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SANCTIONS IN ANTITRUST CASES

Contribution by Sweden

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SANCTIONS IN ANTITRUST CASES

-- Sweden --

1. Introduction

1. Swedish competition law can sanction companies with administrative fines for violating the prohibitions against anti-competitive agreements and abuse of a dominant position. Individuals who have violated these rules on behalf of the companies that they represent can be prohibited from trading. Moreover, the Swedish regime contains rules on damages as a remedy for breaches of the competition rules.

2. The Swedish Competition Authority (“the SCA”) cannot itself impose fines but must make a request to the courts for the imposition of a proposed fine. The SCA has adopted a memorandum which explains how it calculates fines. An additional feature of the Swedish system is that the SCA applies a leniency program which, if applicable, may have an effect on the level of fines imposed on companies in breach of competition law.

3. This contribution considers, with references to relevant case-law where applicable, the above-mentioned aspects of Swedish competition law. Section 2 describes the legal basis for imposing fines as well as the relationship between the SCA and the courts. In sections 3 and 4, a detailed account is given of how the SCA determines the basic fine and the circumstances that can lead to an adjustment of the fine. Some practical issues in determining the amount of fines are discussed in section 5. Finally, section 6 concerns other forms of sanctions, including damages, trading prohibitions and exclusions from public procurement procedures.

2. The Swedish judicial system

4. The Swedish system of determining competition law fines is to a large extent based on the same principles that apply within the EU. The Swedish Competition Act (the “Act”) is the legal basis for imposing fines for violations of the competition rules¹. According to the Act, the Patent and Market Court (the “PMC”²) may, at the request of the SCA, order a company to pay an administrative fine where the company, or a person acting on behalf of the company, has intentionally or negligently infringed the prohibitions against anti-competitive agreements (in chapter 2, article 1 of the Act or article 101 TFEU³) or abuse of a dominant position (in chapter 2, article 7 of the Act or article 102 TFEU).

¹ Chapter 3, article 5

² As of 1 September 2016 the Patent and Market Court and the Patent and Market Court of Appeal replaced the Stockholm District Court and the Market Court respectively as the competent courts to hear competition cases. References are made to the Stockholm District Court and the Market Court only where required for clarity.

³ Treaty on the Functioning of the European Union

5. Consequently, the SCA does not as a general rule have the power to impose fines itself but must make a summons application with a proposed fine to the court. Moreover, before the SCA initiates proceedings against a company and requests a fine, the company must be given an opportunity to express its views on a draft of the summons application.

6. A decision by the PMC is appealable to the Patent and Market Court of Appeal (“the PMCA”). The PMCA has full jurisdiction to assess the level of fine levied in the first instance. Fines cannot be collected before a judgment has gained legal force, meaning that an appeal has a suspensory effect on a fine.

7. Instead of instituting proceedings in court, the Act authorises the SCA to order a company to pay such fines on its own initiative (a fine order), if the SCA considers that the material circumstances concerning the infringement are clear and if the company consents to the order⁴. A fine order shall contain details of:

- the company to which the order refers
- the infringement and the circumstances that are necessary to characterise it
- the provisions applicable to the infringement
- the fine that the order imposes on the company.

8. The company must be informed in the order that proceedings may be initiated in court if the company does not consent to the order within the time specified by the SCA. If the company consents to the fine order in writing and within the specified time, proceedings may not be initiated in court.

9. In this context it should be highlighted that a recent government-appointed inquiry has proposed changes to the Act which would grant the SCA decision-making power to impose fines for infringements of competition law, subject to appeal and judicial review by the PMC and the PMCA. The changes to the Act are proposed to enter into force on 1 January 2018. The inquiry report is currently being consulted upon by the government.

3. Determination of the basic fine

10. The determination of the basic fine is governed by the Act⁵, and can be summarised as follows.

11. The general starting point is that the fine must be determined in relation to the sanction value (i.e. the basic fine) of the infringement. The sanction value depends on (i) the gravity and (ii) the duration of the infringement. When assessing the gravity, particular account must be taken of (i) the nature of the infringement, (ii) the size and significance of the market and (iii) the infringement’s actual or potential impact on competition in the market.

⁴ Chapter 3, article 16.

⁵ Chapter 3, article 8.

12. In 2009, the SCA adopted a memorandum (the “Memorandum”) on the method of setting competition law fines⁶. In the Memorandum the SCA explains how it interprets the Act’s provisions concerning calculation of fines and relevant case law as well as the methodology used by the SCA when it calculates fines. The Memorandum includes, among other things, a detailed description of the determination of the sanction value, aggravating and mitigating circumstances related to infringement, circumstances not related to the infringement and symbolic fines.

13. It is important to note that the Memorandum is not binding for the courts. Consequently, the Memorandum does not pre-empt the courts’ interpretation of the Act’s provisions on calculating fines.

14. With regard to the basic fine the Memorandum provides that the SCA will set the sanction value by reference to the value of sales in the relevant market, the gravity of the infringement and its duration.

15. The value of sales is the company’s sales in the market related to the infringement, i.e. the relevant market at hand, during the last full business year of its participation in the infringement.

16. The gravity of an infringement is assessed at a value of at most 10% of the company’s sales in the relevant market. The SCA considers the following the circumstances in its gravity assessment:

- the nature of the infringement
- the size and significance of the market
- the infringement’s actual or potential impact on competition in the market
- whether or not the infringement has been implemented or not
- whether consumers have incurred significant direct damage or whether a large number of consumers were affected.

17. Infringements such as horizontal price-fixing, market-sharing and output-limitation agreements are considered to be very serious in nature and will generally be construed as representing a gravity at the higher end of the scale. Additionally, when a company holds a position similar to that of a monopoly and abuses this position by taking measures to prevent new companies from entering the market, this is deemed to be a serious abuse of a dominant position and will be construed as representing a gravity at a high level.

18. The duration of the infringement is factored in by multiplying the level of gravity with the number of years that the company has participated in the infringement. Periods of less than six months will be counted as half a year, while periods longer than six months but shorter than one year are counted as a full year.

19. The principle of proportionality is a general principle of Swedish law which has to be considered in the calculation of competition law fines. Neither the Act nor the Memorandum make any explicit reference to the principle of proportionality. However, the principle is reflected by the fact that competition law fines are calculated with reference to the gravity of the infringement.

⁶ Method of Setting Administrative Fines, available in English at <http://www.konkurrensverket.se/globalassets/english/competition/method-of-setting-administrative-fines.pdf>.

4. Adjustment of the basic fine

20. Once the sanction value has been set, it may be adjusted upwards or downwards due to aggravating and mitigating circumstances related to the infringement. Aggravating and mitigating circumstances are considered both in the Act and in the Memorandum and can lead to an adjustment of 5-15% of the basic fine per circumstance.

4.1 Aggravating circumstances

21. The Act provides that aggravating circumstances such as the fact that a company has coerced another company to join the infringement or that a company has had a leading role in the infringement, shall be considered when the infringement is evaluated⁷. Additional aggravating circumstances that the SCA will consider are if a company has been more active than others in the infringement but without having a leading role, and if a company has taken retaliatory measures against another company with a view to enforcing the anti-competitive practices. Furthermore, the SCA may regard the fact that an infringement has been committed intentionally as aggravating circumstance.

22. In the *NCC et al* case⁸ which concerned a bid-rigging cartel between contractors on different markets for public asphalt contracts, the Market Court (now the PMCA) considered that it was an aggravating circumstance that one company had had a decisive influence in the illegal cooperation and that the same company had taken the initiative to the cooperation and acted as a coordinator between the participating companies. It was also an aggravating circumstance that persons who held senior management positions within the companies had also participated personally in the infringements, that the illegal co-operation had been clandestine and that smaller companies had been engaged in the illegal co-operation.

4.2 Mitigating circumstances

23. As regards mitigating circumstances, the Act states that special account shall be taken of whether a company has participated in an infringement to a limited extent⁹. The SCA has described the mitigating circumstances that may be considered in more detail in the Memorandum. Such circumstances may be that a company's participation in an infringement was limited, that a company has negligently participated in an infringement or that an anti-competitive collaboration has been encouraged or authorised by public authorities. In the *Aleris et al* case¹⁰, which concerned a bid-rigging co-operation in the market for clinical physiology services, the requested fines were reduced by the PMC due to the fact that the illegal behaviour had been facilitated by a public authority. The PMC also opined that the fact that the respondents had cooperated in a relatively transparent manner was a mitigating factor that should affect the level of the imposed fines.

24. The fact that a company has infringed the competition rules as a consequence of pressure from another company is not considered a mitigating circumstance. Other circumstances that will not be regarded as attenuating are that a company can prove that the infringement was unprofitable or that a company has suffered damage due to its participation in a cartel.

⁷ Chapter 3, article 9.

⁸ Case MD 2009:11 *NCC Aktiebolag, Peab Asfalt AB, Peab Sverige AB, Peab Asfalt Syd AB, Vägverket, Kvalitetsasfalt i Mellansverige AB, Sandahls Grus & Asfalt AB och Svenska väg AB vs. Konkurrensverket*, Market Court judgment decided on 28 May 2009.

⁹ Chapter 3, article 10.

¹⁰ Case T 12305-13 *Konkurrensverket vs. Aleris Diagnostik AB, Capio St. Görans sjukhus AB och Hjärtkärlgruppen i Stockholm AB*, Stockholm District Court judgment decided on 18 December 2015.

4.3 Circumstances not related to the infringement

25. It also follows from the Act and the Memorandum that the sanction value can be adjusted due to circumstances that are not related to the infringement itself. The Act provides that particular account should be taken of whether a company has previously infringed article 2, section 1 or 7 of the Act or article 101 or article 102 TFEU¹¹. Recidivism can consequently be regarded when adjusting the fine.

26. Moreover, the fact that a company has discontinued the infringement quickly after it has been observed by the SCA and the financial status of company can also be taken into account in this stage of the adjustment of the basic fine.

27. The circumstances stated in the Act are further considered in the Memorandum. With regard to the discontinuation of the infringement, the Memorandum clarifies that this condition does not apply to particularly serious infringements.

28. Concerning the financial status of a company, this may involve an increase for an economically strong company where the fine is intended to have a restraining and deterrent effect. For example, the SCA adjusted the fines upwards in a 2010 bid-rigging case on local markets for the transport of deceased persons¹². One of the involved companies was a large nationwide company and the SCA increased the basic amount from SEK 150 000 (Swedish kronor) to SEK 300 000 (i.e. 100%). The financial status may also result in a reduction of the fine if the company's financial situation is of a precarious nature. To this effect, it is possible to consider a company's inability to pay when calculating the fine (see below).

29. Other circumstances which are recognised in the Memorandum and which can lead to an adjustment of the basic fine are that a company on its own initiative compensates those affected by the infringement or if a company admits to an alleged infringement for abuse of a dominant position.

30. The SCA does not recognise the existence or creation of a compliance program as a mitigating factor. The existence of a compliance program as a mitigating factor was rejected by the Market Court in the NCC et al case. According to the Market court it was impossible to know to what extent internal measures that the company had taken to avoid an infringement being repeated were effective or not.

31. It should also be noted that chapter 3, article 6 of the Act provides for a legal maximum of competition law fines. Thus, if the fine exceeds 10% of the affected company's total sales for the proceeding business year, the fine will be adjusted downwards to meet the 10% limit.

4.4 Inability to pay

32. Inability to pay ("ITP") is not referred to specifically in the Act but can be taken into account when calculating the fine, since the Act and the Memorandum, as stated above, provide for the possibility to consider a company's financial situation when adjusting the basic fine.

33. The SCA will consider parties' ITP arguments in accordance with the practice of the European Commission and the case law of the EU courts. An ITP application may be made before the imposition of the fine. This is due to the fact that it is not the SCA which imposes the fine, but the courts. As such, the SCA is not competent to adjust the court's fining decisions afterwards.

¹¹ Chapter 3, article 11.

¹² SCA decision of 19 May 2010 in case 20/2009 *Transporter av avlidna*, paragraph 36.

34. The existence of ITP has been applied in the *Scandorama et al* case¹³ concerning the market for guided coach tours in Europe. The SCA made its initial calculation based on the companies' sales on the relevant market, but reduced the fine from SEK 19 to 4 million for one of the companies when issuing the summons application. Both companies had in their response to the draft summons application claimed to be in financial difficulty. The SCA's decision to reduce the fine for one of the companies and not both was based on a credit rating agency's rating of the company's credit-worthiness, together with calculations of certain financial ratios.

At the time of the court proceedings however, the company's situation had changed and the same credit rating agency gave the company a much higher rating. The SCA therefore decided to adjust the level to SEK 10 million at a late stage in the court proceedings. The Stockholm District Court delivered its judgment which for all relevant purposes agreed with the findings of the SCA. The company was fined approximately SEK 6.8 million, after a 30% reduction for leniency. The court concluded that the levels of the fines set by the court did not jeopardise the viability of the companies.

4.5 Leniency

35. The Act provides the legal framework for leniency and reduction of administrative fines¹⁴. In addition, the SCA has implemented a leniency programme and has adopted general guidelines on how the authority interprets and applies the rules in the Act relating to the granting of immunity from fines before the authority has had an opportunity to intervene, immunity from fines after intervention from the SCA and reduction of fines. The guidelines also contain advice on how the SCA handles immunity and reduction matters.

36. With respect to the interaction between the SCA's leniency program and the calculation of fines, the Memorandum explicitly states that once the fine has been adjusted to the 10% limit (see above), the fine will be reduced or full leniency will be granted in the event that the rules in the guidelines apply. The first company that complies with the reduction requirements in the guidelines can expect a reduction by 30-50% of the fine which the SCA otherwise would have proposed. The fines of the second company that complies with the requirements will be reduced by 20-30% and the fines of other companies that fulfil the relevant criteria will be reduced by up to 20%.

37. In order to determine the reduction level within the stated intervals, the SCA will take into consideration the point in time that the evidence was submitted and the degree to which value was added to the SCA's investigation. The SCA will also consider the degree and continuity of co-operation from the company after the evidence was submitted.

5. Practical issues in determining the amount of fines

5-1 Parental liability

38. A parent company can be held liable for an infringement committed by a subsidiary forming part of the same undertaking, following the economic entity principle, where the subsidiary was subject to the parent's control and instructions. The SCA will typically seek to address the fine to the company which has actually committed the infringement, rather than attributing parental liability as a matter of course. The fines will consequently be calculated on the basis of the value of the infringing entity's sales rather than those of its parent.

¹³ Case T 199974-10, *Konkurrensverket vs. Scandorama AB och Ölvemarks Holiday AB*, Stockholm District Court judgment decided on 24 February 2012.

¹⁴ Chapter 3, articles 12-15.

5.2 Level of fines claimed by the SCA cannot be increased by the courts

39. The Swedish Code of Judicial Procedure states that a judgment may not be given for something else or more than that properly demanded by a party¹⁵. It follows from this that neither the PMC nor the PMCA can impose fines that exceed the amount claimed by the SCA in its summons application.

40. The PMC and the PMCA have reduced the requested fines in cases due to (i) the court finding mitigating circumstances, (ii) the court's own assessment of the material circumstances in the case which influenced the calculation of the basic fine, for example the duration of the infringement, or (iii) the court opining that a different method should be used to calculate the basic amount of the fine.

41. The *Däckia* case¹⁶, which concerned a horizontal price cooperation in connection to public authorities' procurement of certain tires and related services, illustrates how the requested fine can be reduced due to the court's application of a different calculation method than the one applied by the SCA. The SCA had calculated the requested fines based on the companies' sales on the markets related to the infringement. The PMC did not follow the SCA's method of calculation but based its assessment on the optimal value of the contracts covered by the authorities' procurements. This resulted in the fines imposed by the courts being lower than the SCA's requested fines.

42. In the *NCC et al* case, The Market Court modified the level of the fines ordered by the Stockholm District Court upwards against individual companies, after coming to a different conclusion about the gravity of the offence.

5.3 Collection of fines

43. The Act provides that a fine shall be paid to the SCA within thirty days of a judgment gaining legal force or a longer period as stated in the judgment¹⁷. If the fine is not paid within the right period of time, the SCA will hand over the demand to the Swedish Enforcement Agency for collection.

6. Other sanctions

6.1 Trading prohibitions

44. As stated above, competition law fines can only be imposed on companies and not on individuals. However, chapter 3, article 24 of the Act and section 17 of the Trading Prohibition Act allow the SCA to bring court proceedings concerning a trading prohibition against individuals, either in conjunction with cases concerning competition law fines, or on a standalone basis.

45. The SCA may also apply for a trading prohibition when another competition authority within the EU or the European Commission has found an infringement of the competition rules. This is possible if the infringement has effects on the Swedish market and the company's operations may be deemed to be conducted in Sweden.

46. The possibility to initiate trading prohibition proceedings against individuals has never been used in practice. It should nevertheless be mentioned that the SCA has adopted general guidelines in which the

¹⁵ Chapter 17, article 3.

¹⁶ Case T 18896-10, *Konkurrensverket vs. Däckia Aktiebolag och Euromaster Aktiebolag*, Stockholm District Court judgment decided on 21 January 2014

¹⁷ Chapter 3, section 22.

SCA explains how it interprets certain provisions in the Trading Prohibitions Act in competition law matters. The rules on trading prohibitions in competition law matters can be summarised as follows.

47. A person imposed with a trading prohibition may not run business operations. Furthermore, a person with a trading prohibition is prohibited from holding a senior position in a company. In addition, such a person may not be employed by or have regular assignments from a closely related party or from the business operation where the person has previously failed to fulfil his or her obligations.

48. A trading prohibition is issued for at least three years and at most ten years. A person who breaches a trading prohibition may be sentenced to imprisonment for at most two years. In order for a trading prohibition to come into question, it is required that the matter involves a cartel.

6.2 Damages

49. It follows from the Act that if a company intentionally or negligently infringes chapter 2, article 1 or 7 of the Act, or article 101 or 102 TFEU, it shall compensate any damage that is caused thereby¹⁸. The provision thus provides victims of competition law violations with a right to full compensation for any harm suffered due to the illicit conduct in question. Full compensation in this regard entails that the victim is not only compensated for actual loss suffered but also for any loss of profits resulting from the infringement, including interest from the time the harm occurred until compensation is paid. Chapter 3, article 25 has as its objective the complementary goals of deterrence and compensation. It does not, however, allow for punitive damages.

50. The Swedish government is preparing to implement EU Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions¹⁹ into Swedish law. The implementation will result in the adoption of a specific law on competition damages as well as modifications to the existing Act. These legislative changes are proposed to enter into force on 27 December 2016.

51. For more information about private enforcement of the competition rules in Sweden and examples of private actions, see also the Swedish contribution to the Working Party No. 3 roundtable on the relationship between public and private antitrust enforcement.²⁰

6.3 Exclusion from public procurements

52. Another form of sanction which companies that have participated in a bid-rigging cartel may face is exclusion from future public procurement procedures. This does not follow automatically from the finding of a cartel infringement, but rather it is for the contracting entity to decide in each case whether the company can be excluded from the procurement.

53. The SCA is planning to publish a recommendation aimed towards contracting entities which explains its view on when exclusion from a procurement procedure can be appropriate. An aspect of this will focus on how contracting agencies can, as part of their assessment, take into account the fact that a company has been granted leniency for a competition infringement. By opting not to exclude such companies, this can create incentives to apply for leniency, thus increasing the possibility for the SCA to investigate infringements of the competition rules.

¹⁸ Chapter 3, article 25.

¹⁹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

²⁰ DAF/COMP/WP3/WD(2015)4.