



The Legal 500 Country Comparative Guides

Sweden

CARTELS

Contributor

Hammar skiöld

HAMMARSKIÖLD

Malin Albert

Partner, Advokat | malin.albert@hammarskiold.se

Sofia Falkner

Associate Partner, Advokat | sofia.falkner@hammarskiold.se

This country-specific Q&A provides an overview of cartels laws and regulations applicable in Sweden.

For a full list of jurisdictional Q&As visit legal500.com/guides

SWEDEN CARTELS



1. What is the relevant legislative framework?

The main legislation on cartel prohibition is the Swedish Competition Act (2008:579) which contains a general prohibition against agreements between undertakings (companies) that have as their object or effect the restriction, distortion or prevention of competition (Chapter 2 section 1). The prohibition is equivalent to Article 101 of the Treaty on the Functioning of the European Union (TFEU). There is an exemption from the general prohibition against anti-competitive agreements under Chapter 2 section 2 of the Swedish Competition Act (corresponding to Article 101(3) TFEU). It is, however, highly unlikely that cartel cases can benefit from the exemption. Specific exemptions from the prohibition, that correspond to and implement the EU block exemption regulations, can apply to categories of agreements. In addition, specific exemptions exist in relation to farming and taxi operations. The Swedish Competition Damages Act (2016:964) contains provisions relating to damages resulting from e.g. cartel-infringements.

2. To establish an infringement, does there need to have been an effect on the market?

If an agreement has an anti-competitive object, there is no need to examine its effect on the market. Cartel conduct is normally considered to restrict competition by object. Therefore, a considerable effect on competition is presumed and no effects analysis is required.

3. Does the law apply to conduct that occurs outside the jurisdiction?

The Swedish prohibition against anti-competitive agreements applies to every agreement that prevents, restricts or distorts competition on the Swedish market, if the agreement at least partly is implemented in Sweden. There is no requirement that the conduct has

taken place in Sweden or that the parties to the infringement are incorporated in Sweden. The Swedish Competition Act is enforced in compliance with public international law.

4. Which authorities can investigate cartels?

The Swedish Competition Authority (SCA) is the independent governmental authority responsible for investigating cartels.

5. What are the key steps in a cartel investigation?

An investigation by the SCA can be triggered by leniency application by a cartel member (acting as a whistleblower), a third-party complaint or through investigations launched by the SCA at its own initiative. When a suspected cartel conduct comes to the SCA's attention, the SCA will decide on whether to prioritise and proceed with an investigation or formally dismiss the matter (thereby triggering a subsidiary right for concerned companies to directly bring actions before the Patent- and Market Court). The SCA's decision on whether or not to prioritise a matter for further investigation is based on its prioritisation policy and by weighing all relevant circumstances. Following a decision to initiate a formal investigation, the SCA may, after prior authorisation from the Patent- and Market Court, conduct on-site inspections (dawn raids). The SCA may also at its own initiative formally question representatives of suspected companies and request information from the suspected companies, consumers and other relevant market actors. Should the SCA find that it has sufficient evidence to prove the existence of a cartel, it will issue a statement of objections to the suspected companies, setting out the evidence available to it and its preliminary conclusions as to the infringement. A suspected company is then given the opportunity to respond to the allegations, after which the SCA may: Oblige the company to cease the infringement under penalty of a fine, which may include the

behavioural or structural measures necessary. Such obligation can be decided on an interim basis, i.e. temporarily until the SCA has finally decided on the matter as such. Adopt an infringement decision, i.e. decide that a company has infringed the competition rules (without taking any measures against the infringement). Decide to impose fines for infringement of the competition rules (the maximum amount of the fine is ten per cent of the sum of the company's total worldwide turnover). The approximate timeframe for the SCA's investigation depends on the complexity and scope of the matter and can range between one to several years. Since March 2021, the SCA no longer has to turn to the courts but can impose fines on companies for competition law infringements and in October 2022, the SCA made use of its new powers for the first time. Less than two months later, the next fining decision was adopted by the SCA. Both these cases concerned relatively small market players and minor infringements why it is difficult to draw any conclusions from the investigations as regards timing.

6. What are the key investigative powers that are available to the relevant authorities?

The SCA has extensive powers to request information, documents and other materials both from companies suspected to have committed an infringement and from third parties. The SCA can also order persons to submit to an interrogation. Orders and requests by the SCA may be issued under penalty of a fine. Privilege against self-incrimination applies. The SCA can apply to the Patent and Market Court for authorisation to conduct on-site inspections (i.e. dawn raids) at the premises of suspected companies, the homes of board members and employees of such company or the premises of companies which are not subject to investigation (if there is reasonable cause to believe that relevant evidence is kept there). When carrying out dawn raids, the SCA benefits from investigatory powers similar to those of the European Commission. The SCA is e.g. empowered to: examine books and other business records regardless of the media on which they are stored; make copies of or take extracts from books and business records; 'mirror' digitally stored material for subsequent in-depth search at the SCA's premises; ask employees for explanations of facts or documents relating to the subject matter of the inspection (however, the interviewee is not required to provide any incriminating information); access any premises, land, modes of transport and other areas; and seal business premises for the period of the inspection. Companies that intentionally or negligently violate administrative decisions during the SCA's investigation, e.g. by

submitting incorrect, incomplete or misleading information, failing to ensure that a representative appears for interrogation, breaking a seal or otherwise obstructing an inspection can be imposed fines for non-compliance. Such fines may amount to a maximum of one per cent of the company's turnover during the previous financial year.

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

Legal privilege applies to communication and documentation to and from members of the Swedish Bar Association and other bar associations or law societies and their associates. Legal privilege also covers documents that have been given to a lawyer in confidence within the scope of his or her professional duties. Legal privilege does not extend to the advice of in-house counsel.

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

Immunity (full leniency) can be granted to the first company notifying an infringement to the SCA. The application must contain sufficient information about the infringement to enable an investigation by the SCA. To be granted immunity, the applicant must provide the SCA with all the information on and evidence of the infringement that the company has; continuously and actively cooperate with the SCA; not destroy evidence or hinder present or future investigation of the infringement; and quit its participation in the infringement. Immunity cannot be granted to a company that has coerced another company to participate in the infringement or that has destroyed evidence.

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

Immunity (full leniency) can be granted only to the first applicant that fulfils the conditions provided in section 3.1 above. Other companies can be granted a reduction of fine if they significantly facilitate the SCA's investigation by voluntarily providing all the information on the infringement at its disposal and actively cooperating with the SCA. The information provided must have a significant added value for the SCA. A

30–50 per cent reduction of fines can be granted to the company that, after any immunity applicant, first fulfils the conditions. The fines of the second company fulfilling the conditions can be reduced by 20–30 per cent. The fines of other companies subsequently fulfilling the relevant conditions can be reduced by up to 20 per cent. In order to determine the exact reduction level within the stated intervals, the SCA takes into consideration e.g., at what point in time the evidence was submitted, the degree to which value was added and the continued cooperation by the company concerned.

In a recent case, Arla Foods (a company active in the dairy products sector) was granted a reduced fine by half because of its cooperation with the SCA during the cartel investigation. In this case, Arla Foods had disclosed information about the infringement only after the SCA's enquiry.

10. Are markers available and, if so, in what circumstances?

Markers are available. The marker protects the applicant's place in the queue for immunity or leniency and gives the applicant an extension period to collect and report relevant information regarding the infringement to the SCA. Application for a marker must include at least enough information for the SCA to identify the infringement, including information on the product that the infringement concerns, the other companies participating in the infringement and the purpose of the infringement (e.g. price fixing).

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

Immunity and leniency applicants must provide active and continuous cooperation throughout the investigation and any subsequent enforcement. The requirement entails an obligation to submit all information and documentation requested by the SCA and make current and former employees available to the SCA for interrogation.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

The Swedish Competition Act does not provide for criminal sanctions. However, an immunity or leniency application is automatically extended to potential trading

prohibitions (see section 6.1).

13. Is there an 'amnesty plus' programme?

No such program exists.

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

Save for possibilities of immunity and leniency as described under section 3 above, the concept of 'settlement' or 'plea bargain' does not exist. Voluntarily commitments by the suspected company/companies may give the SCA a formal reason not to intervene. A decision by the SCA to accept commitments may refer to a limited time. During the time that the commitment decision is in force the SCA may not issue an order to cease the infringement or adopt an infringement decision in respects of the behaviour covered by commitments.

15. What are the key pros and cons for a party that is considering entering into settlement?

Not applicable.

16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

The SCA cooperates closely with the European Commission and the national competition authorities (NCA) within the European Competition Network (the ECN). Furthermore, the Nordic countries have entered into a separate cooperation agreement, which enables them to assist each other with cases and exchange information.

In accordance with regulation 1/2003, the European Commission and NCAs shall inform each other about their respective investigations and exchange information.

17. What are the potential civil and criminal sanctions if cartel activity is established?

There are no criminal sanctions under Swedish competition law. When an infringement has been established, any anti-competitive agreement is considered null and void, and the participating companies may be imposed an administrative fine. In cases of serious infringements, natural person in the participating companies (e.g. the CEO or the board members) may be subject to a trading prohibition, meaning that they can be prohibited from conducting business operations or hold senior positions at a company for a certain period of time.

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels? The maximum fine is ten per cent of a company's turnover during the preceding financial year. The fine shall be set in accordance with the gravity and duration of the infringement, with consideration taken to the nature of the infringement, the importance of the relevant market and the actual or potential effects of the infringement on the market. Aggravating or mitigating circumstances are taken into consideration. In practice, the highest fine imposed on a company concerns the asphalt cartel case (SEK 200 million, as amended by the Patent and Market Court in 2009).

19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

A parent company can be held jointly and severally liable with an infringing subsidiary if the subsidiary does not act independently on the market, taking into account economic, organisational and legal links. For wholly owned subsidiaries, there is a rebuttable presumption that the parent company exercises decisive influence and is thus liable for the conduct of its subsidiary.

20. Are private actions and/or class actions available for infringement of the cartel rules?

Private action can be brought against companies that have intentionally or negligently violated the prohibition against anti-competitive agreements. Private action has been available since the Swedish Competition Act of 1993 entered into force under general civil procedural

rules. Private actions in Sweden are governed since December 2016 by the Swedish Competition Damages Act, which implements The EU Damages Directive. Class actions are available under the Swedish Competition Damages Act, in which case the Swedish Group Proceedings Act (2002:599) is applicable. An injured party must bring its claims within five years from the time they became aware or could have reasonably been expected to become aware of i) the infringement, ii) that the infringement caused them harm and of iii) the identity of the infringer. If a competition authority has commenced an investigation, the limitation period of five years will start from the date of a final decision is taken in relation to the investigation.

21. What type of damages can be recovered by claimants and how are they quantified?

The damages that can be recovered include compensation for actual loss and for loss of profit, including interest until compensation is paid. The infringer may also have to compensate the injured party for its legal expenses. The quantification of an injured party's actual loss and loss of profit will be subject to court review. The compensation may be reduced if the infringer can prove that the injured party has passed on the damages suffered from the infringement to indirect purchasers or suppliers.

22. On what grounds can a decision of the relevant authority be appealed?

Decisions by the SCA that establishes an infringement of the competition rules (obliging a company to cease an infringement, including interim measures), imposes fines for infringement and investigatory decision (such as obligations to submit documents or submit to interrogations) can be appealed on its merits to the Patent- and Market Court. A decision by the Patent- and Market Court may in turn be appealed to the Patent and Market Court of Appeal. Leave to appeal is required in the Patent and Market Court of Appeal and can be granted only under the following circumstances: there are reasons to doubt that the Patent and Market Court's judgement is correct; the Patent and Market Court of Appeal cannot determine the correctness of the Patent and Market Court's judgement without thoroughly reviewing the case; it is important for the application of the law that the case is reviewed by Patent and Market Court of Appeal; or an extraordinary reason exists. Judgments and decisions by the Patent and Market Court of Appeal can, upon approval by the Patent and Market Court of Appeal and leave to appeal, be appealed to the

Supreme Court. Leave to appeal to the Supreme Court is granted only for cases that are considered important for setting a precedent. Therefore, the Patent and Market Court of Appeal is in practice the final instance for most cases. A decision by the SCA to not initiate proceeding or take measures cannot be appealed.

23. What is the process for filing an appeal?

An appeal to the Patent and Market Court is considered lodged when an application is received by the registry. The same procedure applies for appeals to the Patent and Market Court of Appeal. The Swedish Supreme Court is the court of final instance. However, a leave to appeal to the Supreme Court is granted only in rare cases, namely where the case is considered important for setting a precedent.

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

There have been no recent notable cartel cases in Sweden. The SCA lost two major cartel cases, that it brought before the Patent and Market Court of Appeal in 2017 and early 2018 respectively. Both cases concerned alleged bid-rigging in public procurements.

25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, impact of COVID-19 in enforcement practice etc.)?

- Similar to the practice and focus of NCAs in other EU Member States, the SCA has recently focused on the digital markets and platforms, inter alia by conducting a sector inquiry.

- The SCA has issued its third decision on interim measures in equally as many years (compared to the many years before without any decisions on interim measures). However, none of the cases has so far concerned cartels but abuse of dominance on markets at risk of not easily reversed effects.
- In 2022, the SCA also opened (but ultimately also closed) its first investigation into obstruction since it received its new powers to issue fine for obstruction of investigation.
- Furthermore, as is the case with several NCAs in the EU, another focal point of the SCA has been pricing conduct in the pharmaceutical sector. In its report, published in February 2022, the SCA has investigated to what extent the amount of competitors selling therapeutic alternatives and parallel-imported versions have an impact on the pharmacies' settled purchase prices for patent-protected pharmaceuticals.
- Against the backdrop of inflation and economic difficulties and rapidly increasing food prices, the SCA in March 2023 announced that it is generally reviewing the food retail sector and that it has the capacity to keep an eye on "other inflationary markets".

26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

It can be expected that the SCA will continue to take a more active investigative role and continue to try its new investigatory and decision-making powers during 2023, becoming a more visible enforcer of the competition rules. There are no imminent changes or upcoming decisions known of for 2023.

Contributors

Malin Albert
Partner, Advokat

malin.albert@hammarskiold.se



Sofia Falkner
Associate Partner, Advokat

sofia.falkner@hammarskiold.se

