

Question A

The consistency and compatibility of transactional resolutions of antitrust proceedings with the due process and fundamental rights of the parties

*SWEDEN**

1. Introduction

Ever since Sweden decided to join forces with the other EU Member States and become part of the EU, Swedish competition legislation has been closely modelled on its EU equivalent. Last year, Sweden celebrated the 20th anniversary of its modern competition law regime. The competition law rules are currently contained in the Swedish Competition Act (“the Act”),¹ which entered into force on 1 November 2008. However, the substantive antitrust provisions have been the same since 1993 and mirror Articles 101 and 102 TFEU.

Initially, it was only the substantive rules that were brought in line with EU competition legislation, as the decision was made to shape the procedural rules in another manner. Unlike the European Commission, the Swedish Competition Authority (“the SCA”) has therefore not been granted the powers to impose fines on competition law offenders. It may order a company to terminate an infringement or even accept commitments under penalty of a fine, but when it comes to actually imposing any sanctions, the SCA will have to turn to the courts.

Thus, when the SCA considers that a company has participated in restrictive practices or abused its dominant position contrary to Chapter 2, Section 1 or 7 of the Act, it has to turn to the Stockholm District Court and request the court to impose fines.

Over the years, the Swedish legislator has at times chosen to draw inspiration from Brussels also when it comes to certain procedural aspects of Swedish competition law enforcement.

One example was the adoption of a leniency programme in 2002. Six years later, and following the introduction of the European Commission’s (“the Commission”) settlement procedure in June 2008, a similar – although in no way identical - procedure was introduced also under the Swedish system. Under the Swedish settlement procedure, the SCA has the powers to issue so called “fine orders” where an infringement of either Chapter 2, Section 1 (restrictive practices) or Chapter 2, Section 7 (abuse of dominance) of the Act has been established, and provided that the company addressed by such order chooses to consent in

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¹ Sw. Konkurrenslagen (SFS 2008:579).

writing. The acceptance makes the order legally binding, thereby allowing the company to avoid a lengthy court proceeding. The SCA is then prevented from instituting proceedings before the Stockholm District Court.²

The introduction of the fine order was preceded by a discussion as to whether a more profound revision of the procedural system was required or desired, and whether the SCA should be granted general powers to impose fines in competition cases. This was not the first time that the SCA's powers were up for debate, but as so many times before, the decision was made not to grant the SCA general fining powers. The main concern raised by stakeholders during the debate was that the major cartel cases that had been brought by the SCA had all required lengthy preliminary hearings in order to sort facts and pleas before the actual hearing could take place.

It was acknowledged that a system where the competition authority has the powers to impose fines will indeed guarantee a more effective and efficient competition law enforcement. However, at the same time, such a system would not contain equally effective procedural safeguards and was therefore not considered desirable from a due process perspective. The decision was therefore made to keep the old sanctioning system, save for the introduction of the fine order.³

Transactional resolutions, such as the settlement procedure, have definitely allowed parties to choose a more expedient procedure. It is not uncommon that a cartel case, from the date of the dawn raid to the final ruling by the Market court (which is the court of last instance) can take five years or more. A company willing to admit its guilt and accept a fine order may now avoid lengthy court proceedings. However, as will be discussed below, there is not possibility of settlement until the circumstances of the case are clear, and a fine order will thus not be issued before the SCA has finished its investigation.

2. Transactional resolutions of agreements and the abuse of dominance

When the Swedish competition rules were revised in 1993 pending the EU membership, the competition act then adopted provided no room for transactional resolutions.

It was not until 2002 that a leniency programme was formally introduced. Two year later, in 2004, the SCA was granted the powers to accept commitments. In 2008, the competition rules were once again revised and through the adoption of the Act, it is now also possible for companies to enter into settlement agreements - or rather to accept a fine order - if they are willing to admit to the infringement and want to put their past behaviour behind them. These

² Chapter 6, Section 16 of the Act.

³ See e.g. the preparatory works to the Act, SOU 2006:099, En ny konkurrenslag, at page 311.

are really the only transactional resolutions of antitrust procedures available under Swedish law.

Below is brief presentation of each transactional resolution.

2.1.1 Commitments

Chapter 3, Section 1 of the Act empowers the SCA to order companies to terminate infringements of the prohibitions on restrictive practices or abuse of dominance contained in the Act or Articles 101 and 102 of the TFEU. However, if during the course of an investigation, the company/-ies under investigation offer to accept commitments that may eliminate any competition concerns, the SCA may accept such commitments and declare that there are no longer any grounds for action under Chapter 3, Section 4 of the Act.

The commitment proposal should thus be made by the company under investigation. However, in practice it is not always clear on whose initiative the commitment was drafted. It may well be that the SCA and the undertaking meet during the course of the investigation, and that there is an informal discussion on how to best solve the problem.

The possibility for the SCA to accept commitments was introduced in July 2004 following the adoption at EU level of Council Regulation 1/2003 (“the Regulation”).⁴ Article 5 of the Regulation provides that the Member State authorities should have the power to apply Articles 101 and 102 TFEU. For this purpose, they may make decisions to accept commitments.

The Swedish rules on commitments have been closely modelled on Article 9(1) of the Regulation, which lays down the procedures for the Commission when accepting commitments. Just as under Article 9(1) of the Regulation, commitment decisions made by the SCA should find that there are no longer grounds for action by the SCA without concluding whether or not there has been or still is an infringement.⁵

When the Act was adopted in 2008, the wording of the provision on commitments was revised to ensure that the *only* legal effect of a commitment decision is that the SCA does not find any grounds for action. The revision was made after the SCA had received complaints from the Commission. Under Article 11(4) of the Regulation, Member State authorities shall inform the Commission before adopting commitment decisions. During the course of such a procedure, the Commission complained of the wording of the decision in question where the

⁴ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1.

⁵ See preamble 13 to the Regulation.

SCA had declared that following the commitment, there would no longer be an infringement of the competition rules. According to the Commission, such statement went against the prohibition on Member States to grant negative clearance.

A decision to accept a voluntary commitment by the SCA may cover a specified period. As long as the decision applies, the SCA may not issue a prohibition decision regarding the practice covered by the commitment. Like the Commission, the SCA may revoke its decision to accept the commitments where:

1. there has been a change in any of the facts which were material to the making of the decision,
2. the parties commit a breach of any obligation attached to the decision, or
3. the decision is based on incomplete, incorrect or misleading information which the parties have submitted.

A commitment shall be combined with a periodic penalty payment. When the rules were introduced in 2004, the SCA was not given the powers to attach conditional fines itself, as the legislator saw the risk that the SCA would then attempt to persuade undertakings to offer (or propose) commitments that went further than was necessary to eliminate any competition concerns.

The SCA would therefore have to request the Stockholm District Court to attach conditional fines to voluntary commitments. When the competition rules were revised, and the Act was adopted in 2008, stakeholders did no longer see any cause for concern, and the Act now grants the SCA the powers to attach conditional fines.⁶ However, the decision to actually impose such payment in the event that the does not stick to the commitment, will have to be made by the Stockholm District Court. Hereby, the company is guaranteed a judicial review of the SCA's decision before any fines are actually imposed.⁷

There are a number of cases that have been closed through voluntary commitments. One recent case concerns an investigation into the practices of a Swedish trade association (Föreningen Ackrediterade Laboratorier). After having found that the general provisions applied by the trade association were restrictive of competition and thus in breach of Chapter 2, section 1 of the Act, the association made a voluntary undertaking to change its general provisions.⁸ The SCA accepted the voluntary undertaking and decided to attach a conditional fine of SEK 750,000 to the undertaking.

⁶ Chapter 6, Section 1 of the Act.

⁷ Chapter 6, Section 2 of the Act.

⁸ In the preliminary assessment of the SCA, the general provisions issued by the association governing the actions of member laboratories contained a potentially anti-competitive clause. The provisions set out fixed percentage rates for determining charges payable when deliveries are delayed. In the SCA's view, the

2.1.2 Leniency

The willingness of undertakings to assist and facilitate the investigation of the SCA has always been reflected in the fine eventually imposed. However, it was not until 2002 that a formal leniency programme was introduced in Sweden. Initially, the programme covered both restrictive practices and abuse of dominance. However, when the Act entered into force in November 2008, the possibility for dominant firms to receive immunity was abandoned. Still, the scope of the programme is wider than its EU equivalent as all kinds of restrictive practices, and not only cartels, are covered by the programme.

The rules on leniency are laid down in Chapter 3, Sections 12 – 15 of the Act.

Immunity from fines

According to Chapter 3, section 12 of the Act, an undertaking may be granted immunity from fines if it discloses its participation in an illegal cartel. A notification submitted by a number of undertakings jointly will not be regarded as a notification under the Act. Consequently, a joint notification will result in none of the undertakings fulfilling the conditions for immunity from fines.

To be granted full immunity, the undertaking must fulfil the following requirements:

- (1) It must be the first to notify the SCA of the cartel.
- (2) Notification must be made before the SCA has sufficient information from other sources to be in a position to intervene against the cartel, that is, the SCA must not possess enough evidence to carry out an inspection according to Chapter 5, section 3 of the Act.
- (3) The undertaking must submit all information concerning the illegal cartel and cooperate fully with the SCA.

However, it is possible to be granted full immunity also in situations where the SCA is already in possession of sufficient evidence to take action, provided that no other company has submitted a leniency application, and that the company in question has in some other way *to a very significant extent facilitated the investigation* of the infringement.

The undertaking must cease to be a member of the cartel. It may consult with the SCA on how it shall cease its participation in the infringement.

laboratory companies should compete over the rates they charge because this can influence speed of delivery. The trade association's voluntary undertaking involved revising the general provisions so that they now recommend the negotiation of separate agreements regarding deductions for time lost (delay charges).

Immunity from fines may not be granted, however, if the undertaking has compelled another undertaking to participate in the restrictive agreement, as it is then considered manifestly unreasonable to grant that company immunity from fines.

Reduction of fines

Undertakings that are not the first to notify a cartel to the SCA or do so when the SCA is already in possession of evidence of the cartel, may still benefit from a reduction of fines if they cooperate fully with the SCA. According to Chapter 3, section 13 of the Act, the fine may be set at a lower amount than would be the case when applying Chapter 3, section 12 if the undertaking has provided significant assistance in the investigation into its own participation in the infringement or that of others.

Today it appears that most of the cartel cases decided by the Commission originates from a leniency application. In Sweden, however, the leniency programme does not appear to be equally successful although it is claimed that around fifty percent of the cases handled by the SCA originates from a leniency application. Perhaps a majority of these cases are closed instead of brought to court.

2.1.3 Settlements

Furthermore, in November 2008, the SCA was granted the powers to enter into settlement agreements with cartelists. Cartel proceedings tend to be both lengthy and costly.

Undertakings that wish to put the infringement behind them, and are willing to admit their guilt, are now given the opportunity to accept an administrative fine proposed by the SCA, a so called fine order.

The term settlement may be misleading as it is the SCA that decides whether or not a fine order shall be offered and on what terms. The amount of the fine is not up for negotiation. Nor will the company accepting the fine order receive a reduction in the fine. The reason for this being that the legislator did not seek to set up a system where companies could or should be “persuaded” to admit guilt.

Under the new rules, an undertaking that accepts a fine, within the time period and in the manner that the SCA decides, avoids a trial, as the SCA may then not bring action against the undertaking. The acceptance of the fine order will have the same legal status as a binding judgment. However, a consent that is not given in writing within the time limit set by the SCA, shall have no legal effect.

Another requirement is that an order may only be issued if the SCA considers that the material circumstances regarding the infringement are clear. This means that a company may propose a fine order at an early stage of the investigation, but the order will not be issued until the investigation is over and the SCA has the Statement of Objections ready for distribution to the companies concerned.⁹

According to the preparatory works, the legal certainty may be jeopardized if the infringement has not been properly investigated and the companies have been given the opportunity to take part of the case built against them and the evidence available to the SCA. Only then can a company make a reasoned decision as to whether it should go to court or accept a fine order.¹⁰

Not only shall the material circumstances be clear, a fine order may not be issued where there are questions in law that may serve as precedent, and where there is thus an interest to have the court decide on the matter.

If the SCA, after having performed the investigation, considers that one or more companies should be granted the possibility of a fine order it will, when sending out the Statement of Objections, offer such companies the possibility to accept a fine order instead of taking matters to court. In such case, the SCA will send out a pre-printed form to be signed and returned by the company within three weeks.

Chapter 3, Section 19 of the Act provides that a fine order for which consent has been given shall upon appeal be set aside under the preconditions specified in Chapter 59, Section 6, first paragraph of the Swedish Code of Judicial Procedure.

The said provision of the Code of Judicial Procedure deals with summary penalties consented to by a suspect and the situations where such penalties can be set aside by the suspect. The same conditions shall apply to fine orders.

According to these rules, a fine order may only be set aside if:

1. the consent cannot be considered a valid voluntary declaration of intent;
2. an error occurred during the processing of the matter of such a character that the order should be considered invalid; or
3. the order is otherwise inconsistent with a statutory provision.

⁹ Chapter 3, Section 18 of the Act and http://konkurrensverket.se/t/Page___4120.aspx.

¹⁰ Regeringens proposition 2007/08:135, Ny konkurrenslag m.m., at p. 88.

A party who wishes to appeal must do so in writing to the Stockholm District Court within one year from consent being given for the order. In cases concerning appeal against a fine order, the SCA is the respondent party.

If a fine order is set aside, the undertaking may not thereafter be imposed an obligation to pay a higher administrative fine for the same infringement.

So far, the SCA has issued fine orders on three occasions, the first being in connection with a market sharing cartel in the market for power-line poles. The cartel was exposed when ScanPole AB provided information on its illegal cooperation with its sole competitor, Rundvirke Poles AB through a leniency application. Being presented with convincing evidence of the cartel activity, Rundvirke chose to accept a fine order of SEK 2 million thereby avoiding a trial.¹¹

The second case concerned a bid-rigging cartel in the market for transportations of deceased, where three undertakers accepted fine orders totalling less than SEK 1 million. The most recent case, which concerned bid rigging in a tender for waste transportation, was taken in December 2011 and subsequently settled. The companies which accepted the fine were two of the six companies that had submitted offers in the tender. The fines amounted to SEK 175,000 kronor and SEK 293,000 respectively. The modest amounts reflect the limited scope of the cartel: it related to one tender in one city, lasted for a little over one month and the parties had not won the contract.¹²

The case of ScanPole and Rundvirke was a schoolbook example of a market sharing cartel, where two players had divided the market between them. This is a situation where the SCA will typically be able to offer a fine order; the circumstances are clear and there are no complex questions in law to be dealt with by the court. The two other cases are also typical, in that although they concerned serious infringements, they were of limited scope and the fines imposed were low.

Another possible situation is where there is a major cartel, but where the involvement of some of the undertakings is peripheral. In the largest Swedish cartel case to date, the asphalt cartel,¹³ the SCA decided not to bring action against two of the cartelists, as their involvement had been so peripheral that the costs of the court proceedings would have exceeded the fine requested by the SCA. Today, these companies may not have been that lucky. Instead, the SCA would probably have offered them the possibility of a fine order before going to court.

¹¹ Decision Dnr 237/2007.

¹² Decision Dnr 327/2010.

¹³ NCC AB m.fl. ./.. Konkurrensverket, Marknadsdomstolens dom 2009:1.

2.2 *Fundamental and procedural rights of the parties*

As all other member states of the EU, Sweden has acceded the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the ECHR” or “the European Convention on Human Rights”). Furthermore, the European Charter of Fundamental Rights (“the Charter”) is applicable whenever Member States apply EU law.

Thus, Sweden shall assure that the procedures before the SCA and the Swedish courts meet the standards of the ECHR and the Charter, thus protecting rights such as the right to privacy (Article 7 of the Charter/Article 8 of the ECHR), the right good administration (Article 41 of the Charter), and the right to a fair trial laid down in Article 47 of the Charter and Article 6 of the ECHR.

When it comes to due process issues, it is important to at all times have in mind that the powers of the SCA to use force or impose sanctions are very limited, and that it is the court that will decide on such matters.

The SCA will have to require the assistance of the Stockholm District Court already at a very early stage of a competition case, as it is the court and not the SCA that issues inspection decisions. Thus, the initial decision whether the SCA has enough evidence/indicia to carry out an on-the-spot investigation is in the hands of the court and not the SCA.

Furthermore, with regard to both voluntary undertakings and leniency applications, it is the court that will eventually decide on the sanction.

As the powers of the SCA are circumscribed to such extent, much of the critique directed towards the EU system is not valid in Sweden.

Today, companies challenging Commission decisions in antitrust cases appear to invoke violations of fundamental rights more or less on a regular basis. The debate is intense also outside the court rooms, and one of the more common objections against the EU system is that it fails to respect Article 6(1) of the ECHR and the right to a fair trial.

The critics argue that the protection provided by the EU Courts falls far short of the protection afforded under the ECHR.¹⁴ Some even argue that the ECHR requires the

¹⁴ See e.g. Aslam and Ramsden, *EC Dawn Raids: A Human Rights Violation?*, *The Competition Law Review*, Volume 5 Issue 1, December 2008, pp 61-87. See also the appeal by Saint Gobain SA which raises the question whether the imposition of a fine by an administrative body which holds powers both on investigation and sanction is compatible with the right to an independent and impartial tribunal and of the

Commission to be deprived of its adjudicating powers, and that fines in antitrust cases should instead be imposed by a court.

However, at this point, most accept the fact that the Commission has both investigatory and adjudicative powers. Instead the critique is focused on the judicial review performed by the EU Courts in general, and the General Court in particular. According to the critics, the General Court is too deferential towards the Commission, and is granting the Commission too large a margin of appreciation, failing to respect the principle of equality of arms. Some even refer to this as the ‘judicial deference doctrine’.¹⁵

More specifically, the criticism against the Courts’ (limited) review is focused mainly on two issues: the EU Courts’ assessment of the fines imposed by the Commission in antitrust proceedings, and their review of any complex economic or technical assessments undertaken by the Commission.

As the Swedish system is structured differently many of the concerns expressed above do not apply here.

First, the Stockholm District Court will decide on the dawn raid. If the SCA believes that the investigation provides evidence of restrictive practices or abuse of dominance, it will once again have to turn to the court and request the court to impose fines. During such court proceedings (i.e. where the SCA requests that a fine is imposed), the SCA and the undertakings will have equal standing. The courts will by necessity carry out a very thorough examination of the allegations made and the evidence presented by the parties to the proceeding. Furthermore, the court will be presided not only by a number of jurists, but also of economic experts in order to ensure that any complex economic issues are assessed properly.

2.2.1 The Administrative Procedure Act

Before discussing specific rights, a few words should be mentioned about the legislation governing the work of all public bodies in Sweden – including the SCA - namely the Administrative Procedure Act..¹⁶

right to respect for the presumption of innocence. Case T-56/09, *Saint Gobain v. European Commission*, pending.

¹⁵ See e.g. Jaeger, *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, *Journal of European Competition Law and Practice*, 2011 2(4):295-314.

¹⁶ Sw: Förvaltningslagen (SFS1986:223)

The Administrative Procedure Act applies, in principle, to all administrative authorities. It consequently affects a large part of the operations of central and local government. The primary objective of the Administrative Procedure Act is to protect the legal security of citizens in their contact with administrative authorities. Another important aim is to ensure that the authorities provide efficient service to the public. Furthermore, it shall promote the expeditious processing of decisions by trying to avoid matters having to be considered at too many instances.

The Administrative Procedure Act imposes certain rules for legal security, for example requirements of impartiality, careful processing and uniform assessment. At the same time it is based on the view that there is a link between legal security and service. It is thus not sufficient that authorities act impartially, carefully and otherwise correctly in the formal legal sense. They must also provide rapid, simple and clear information and assist citizens to protect and benefit from their rights. The Administrative Procedure Act contains, for example, rules on the service duty of authorities, rules on their collaboration and coordination with other authorities, rules on rapid and simple processing of matters, rules on the use of easily understood government language and rules on oral elements of the processing.

The Administrative Procedure Act constitutes the foundation for how administrative matters should be dealt with by laying down certain rules that, in principle, must be applied by all authorities in all fields.

Important issues governed by the Administrative Procedure Act include:

- Representative and counsel. A person who in connection with a matter to be dealt with by an authority desires to engage a representative or counsel is normally entitled to do so. A person who engages a representative or counsel must usually bear the expenses involved.
- Oral processing. An applicant, appellant or another party who wishes to provide information orally in a matter to be dealt with by an authority, should normally be allowed to do so. Furthermore, an authority may, on its own initiative decide on oral processing.
- Access to information. The Administrative Procedure Act lays down that a party is entitled to view the material in the matter. The authority shall, on its own motion, provide a party with information that has been received from another person that is of significance to the determination of the matter. The party shall be given an opportunity to express his/her views on such information.
- Reasons for decision, notification of decision and notification of how to appeal. Authorities must give reasons for their decisions and notify the parties about the

decision. They are also under a duty to explain how the decision may be appealed against.¹⁷

2.2.2 *Right against self-incrimination and presumption of innocence*

Like in the other EU Member States and the Contracting States to the ECHR, there is both a right against self-incrimination and a principle of the presumption of innocence. However, the CJEU has given the right against self-incrimination in competition cases a rather narrow scope of application. Under EU law the right does only cover oral statements, and no one should be forced to, during the course of an interview or a hearing, admit having participated in a cartel or abused a dominant position. However, during the course of a dawn raid, the company cannot claim that certain documents are out of reach to the Commission inspectors on the ground that the documents contain incriminating information.

There is really nothing indicating that the Swedish rules give companies a broader protection against self-incrimination. In the preparatory works to a recently adopted law on the duty to provide information in i.a. sector inquiries, the privilege against self-incrimination was discussed, and the discussion relied completely on the case law of the CJEU also when it came to investigations relating to infringements of the Swedish competition rules.

Although the privilege against self incrimination is construed rather narrowly, the Act contains no express obligation on the part of the companies to co-operate with the SCA during a dawn raid, and there are no sanctions imposed for failure to do so. However, According to Chapter 5, Section 1 of the Act, the SCA can order an undertaking to supply information, documents or other material, and this provision may be held to apply also during dawn raids.

In practice, the fact that there is no explicit obligation to co-operate during dawn raids has not been a cause of concern to the SCA, and in a recent proposal to amend the Act in order to make enforcement more efficient, the legislator saw no point in amending the rules on dawn raids in this respect.¹⁸

2.2.3 *Right to be heard and access to the file*

As for the right to be heard, Section 14 of the Administrative Procedure Act provides the following:

¹⁷ See <http://www.government.se/content/1/c6/02/78/08/6ece30b5.pdf>.

¹⁸ SOU 2013:16, Effektivare konkurrenstillsyn, at p. 228.

“Any applicant, appellant or other party who wants to make an oral statement in a matter concerning the exercise of public power in relation to someone shall be afforded an opportunity to do so, provided that the due progress of the work so permits.”

During the course of a competition case, there will be a number of formal and informal contacts between the SCA and the companies under investigation. A party that wants to make oral statements will be able to do so.

As for the question of access to the file, Swedish rules on transparency are comparatively far reaching, as public bodies need to abide by the principle of public access. The principle means that the general public are to be guaranteed an unimpeded view of activities pursued by the government and local authorities. Chapter 2, Section 1 of the Freedom of the Press Act provides the right to free access to official documents in order to encourage the free exchange of opinion and the availability of comprehensive information.

The right to access may be restricted only under certain, specified, circumstances. For parties to a competition case, the restrictions are even fewer. A party in a case or matter before a court or other authority is in principle entitled to see all information in the case or matter. It is only in exceptional cases that something can be kept secret from a party. Judgments and decisions must always be provided to the parties. If information that is subject to secrecy is provided to a party, a reservation may be made when the information is provided.

Section 16 of the Administrative Procedure Act¹⁹ thus stipulates:

“An applicant, appellant or other party is entitled to have access to the material that has been brought into the matter, provided that the matter concerns the exercise of public power in relation to someone. This right of access to information applies with the restrictions prescribed by Chapter 10, Section 3 of the Public Access to Information and Secrecy Act (2009:400).”

The wording of the Article suggests that the right of access applies with the restrictions prescribed by Chapter 10, Section 3 of the Public Access to Information and Secrecy Act.

The latter provision stipulates that a party's right to access may be circumscribed if, in the interest of the public or a private party, it is of utmost importance that certain information contained in the requested material is not disclosed. In such case, the authority will have to inform the requesting party in some other way of the document's content in order to ensure that the party is granted the information necessary to be able to protect his/her rights without disclosing the secret information.

¹⁹ Sw. Förvaltningslagen (SFS 1986:223).

Not only shall a party have a right of access to the file, the SCA may not decide on a matter before having informed the company of all information provided to the SCA by others, as Section 17 of the Administrative Procedure Act stipulates:

“No matter may be determined without the applicant, the appellant or any other party having been informed about any information that has been brought into the matter by someone other than himself and having been given an opportunity to respond to it, provided that the matter concerns the exercise of public power in relation to someone.”

These rights apply at all times, and a waiver to the rights may thus not be a precondition to the proceedings or conclusion of a transactional solution.

A final comment concerns leniency applications. Applications and corporate statements will be considered confidential according to Chapter 30, Section 1 and/or 3 of the Public Access to Information and Secrecy Act (2009:400). A party to a competition case will thus not be able to request access to such applications/statements made by other parties to the proceeding.

2.2.4 Right to an impartial judge

Neither the voluntary commitment nor the fine order will or need to be approved by a judge. However, when a commitment is combined with a periodic penalty payment, the decision to eventually impose such fine will be made by the Stockholm District Court.

2.2.5 Right to a trial

Companies that make a voluntary commitment or accept a fine order, do so in order to avoid a trial. There will obviously not be a trial in such cases unless the company fails to abide by the commitment or the provisions in the second paragraph of Chapter 3, Section 4 apply (listing the situations where a fine order may be set aside).

However, the commitment is *voluntary* and so is the acceptance of the court order.

When it comes to leniency, this procedure does not affect the company's right to a trial *as such* (save of course for the company that has been granted immunity).

The fine will eventually be imposed by the court. This being said, a leniency application or an application for the reduction of fines will of course contain an admission of guilt and the companies will have to provide the SCA with all the evidence they have in their possession and will also have to cooperate actively with the SCA during the course of the investigation.

This will by necessity have an effect on the trial, as the SCA will not have to prove its case against the leniency applicant (or rather, the leniency applicant has already done the job of the SCA).

It is however, important to keep in mind that under the Swedish system, it is the court that eventually sets the fine. The parties are free to dispute the SCA's view on what constitutes a fair "basic amount". The fact that the SCA has agreed to grant a 25 or 50% reduction does not mean that the final amount of the fine is fixed. Instead this means that the sum requested by the SCA is reduced. The company may still argue before the court that the fine (before reduction) is too high with regard to the nature, scope or duration of the infringement or the company's level of involvement, and that it should thus be set at a lower level.

2.2.6 *Ne bis in idem*

The principle of *ne bis in idem* applies in Sweden, although the recent case of *Åkerberg Fransson* has certainly stirred up a lot of commotion among lawyers here in Sweden, as to the meaning of the principle and whether it is respected in the Swedish system.²⁰

There is also a recent case where the defendant claimed that the Stockholm District Court should dismiss the case due to infringement of the principle of *ne bis in idem*. In January 2014, the Stockholm City District Court handed down its judgment deciding that the SCA's action proposing that a fine of SEK 340,000 be imposed on Swedavia (a state owned company that owns and operates Stockholm Arlanda Airport) for the alleged abuse of its dominant position was not contrary to the principle of *ne bis in idem* even though the Swedish Market Court had already in a previous, unrelated, procedure examined the same conduct of Swedavia.

In November 2011, the Market Court found Swedavia to have abused its dominant position. In June 2013, the SCA brought an action before the Stockholm City District Court requesting the court to impose a fine of SEK 340,000 on Swedavia for the same abusive behavior. Swedavia claimed that the SCA's claim was inadmissible due to the *ne bis in idem* principle. The Stockholm District Court rejected Swedavia's claim as the legal proceedings in the Market Court are not criminal in nature, and thus found the SCA's claim admissible. The substantive review of the SCA's claim is still ongoing.

Furthermore, given the decentralized structure of the EU antitrust enforcement system, there is of course also the risk – at least in theory - that a the Swedish authorities will impose sanctions on infringement of Article 101 or 102 TFEU that is/has or will be investigated also

²⁰ Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson* [2013]. Not yet reported. The case concerned the application of the principle of *ne bis in idem* to certain penalties related to tax evasion.

by other authorities throughout the EU. Although the CJEU does not deem such practice to conflict with the principle of *ne bis in idem*, there are those that are critical against such order.²¹ However, that discussion is left for another occasion.

2.3 *Rights of third parties*

2.3.1 Right to be heard and access to the file

According to the principle of public access, third parties are entitled to access the file. However, in their capacity of third parties, they will not get access to confidential information.

As for the right to be heard, only parties to a matter before an authority has such right under the Administrative Procedure Act. In practice, however, anyone being able to contribute to the SCA's investigation will have a possibility to have at least informal contacts with the case handlers.

2.3.2 *Right to trial*

Chapter 7, Section 1 of the Act deals with appeals. The provision lists a number of decisions that may be appealed. This list is exhaustive. It is expressly stated that no appeals may be made against other decisions than those listed.

Decisions to accept voluntary commitments, grant immunity from or reduction of fines, or issue fine orders are not among the ones listed in the provision. No appeals may thus be made against such measures, and third parties do not have a right to a trial in regard to transactional resolutions.

It should be noted, however, that if the SCA decides not to take *any* action at all, there is then a possibility for third parties affected by an infringement to do so. If a company files a complaint with the SCA, arguing that a competitor or supplier acts in violation of the Act, and the SCA decides not to act upon such complaint, the company may then take matters to court under Chapter 3, Section 2 of the Act which stipulates:

“If the Swedish Competition Authority decides in a particular case not to impose such an obligation pursuant to Article 1, the Market Court may do so at the request of an undertaking that is affected by the infringement.”

²¹ See e.g. W. Devroe in General Principles of EU Law and European Private Law, “How General Should General Principles Be? Ne bis in Idem in EU Competition Law”, Wolters Kluwer 2013.

Such a right to legal action, however, does not exist if the decision of the Swedish Competition Authority is based on Article 13 of the Council Regulation (EC) No 1/2003.”

2.3.3 Principle of legitimate expectations and of good faith

The SCA is bound by the principle of good administration laid down in Article 41 of the Charter when applying the EU rules. Furthermore, the Administrative Procedure Act regulates the authority's actions. See Section 2.2.1 above.

2.3.4 Confidentiality and publicity of the transactional resolutions

Leniency applications, corporate statements made in relation to such applications and the like are confidential. They will thus not be disclosed to third parties.

Decisions to accept voluntary commitments are not confidential and are posted on the SCA's website.²²

3. Merger control

Under Chapter 4, Section 1 of the Act, a concentration that must be notified or has been voluntarily notified can be prohibited if the concentration is liable to significantly impede the existence or development of effective competition in the country as a whole, or a substantial part thereof and if a prohibition can be issued without significantly setting aside national security or essential supply interests. The competition test corresponds to the SIEC test of the EU Merger Regulation.

If it is sufficient to eliminate the adverse effects of a concentration, a party to a concentration, instead of being subject to a prohibition, may instead be required:

1. to divest an undertaking, or a part of an undertaking, or
2. to take some other measure having a favourable effect on competition.²³

Just as under the antitrust rules, undertakings may also voluntarily make commitments to the Competition Authority and the commitment may be made subject to a penalty of a fine.²⁴

²² See e.g. <http://www.kkv.se/upload/Filer/Konkurrens/2009/Beslut/08-0346.pdf>.

²³ Chapter 4, Section 2 of the Act.

²⁴ Chapter 4, Section 4 of the Act.

3.1 Negotiation of remedies

Decisions by the SCA in concentration cases are sometimes made after the parties to a concentration have given voluntary commitments. In order for a commitment to be effective, it shall eliminate the anti-competitive effects identified from the planned concentration.

It wasn't until the Act entered into force in November 2008, that the SCA was given express powers to accept voluntary commitments also in relation to concentrations. The authority had done it on many occasions under the old competition act, but it was not until then that the possibility was explicitly laid down in the competition rules.

Thus Chapter 4, Section 4 of the Act now stipulates:

“If a question has arisen whether there will be a prohibition pursuant to Article 1 or an obligation pursuant to Article 2, a commitment from a party to the concentration may lead the Swedish Competition Authority to leave the case without any further actions.”

It is the notifying party that shall take the initiative to the voluntary commitment, and such commitment may be accepted at an early stage of the investigation. It is sufficient that “a question has arisen whether there will be a prohibition”. The SCA need not have *established* that the concentration will lead to SIEC.

The SCA may and does accept both structural and non-structural commitments. Structural commitments are often easier to verify and have more enduring effects on the market, whereas non-structural remedies are usually less interventionist and therefore preferable from the merging parties' point of view. A non-structural commitment may be limited in time.

The formulation of structural commitments specifies activities which are to be divested, the time period within which the divestment should take place, and the requirements which are imposed on the buyer with respect to competitiveness, competence and financial solidity. Deadlines for divestment are normally confidential with respect to third parties and are normally no longer than one or two years.

In the formulation of non-structural commitments, account is taken of issues concerning the applicable period, follow-up and dissemination of information to third parties. When formulating commitments of a non-structural nature, clarity is of great importance, since in many cases it will be necessary to monitor and follow these up over a longer period than is the case for structural commitments. Under certain conditions, it is essential that third parties are made aware of the contents of a commitment.

The examination of concentration cases usually involves short deadlines. It is thus important to consider at as early a stage as possible in the examination process, whether a commitment might be required. Any commitments issued must, however, be put in relation to and help to reduce the anti-competitive effects identified by the competition authority in its examination of the concentration.

Like commitments in antitrust cases, commitments relating to concentrations shall be combined with a periodic penalty payment in order to make sure that the parties adhere to their commitments. Such a decision takes effect immediately unless otherwise decided.²⁵

4. Impact on transactional outcome and on market intervention

There are no obvious risks of over or under deterrence under the Swedish system, partly due to the SCA's limited powers when it comes to imposing sanctions.

5. Conclusions and recommendations

Many of the due process concerns expressed against the EU system are not relevant to the Swedish system, as it has been structured differently, circumscribing the powers of the SCA in order to guarantee a judicial review of both inspections and the imposition of sanctions. The proceedings before the court are adversarial and the courts will usually not defer to the SCA's findings, but will instead carry out a thorough examination of both law and facts.

The limited powers of the SCA will also have an effect on the incentives of a company to accept or propose transactional resolutions. If it is not the competition authority that imposes sanctions, then a company may be more inclined to take matters to court. If on the other hand, the competition authority has such powers and hints that it is about to impose a substantial fine, a company may be more inclined to accept a settlement and reduction of the fine even though it considers that part of the authority's case is not that solid.

Still, the Swedish system is not flawless, and there are a number of issues that may be of concern from a due process perspective. The ones that are debated at the moment are all related to the evidence gathering by the SCA in competition cases.

As stated previously, the decision to carry out a dawn raid is made by the Stockholm District Court. There is thus an ex-ante control of inspection decisions. However, the ex-post control may not be as effective. Much indicates that the ex-post control of inspection decisions and of measures taken on their basis do not meet the standards set by the European Court of Human Rights ("the Strasbourg court").

²⁵ Chapter 6, Section 1 of the Act.

In cases such as *Ravon*,²⁶ *Canal Plus*²⁷ and *Primagaz*,²⁸ the Strasbourg court has explicitly declared that, in order for the requirements in Article 6(1) of the ECHR to be met,²⁹ companies targeted by a dawn raid must be *guaranteed an effective a posteriori review* (in law and in fact) not only of the inspection decision as such, but also of any measures taken on its basis.

In Sweden, it is a fact that as the law now stands, there is no such guarantee.

In 2010, the SCA assisted its Dutch counterpart in a dawn raid at the premises of the pharmaceutical company AstraZeneca. During the course of the dawn raid, the inspectors wished to take copy-images of the hard drives for review at the authority. AstraZeneca agreed to the taking of copy-images but refused to let the SCA bring them back to the authority for review. The company appealed the SCA's decision to the Market Court. The court did not grant leave to appeal, simply stating that the challenged measure constituted an implementing measure.³⁰

Clearly, the situation, as it now stands is not in line with the case law of the Strasbourg court. There should be a possibility also to have implementing measures reviewed by an impartial tribunal, and the rules governing these procedures are now being revised.

Not only did the case of AstraZeneca highlight the lack of effective ex-post control, it also touched upon another controversial issue from a due process perspective. There is currently an on-going and much heated debate with regard to the SCA's practice to take copy-images of the companies' hard drives and bring these back to the authority for review. Companies, practitioners and others claim that this practice fails to respect fundamental rights, such as the right to the defence, as well as the principle of proportionality. The right to go through documents and books is broader than the right to make copies of such documents or files. Only documents directly related to the subject-matter of the inspection should be copied, and at no time may documents containing trade secrets or covered by legal professional privilege be copied (or reviewed for that matter).

The SCA's procedure in relation to dawn raid is currently under review by the legislator, and the SCA has declared that, until the matter has been solved, it will no longer bring copy-

²⁶ *Ravon v. France*, judgment of 21 February 2008, Application no. 18497/03.

²⁷ *Société Canal Plus ao v. France*, judgment of 21 December 2010, Application no 29408/08..

²⁸ *Compagnie des Gaz de Pétrole Primagaz v. France*, judgment of 21 December 2010, Application no 29613/08.

²⁹ The right to a fair trial.

³⁰ Decision of the Market Court, A 5/10.

images back to the authority if the company in question raises any objections against such action.

Finally, the fact that the SCA's evidence gathering practices are up for debate, makes it important to draw the attention also to the fact that in Sweden, the rules on evidence allowed in court differ from many other jurisdictions.

For an outsider it may seem awkward that Swedish courts shall accept evidence no matter how it has been obtained or collected by the party relying on it. Under Swedish law, parties are free to refer to whatever evidence they are able to produce, even unlawfully obtained evidence, and the courts are free to evaluate such evidence. This of course makes the issue of the procedures governing the SCA's evidence gathering even more pertinent. In a competition proceeding where a company considers that the SCA has obtained evidence in an unlawful manner, it may thus not request the court to disregard such evidence.

Although the rules on evidence gathering and review of inspection decisions are not directly related to the issue of transactional resolutions, the fact that the SCA has gathered evidence that it might not have been able to, had there been effective procedural safeguards in place, may of course affect a company's incentive to file a leniency application or its willingness to accept a fine order or propose a voluntary commitment.

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