notified to the NCA have been changed. Under the old Competition Act, a duty to notify applied if the undertakings concerned (typically

the acquiring group and the target company) together had a total turnover of SEK 4 billion (approximately € 400 million) and at least two of the undertakings concerned each had a turnover in Sweden of at least SEK 100 million (approximately € 10 million).

Under the new Competition Act, in order for there to be a duty to notify the merger, the undertakings concerned must have a joint turnover in Sweden of SEK 1 billion (approximately € 100 million) and at least two of the undertakings concerned must each have a turnover in Sweden of at least SEK 200 million (approximately € 20 million). The rationale behind this is to increase the accuracy of the law and to focus on such concentrations which, de facto, may have a damaging effect on the Swedish market.

Another new feature in the new Competition Act is that, as under the EC Merger Regulation, multiple transactions between the same persons or companies which take place within a two-year period shall be treated as one and the same concentration arising on the date of the last transaction.

Since 2 January 2008, a signed share purchase agreement is no longer required in order for a notification to be submitted. As under EC law, a notification may be made on the basis of e.g. a letter of intent, provided that the parties have enough information to be able to submit a complete notification.

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⁸ (Unofficial translation), Prop 2007/08:135 p. 182