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# Cartels 2023

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## **Sweden: Law & Practice**

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Mannheimer Swartling



# SWEDEN



## Law and Practice

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**Mannheimer Swartling** has an extensive international practice, with an especially strong focus on the Nordic region. The firm employs over 400 lawyers, based in offices in Sweden, Belgium, China and the USA. Its EU and competition practice group, with more than 25 specialists, is involved through all the stages of many of the largest and most complex cartel investigations in Sweden. It advises on everything from developing compliance programmes to assisting during investigations by the Swed-

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## 1. Basic Legal Framework

### 1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

The Swedish Competition Act 2008:579 (as amended) (the “Act”) came into force on 1 November 2008 and governs Swedish competition law. Chapter 2 of the Act covers anti-competitive agreements, including cartels.

In many respects, Swedish law in this area is similar to the equivalent rules at the EU level, as found in the Treaty on the Functioning of the European Union (TFEU). Chapter 2, Section 1 and Chapter 2, Section 2 of the Act are structured in the same way as Articles 101(1) and 101(3) of the TFEU. Section 1 sets out the prohibition against anti-competitive agreements, and Section 2 explains the possible exemptions to it. Chapter 2, Section 6 states that agreements falling within Chapter 2, Section 1 are unenforceable (and, as such, is equivalent to Article 101(2) of the TFEU).

### 1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

The Swedish Competition Authority (SCA) (*Konkurrensverket*) is the body in charge of investigating cartel matters through implementation of the Act. The SCA is independent of the European Commission but is required to cooperate with it.

There are no other Swedish authorities tasked with administering the Act or otherwise prosecuting cartel infringements, as there are no criminal sanctions for cartel activity in Sweden.

Since March 2021, the SCA has had new powers resulting from the implementation of Directive (EU) 2019/1 (the ECN+ Directive), as well as

other related reforms intended to further extend the SCA’s enforcement toolbox. These developments include, for example, the power for the SCA to impose fines without needing to go to court, extended powers relating to dawn raids, and the ability to issue so-called “investigation fines” for various forms of non-compliance during investigations.

### 1.3 Private Challenges of Cartel Behaviour/Effects

The SCA has the exclusive authority to take legal action, to impose fines or to take other enforcement action against companies that are suspected of infringing the prohibitions against cartel behaviour. An exception to this is when the SCA has decided not to deliver an injunction under Chapter 3, Section 1 of the Act to stop infringing behaviour. In such cases, a company that qualifies as one concerned by the infringement has the right to launch an action for such an injunction against the behaviour. The private action must be brought before the Patent and Market Court.

Of course, private parties also have the right to launch actions for damages stemming from infringements of the competition rules. Such actions are brought under the Competition Damages Act (2016:694) before the Patent and Market Court. See 5.1 Private Right of Action, 5.2 Collective Action, 5.3 Indirect Purchasers and “Passing-On” Defences and 5.4 Admissibility of Evidence Obtained From Governmental Investigations/Proceedings.

### 1.4 Definition of “Cartel Conduct”

There is no definition in the Act of behaviour that amounts to “cartel conduct”. However, the term “cartel” is generally used to describe horizontal agreements and concerted practices involving hardcore restrictions of competition, such as

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price fixing, market sharing, bid rigging or limitation of production.

Like the European Commission, the SCA has guidance on “agreements of minor importance” (KKVFS 2017:3). Below specific market share and turnover thresholds, certain agreements will fall outside the competition rules. However, these *de minimis* rules do not apply to hardcore restrictions, so cartel-like behaviour would not benefit from the *de minimis* regime.

## 1.5 Limitation Periods

The SCA may only impose a fine if it adopts a decision to this effect within five years of the infringement ceasing.

If the undertaking concerned has been subject to an unannounced inspection, or has been given the opportunity to respond to a draft decision (the Swedish equivalent to a statement of objections at EU level), within the same period, then the five-year limitation period counts from this later point instead. However, in such a case, a fine may only be imposed if the decision has, in any event, been adopted within ten years of the infringement ceasing.

The limitations are suspended if a national competition authority in another member state or the European Commission investigates the same suspected infringement. The suspension of the limitation period ceases when those authorities conclude their investigations.

However, in all cases, a fine may only be imposed if the decision is adopted within ten years from when the infringement ceased.

## 1.6 Extent of Jurisdiction

The geographic reach of public enforcement of the Act is determined by the effects of the

relevant anti-competitive behaviour. The Act concerns behaviour affecting Sweden, a part of Sweden or an area larger than Sweden. An agreement outside Sweden may be prohibited under the Act if it has actual or potential effects in Sweden.

In practice, this means that a cartel may be prosecuted under Swedish law if it has appreciable effects on competition in Sweden, even in circumstances where it is organised from outside Sweden or involves non-Swedish undertakings. That said, there are generally applicable public international law restrictions on extraterritorial jurisdiction, which mean that the SCA is unlikely to take action against foreign undertakings unless it is actually possible for that action to be enforced.

## 1.7 Principles of Comity

Where conduct is potentially subject to enforcement in multiple European jurisdictions, the SCA follows procedures flowing from its involvement in the European Competition Network (ECN). Regulation 1/2003 dictates that the SCA must co-operate closely with the national competition authorities (NCAs) of other EU member states under the auspices of the ECN; including in case allocation between the NCAs, assisting another NCA, sharing and using information supplied by another NCA and the way in which multi-jurisdictional leniency applications should be treated. For example, the SCA may assist in an unannounced inspection in Sweden on behalf of another NCA.

In the Nordic region, there is also specific co-operation between the NCAs in Denmark, Finland, Iceland, Norway and Sweden (revised in 2017 and further reaching than the ECN). As regards non-EEA jurisdictions, however, Sweden is not a party to any form of specific co-

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operation agreement or treaty. It is involved in the activities of the International Competition Network, but this does not have a rule-making function.

## 1.8 COVID-19

No pandemic-specific guidance, comfort letters or exceptions were introduced as a result of the COVID-19 pandemic.

The SCA stated in a March 2020 press release that it was available to provide informal advice regarding co-operation initiatives which might be considered necessary during the COVID-19 pandemic, but also emphasised that unjustified anti-competitive behaviour would not be tolerated. The European Competition Network, of which the SCA is a member, also issued a press release underlining the same messages.

## 1.9 Changes in the Regulatory Environment Affecting Competition Regulation

### The War in Ukraine

Similarly, as during the COVID-19 pandemic, the SCA issued a press release in March 2022 stating that it is available to provide informal advice regarding co-operation initiatives which may be considered necessary during, and in connection with, the current situation in Ukraine, again emphasising that unjustified anti-competitive behaviour will not be tolerated. The European Competition Network has issued a similar press release.

### Focus on Price Increases

As a result of the increasing inflation in Sweden, the [Swedish government declared in March 2023](#) that the SCA will receive increased financial resources. The purpose is to facilitate competition review of industries that have seen large price increases and to analyse the relationship

between price increases and costs in industries with limited competition. While this is not anticipated to lead to any changes in competition laws and regulations, it indicates an increased focus on competition in inflation-driving oligopolistic sectors, such as the [food industry](#) and the [fuel market](#).

## 2. Procedural Framework for Cartel Enforcement – Initial Steps

### 2.1 Initial Investigatory Steps

After receiving information that suggests cartel activity, either through market monitoring or through informants (leniency or tip-offs), the SCA will decide whether to initiate an investigation. In certain cases, the SCA may then file an application before the Patent and Market Court for authorisation to conduct an unannounced inspection at the premises of the companies in question (a dawn raid). Hence, court approval is necessary for conducting a dawn raid in Sweden.

If the SCA's suspicion is supported by the information collected, then the SCA will continue its investigation, for example, by reaching out to the market via contacts with customers, other competitors and individuals working for the companies involved.

If sufficient evidence to establish a case is found, the next step is for the SCA to issue a draft decision (equivalent to the European Commission's statement of objections) to the companies concerned, explaining its findings and position. Provided that the SCA maintains its stance after receiving responses from the companies, it has three options for how to proceed:



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- it can order the companies concerned to discontinue the alleged infringement through an injunction, subject to a non-compliance fine;
- it can impose administrative fines on the companies concerned; or
- it can, without taking any other action, establish in a decision that a company has infringed the prohibition against anti-competitive agreements or the prohibition against abuse of a dominant position – this type of decision prohibits the infringement from being assessed in a subsequent proceeding for damages, but it can be appealed.

In principle, there is no time limit for how long an SCA cartel investigation may last, and in-depth cases will typically take a number of years from start to finish (however, see **1.5 Limitation Periods**). In its annual reports on its supervision of competition, the SCA typically gives an account of its average periods of review in different types of case (available on the SCA [website](#)).

## 2.2 Dawn Raids

With court approval, the SCA has the authority to carry out unannounced inspections (dawn raids) at:

- corporate premises;
- the private homes of board members or employees of the companies concerned; and/or
- the premises of companies that are not suspected of an infringement, if there are special reasons to suspect that evidence of the infringement could be found there.

Since March 2021, dawn raids may be carried out not only to investigate possible infringements of the two prohibition rules (against anti-competitive agreements or abuse of a dominant position), but also to investigate whether a

company has contravened a decision ordering it to cease certain behaviour, or a commitment to cease certain behaviour. Furthermore, dawn raids may be carried out in order to investigate whether there are reasons to impose an investigation fine (see **2.8 Non-cooperation With Enforcement Agencies**).

During an inspection, the SCA has the power to:

- examine the books and other company records;
- take copies of or extracts from books and business records (including electronic records);
- access all information available to the company from the site covered by the court authorisation, regardless of the form in which it is found;
- ask for on-the-spot oral explanations;
- access any premises, land, transport and other areas covered by the court authorisation; and
- seal premises, books and other company records, as long as and to the extent necessary, to conduct the inspection.

In practice, the SCA will typically carry out a physical search of the tangible material found at the premises, as well as digitally stored material. Since March 2021, the SCA has had the power to bring both tangible and digitally stored materials to the SCA's premises for review (previously, company consent was needed to continue an inspection off-site in this way). The search at the SCA's premises can be a long process, but the company will be invited to have a representative present throughout.

The SCA has the power to levy a fine for failure to co-operate during and after an investigation. For

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example, a fine can be imposed for intentionally or negligently:

- not granting the SCA access to relevant premises and documents;
- breaking seals to areas at the company restricted by the SCA during the investigation; and
- failing to appear for an interview after the inspection (see also **2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**).

The legal maximum for this kind of penalty is 1% of an undertaking's turnover in the previous financial year.

A company that is subject to a dawn raid may send for external legal counsel as support, but the SCA is not obliged to wait for the lawyers to arrive, and will normally only wait a short period of time.

### Restrictions on Dawn Raids

During an inspection, the SCA may not examine or take copies of, or extracts from:

- documents relating to issues outside the scope of the court authorisation; or
- documents that are covered by legal professional privilege.

Where there is disagreement about whether a particular document should benefit from the protection afforded by legal privilege, the document is to be sealed immediately and sent by the SCA to the Patent and Market Court for the issue to be determined without delay.

Where there is disagreement about whether material falls within the scope of the court authorisation, case law from the Supreme

Court (2018) has reaffirmed that the appropriate procedure is for the SCA to seek assistance from accompanying officials from the Swedish Enforcement Service (*Kronofogden*). The court confirmed that the measures taken by the SCA during a dawn raid are inadmissible for judicial review under Swedish law but that parties are, in any event, sufficiently protected as any eventual enforcement decision is subject to appeal (and a damages action for breach of fundamental rights remains an option).

### Dawn Raids Procedure

As part of an inspection, the SCA can request on-the-spot oral explanations from representatives or employees of the undertaking involved. This does not mean that the interviewee is required to provide incriminating information, only that the SCA can request clarifications in respect of the material found or sought during an inspection – for example, how a computer is activated, or what role a particular individual of interest has in the organisation.

Companies and interviewees can obtain copies of documents that are furnished to the SCA, or other records reflecting what transpired – see **2.3 Spoliation of Information** and **2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**.

During 2021, there were inspections in three investigations. The SCA not only conducted inspections at company premises, but also at the homes of employees, for example, the chief legal counsel. This is likely a consequence of the new hybrid style of working that has followed the COVID-19 pandemic, and it is reasonable to expect that more such inspections will be carried out at the homes of employees as a result.

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According to publicly available information, the SCA conducted only one inspection in 2022. This concerned suspected anti-competitive coordination in the bread industry. The inspection was conducted only at company premises.

## 2.3 Spoliation of Information

In order to ensure the SCA's full access to the premises of the companies concerned during an inspection, SCA officials are usually accompanied and assisted by representatives of the Swedish Enforcement Service, which has authority to gain access to premises and apply official seals.

Seized documents are usually copied in duplicate. After the on-site inspection, the SCA and company representatives verify that the two sets of copies are identical (and that each document is covered by the scope of the court authorisation allowing the inspection). The SCA and the company keep a copy each. Since March 2021, the SCA has also had the power to seize original documents. In such cases a copy of the document should, if possible, be left at the company's premises. The digital search typically continues off site, but a similar process is followed. The SCA has, in recent years, invested in improving its forensic capabilities, in terms of hardware, software and staffing.

## 2.4 Role of Counsel

Legal counsel attending to assist a company during an inspection can also support an officer or employee when they are required to provide explanations to the SCA.

It is stated in the preparatory works of the Act that nothing prevents an employee or other representative of a company under investigation from being represented by counsel during SCA interviews. Whether it is appropriate for an

employee to seek separate counsel is assessed on a case-by-case basis (eg, when their interests are not aligned with those of their employer), especially post-dawn raid.

In-house legal counsel may represent an undertaking during an investigation, but certain privileges will not be enjoyed in the relationship between the company and the in-house counsel (eg, attorney-client privilege). In addition, an in-house counsel is not subject to the same formal, ethical standards as an attorney who is a member of the Swedish Bar Association (*Advokatsamfundet*).

If the investigation commences with an inspection, guiding the client throughout the raid is a necessary first step. The investigated company's counsel is usually also present during the subsequent digital search at the SCA's or the company's premises.

Following the continued search, the SCA will formally close the dawn raid at a meeting to which the investigated company (usually accompanied by its counsel) is invited. At this meeting, the SCA explains which documents it intends to seize following its continued search. As there is no formal possibility of appealing a decision to seize documents, the company should be prepared to present such objections on scope during this meeting, if not before.

As in most jurisdictions, another key step in the initial stages of an enforcement action is considering a leniency application. This would typically include an internal audit involving employee interviews and a forensic review of relevant individuals' email accounts and other documentation to determine the degree to which the SCA's suspicions have foundation.

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Depending on the nature of the suspected infringement, it may also be advisable to suggest that key individuals secure their own legal counsel, considering that trading prohibitions can be issued (or criminal charges in other jurisdictions).

## 2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony

The SCA may require undertakings or other parties to supply information, documents or other material by issuing a Request for Information (RFI) under Chapter 5, Section 1(1) of the Act, when necessary for the implementation of its duties under the Act. Possible targets for an RFI include both the company being investigated and other companies that the SCA has reason to believe hold information of interest.

Where the SCA has sufficient reason to suspect anti-competitive behaviour, it can apply to the Patent and Market Court for authorisation to conduct an inspection at locations that are relevant to the suspected infringement. The SCA can require individuals who are likely to be in a position to provide relevant information on an investigation to attend a hearing at the SCA's premises, under Chapter 5, Section 1(2) of the Act. Counsel may assist the interviewee during the hearing.

The contents of the interview must be documented by the SCA, and the interviewed person must be given the opportunity to review the document and must be asked if they object to any of its contents. An objection requires the SCA to either adjust the document or at least note the objection.

While there is no obligation to speak at the hearing, a summons to attend a hearing may be combined with a general request to supply information. The summons can also be combined

with the imposition of a conditional fine in the case of non-attendance.

## 2.6 Obligation to Produce Documents/Evidence Located in Other Jurisdictions

Information that is requested by the SCA and that is accessible to an individual or a company must be produced, without regard to its physical location. This includes information stored on data servers in other jurisdictions.

## 2.7 Attorney-Client Privilege

During an SCA inspection, the authority may neither examine nor take full or partial copies of documents that are covered by legal professional privilege. According to Chapter 5, Sections 11(2) and (3) of the Act, documents that are disputed must be sealed immediately and sent to the Patent and Market Court for it to assess whether or not privilege applies.

Communications with legal professionals from other jurisdictions who can be considered to have roles equivalent to that of a lawyer in Sweden are also covered by legal privilege. Internal communications with in-house counsel, however, are not recognised as privileged.

## Other Forms of Privilege

The privilege against self-incrimination is set out in Chapter 5, Section 13 of the Act (a codification of case law following amendments in March 2021).

The SCA may require an undertaking to provide specific documents or information, but cannot compel the provision of answers that might involve an admission of the existence of a competition law infringement, as it is incumbent upon the SCA itself to prove this.

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## 2.8 Non-cooperation With Enforcement Agencies

To ensure a company's compliance with an RFI, the SCA may combine it with a conditional fine. Failure to comply with the RFI will lead the SCA to apply to the Patent and Market Court for it to impose the fine. This type of conditional fine can be applied also in relation to a company which is not being investigated, in contrast to the "investigation fine" mentioned below.

Since March 2021, the SCA has been able to issue investigation fines if, for example, an investigated company:

- intentionally or negligently provides incorrect, incomplete or misleading information during an investigation;
- fails to provide information requested by the SCA by a stipulated deadline; or
- fails to appear for an interview.

Such a fine can also be imposed if the company hinders the SCA during a dawn raid, for example, by breaching a seal or by providing incorrect, incomplete or misleading answers to questions asked during the dawn raid. However, the investigation fine cannot be applied in relation to conduct already covered by a conditional fine decision, if the SCA has already applied for the conditional fine to be imposed.

In 2022, the SCA initiated its first investigation for imposing an investigation fine in relation to an ongoing cartel case. However, the SCA was unable to prove an infringement and thus discontinued its investigation.

Companies usually co-operate with the SCA in order to simplify and streamline the process. However, it is not unusual for there to be discus-

sions seeking to adjust the scope of the questions before responding.

## 2.9 Protection of Confidential/Proprietary Information

Since March 2021, companies under investigation are no longer able to refuse disclosure to the SCA of business secrets of a technical nature (where they satisfy general conditions of relevance).

After documents and information come into the SCA's possession, qualifying content will be kept confidential from third parties by general secrecy rules. Material concerning a company's business or operating conditions, inventions or research findings – which is gathered by the SCA during an investigation – is to be kept confidential, on the basis that loss will result if such information is revealed. Information pertaining to third parties that have entered into business relationships with the investigated party is protected by even stronger, unconditional rules.

## 2.10 Procedure for Defence Counsel to Raise Arguments Against Enforcement

Arguments can be raised by an investigated company or its counsel at any point, depending on how the investigation is pursued. A typical opportunity to present arguments is in response to an RFI or during a hearing. Parties will also have the opportunity to respond to the SCA's draft decision, which in effect doubles as the SCA's statement of objections.

## 2.11 Leniency and/or Immunity Regime

Chapter 3, Sections 12–15 of the Act provide for immunity, or a reduction in the fine imposed, where infringing undertakings fulfil certain specific conditions. These rules were amended in 2014 to introduce more predictability and to mirror the EU leniency system (through the addition

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of a marker system). The SCA also publishes guidelines on its leniency policy (KKVFS 2021:1), which were updated in 2021 to take account of amendments to the Act introduced in March 2021.

The Swedish leniency regime is, in a sense, broader than that at EU level as it is available for all infringements falling within Chapter 2, Section 1 (ie, more than cartel-related infringements). Investigations can also often be triggered by tip-offs or complaints from other sources, such as competitors, customers or suppliers. The SCA's whistle-blowing system, launched in 2017/2018, further complements the leniency system.

### First-in-the-Door (Immunity Applicants)

To obtain immunity from fines, a company must satisfy certain conditions set out in the Act. Immunity may be granted to the first company to notify the SCA of an infringement only if it is as a result of this contact that the SCA has sufficient information to take action against the infringement (Type 1A immunity). Alternatively, if the SCA has already reached that point without the help of an immunity applicant, immunity may be granted where the company is the first to provide information that allows an infringement to be established (Type 1B immunity).

In either case, a company seeking immunity must also fulfil the following additional conditions:

- it must provide all relevant information available;
- it must actively co-operate with the SCA throughout the investigation;
- it must ensure that no evidence is destroyed and it must in no other way hinder the SCA's investigation; and

- it must cease participation in the infringement as soon as possible.

As regards Type 1A immunity applications, the SCA issues a decision that states whether the initial condition has been fulfilled (compliance with the conditions listed above can, of course, only be assessed at a later stage). This decision is binding on the SCA. Immunity is not available to a company that has compelled another undertaking to participate in the infringement.

### Marker System

Following amendments to the Act, a marker system was introduced into the Swedish leniency regime in August 2014. Under this system, a company seeking immunity can now apply for a marker and subsequently perfect that marker within a specified period in order to secure its position.

Another company cannot “jump the queue” for immunity unless and until the company with the prior marker fails to provide the additional information required within the time determined by the SCA.

When applying for a marker, the company should inform the SCA of the actions that need to be taken, how long this will take and what information it will be able to submit. The SCA will then consult with the company and determine when the information must be provided. As a general rule, the marker will last for two weeks, but the SCA may extend this deadline if the company cannot reasonably submit the information within two weeks. If information sufficient for immunity is provided within this time, the information will be deemed to have been provided at the time of the application.

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In line with the ECN Model Leniency Programme, it is possible to submit a summary application to the SCA in circumstances where leniency has been sought in other EU member states. In such cases, an abbreviated volume of data is required.

## Second-in-the-Door Companies and Latecomers

A company that is not the first to apply for leniency (ie, where immunity has been secured by another company) can still benefit from a reduction in fines (Chapter 3, Section 13 of the Act) if it can provide information to the SCA that facilitates the investigation to a significant extent. The conditions explained above in relation to immunity applicants apply equally to those seeking a reduction of fines.

Information provided by a company, which leads to the fine being set at a higher amount for the undertakings which participated in the infringement than would otherwise have been the case, cannot be taken into account when the SCA determines the fine for the undertaking that provided that information.

According to the SCA's guidelines, the first company in this category to satisfy the relevant conditions will be eligible for a 30–50% reduction, the second can receive a 20–30% discount and additional undertakings stand to benefit from a reduction of up to 20%. In determining the applicable reduction, the SCA will take into account the timing of the provision of the information, the extent to which the information has added value, and the continuity of the applicant's cooperation throughout the investigation.

## Corporate Oral Statements

There are few rigid rules of procedure when making a leniency application to the SCA, but it is

necessary to demonstrate (eg, through a power of attorney) that the application is submitted by an individual with the authority to act on behalf of the applicant. A leniency marker can be submitted orally or in writing, in Swedish or in English. Initial contact can be made on an anonymous basis in hypothetical terms (in a meeting or by telephone contact) but will be insufficient to secure the marker.

To submit an oral corporate statement, the relevant company must contact the SCA's Leniency Group to arrange a meeting, where the statement will be read aloud by a representative for the company and recorded by the SCA.

## Access to Documents

In Sweden, there is a strong legal tradition of transparency. As a starting point, all (final form) documents and information created by, or submitted to, a public authority can be accessed. However, this is tempered by the Public Access to Information and Secrecy Act (2009:400) (the "Secrecy Act"). Leniency applications and settlement pleas are covered by absolute confidentiality under Chapter 30, Section 1 a of the Secrecy Act. However, this confidentiality does not apply to information that is incorporated in a decision. It is also always subject to the rights of defence of the other allegedly infringing parties.

Furthermore, the SCA is prohibited from sharing a leniency application with another member state's national competition authority or the European Commission without the company's consent.

Additional protection is available for business secrets and information that could be damaging to an individual concerned, and to protect the integrity of the investigative process.

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See also 5.4 Admissibility of Evidence Obtained From Governmental Investigations/Proceedings.

## 2.12 Amnesty Regime

There are no formalised amnesty-plus or penalty-plus systems available under the Swedish leniency regime. This means that there is no explicit scope to receive lenient treatment in one case as a result of providing information about an infringement in another separate case, nor does a company risk more severe fines if it does not report a previous infringement.

## 3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds

### 3.1 Obtaining Information Directly From Employees

See 2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony.

### 3.2 Obtaining Documentary Information From the Target Company

See 2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony.

### 3.3 Obtaining Information From Entities Located Outside This Jurisdiction

When the SCA requires information from a company or individual that is based outside Sweden, it will submit this request through the relevant NCA of the country in which the company in question is based. See 1.7 Principles of Comity.

### 3.4 Inter-agency Co-operation/Coordination

The SCA normally conducts its investigations without assistance from other Swedish authorities. In 2018, the SCA acknowledged a trend of

tip-offs relating to both competition and anti-corruption law issues, a crossover area which has been given focus in subsequent SCA reports, in particular in relation to procurement. For this reason, additional co-operation, for example in relation to advocacy work, with other agencies in this field (such as the police and the Anti-Corruption Institute) may become more common.

## 3.5 Co-operation With Foreign Enforcement Agencies

See 1.7 Principles of Comity.

## 3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases

There are no criminal charges in relation to the Act in Sweden.

## 3.7 Procedure for Issuing Complaints/Indictments in Civil Cases

The SCA's decisions to issue fines may be appealed to the Patent and Market Court. A judgment of the Patent and Market Court may, in turn, be appealed to the Patent and Market Court of Appeal. While the Patent and Market Court of Appeal is the court of last instance in competition law matters, it may allow a judgment to be appealed to the Supreme Court if this is necessary to set a precedent.

## 3.8 Enforcement Against Multiple Parties

Actions against several participants in a cartel can be brought before the Patent and Market Court as a single case. The court can decide if it is beneficial for the ongoing procedure to treat the actions together or separately, but the principal rule is that they will be dealt with together.

## 3.9 Burden of Proof

The SCA carries the burden of proof. Case law describes the standard of proof to which the SCA will be held in prosecuting its cases



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under the Act as high, but not as high as that required in criminal cases (ie, not beyond reasonable doubt). To some extent, the standard of proof can be adapted to fit the seriousness of the infringements and the fines sought in a particular case.

### 3.10 Finders of Fact

The SCA conducts the investigation into suspected cartel infringements, collecting information through inspections, interviews and requests for information.

### 3.11 Use of Evidence Obtained From One Proceeding in Other Proceedings

Under Swedish law, a court may try virtually any document, statement or occurrence as evidence, irrespective of source, including evidence obtained in another proceeding. The Patent and Market Court can therefore freely evaluate evidence presented before it by the SCA or by another party, using its discretion in line with the principles of free submission of evidence and free evidence assessment.

### 3.12 Rules of Evidence

See 3.11 Use of Evidence Obtained From One Proceeding in Other Proceedings.

### 3.13 Role of Experts

It is common to retain professionals from different fields as expert witnesses during trial. Economists specialising in competition law are often employed to provide insights into market definitions and the economic effects of an alleged infringement. Other types of expert, who are relevant to the understanding of markets and businesses, are also commonly heard as witnesses.

One of the SCA's departments is that of the Chief Economist, which provides the SCA with its own economic analyses.

To deal with competition cases, the Patent and Market Court will consist of at least two legally trained judges and two economists. The Patent and Market Court of Appeal will consist of three legally trained judges and two economists. The intention is to provide the court with sufficient expertise to review the economic issues presented before it.

### 3.14 Recognition of Privileges

Legal privilege (for external counsel) is far reaching under Swedish law. It is equally applicable during the SCA's investigation and during the process in court.

### 3.15 Possibility for Multiple Proceedings Involving the Same Facts

In theory, it is possible under Swedish procedural rules to consider the same facts in different SCA or court proceedings, provided that the proceedings concern different defendants. In practice, the SCA and the courts will consolidate cases so that the same facts are not presented in parallel proceedings.

## 4. Sanctions and Remedies in Government Cartel Enforcement

### 4.1 Imposition of Sanctions

Since March 2021, the SCA has been able to fine companies not only for infringements of the prohibitions against anti-competitive agreements and abuse of a dominant position, but also for infringing obligations or commitments that have already been imposed by the SCA. Appeal of the SCA's decision to the Patent and Market Court involves a full review of facts and substance, affecting both legal assessment and sanctions.

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## 4.2 Procedure for Plea Bargaining or Settlement

The SCA cannot agree to a plea bargain to resolve an investigation and the form of settlement process that was previously available was removed in March 2021, in connection with the SCA's new powers to issue fines.

## 4.3 Collateral Effects of Establishing Liability/Responsibility

A company may be debarred from government procurement procedures through a discretionary choice available to the procuring authority, according to Chapter 13, Section 3, paragraph 1(4) of the Public Procurement Act (2016:1145). This sanction is not imposed during the competition infringement procedure, but during the specific procurement procedure by the relevant contracting authority.

See also 5.1 Private Right of Action.

## 4.4 Sanctions and Penalties Available in Criminal Proceedings

Breach of the competition rules is not a criminal offence in Sweden, but an individual can face imprisonment of up to two years for failing to respect a trading prohibition.

## 4.5 Sanctions and Penalties Available in Civil Proceedings

The SCA can impose fines on companies, and has published a notice on the setting of fines (Dnr 21/2021). The notice has been updated to take recent changes to the Act into account, as well as recent case law and experience. In addition, the size of fines is to be brought more in line with those found in the rest of the EU. The SCA may not fine an infringing undertaking more than 10% of its turnover during the previous financial year. In contrast to the European Commission's practice, the SCA tends not to take account of

the infringing group's turnover when setting the cap, but rather only that of the infringing entity (although see the "Joint and Several Liability" section below).

When setting the level of a fine, the SCA will evaluate the gravity of the infringement (up to 30% of the value of sales in the relevant market), which is then multiplied by the duration. Factors affecting the gravity assessment include the nature of the infringement, the scope and importance of the market, and the harmful effects of the infringement on competition in the market.

The base level is then adjusted for aggravating or mitigating circumstances. Deterrent effect and recidivism may be taken into account. There is some scope for reductions due to inability to pay. Compliance programmes are not seen as a mitigating circumstance.

## Recent Cases

The highest individual fine yet imposed in Sweden under the Act was in 2009, in a cross appeal by the SCA of the 2007 Asphalt judgment; the Market Court (predecessor to the Patent and Market Court of Appeal) increased NCC's fine to SEK200 million. Following the various appeals, total fines for all the parties amounted to approximately SEK500 million, which is certainly notable in the context of the general level of fines in Sweden, but still significantly less than the SEK1.2 billion originally sought by the SCA.

A more recent case from 2014 concerned a co-operation between two tyre companies (Däckia and Euromaster). The court considered this to be an infringement by object due to the submission of a joint tender in a public procurement in circumstances where each could have tendered separately. Fines totalling just under SEK2.5 million were imposed on the companies (around

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one quarter of the amount sought by the SCA). By contrast, in a case against Telia and Gothnet for bidding co-operation, the SCA sought fines of SEK35 million. At first instance in 2016, SEK16 million was imposed. In 2018, however, on appeal by one party only, the case (and fine) against Telia was overturned as the Court of Appeal disagreed with the SCA's claim that an infringement by object had occurred.

In October 2022, the SCA for the first time used its new mandate to impose fines without having to go to court. In its decision, which was later upheld by the Patent and Market Court, it imposed total fines of SEK1.55 million on two colluding taxi companies. In a second decision, in December 2022, the SCA imposed fines totalling around SEK1.2 million on one of two colluding companies in the remediation industry (the other company received full immunity). The decision has been appealed.

### Joint and Several Liability

Under certain circumstances, liability for payment of fines may be attributed to an infringing subsidiary's parent company. This may be the case if the subsidiary does not decide independently upon its own conduct in the market, despite having a separate legal identity, but in all material aspects, carries out the instructions given to it by the parent company. In this respect, the SCA would pay particular regard to the economic, organisational and legal links that tie the legal entities.

In cases where the parent company holds 100% ownership of the infringing subsidiary, there is a rebuttable presumption that the subsidiary does not act independently. When the conduct of the subsidiary may be imputed to the parent company, the latter's turnover may be included in applying the 10% cap described above. How-

ever, the basic principle is still that only turnover of the infringing entities is relevant for the calculation of the cap. Therefore, the relevant turnover may include that of the parent company as well as one or several of its subsidiaries, but not the group's turnover as a whole.

When trade associations are fined for infringements, a member company can be liable to pay part of the fine if the association is itself unable to pay it in full. This applies in cases where the fine has been set on the basis of the member companies' turnover in the market affected by the association's infringement. Such a fine may not exceed 10% of the company's turnover. A member company cannot be liable to contribute in this way if it did not implement the decision of the association, or can show that – before the SCA commenced its investigation of the infringement – it was unaware of the decision or actively distanced itself from it.

### Trading Prohibition

In addition to fines, the SCA can also apply to impose trading prohibitions on individuals who are involved in particularly serious infringements of Chapter 2, Section 1 of the Act (ie, hardcore horizontal infringements such as price fixing, limiting or controlling production, or market sharing). The SCA will only seek a trading prohibition where it is considered to be in the public interest to do so, and the individual has seriously failed to fulfil their obligations. Negligence in supervision is not generally sufficient to justify a trading prohibition. However, managers and board members have the responsibility to take corrective action if they learn of infringing conduct, with failure to take such timely action being considered relevant to the SCA's assessment.

The prohibition must be in the public interest. For this assessment, it must be considered whether:

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- the behaviour has been of a systematic nature;
- the behaviour was intended to produce significant gains;
- the behaviour has or could have inflicted significant harm;
- the person has been previously convicted of other financial crimes; and
- the conduct was intended to seriously prevent, restrict or distort competition.

Factors that can affect the public interest assessment include whether the person has assisted the SCA, another EU NCA or the European Commission in investigating the infringement, in a significant way. Being the first company to report an infringement will be considered as giving particularly significant assistance. An individual risking a trading prohibition may also apply for individual leniency.

An individual on whom a trading prohibition is imposed may not run business operations or hold a senior position in a company for a period of between three and ten years. Furthermore, failure to abide by a trading prohibition risks imprisonment of up to two years. The fact that an individual has left (or been removed from) a post does not prevent the SCA from seeking a trading prohibition.

The SCA may grant immunity from a trading prohibition where either the connected company benefits from leniency (automatic protection) or the individual has personally co-operated to a significant extent. The SCA has not yet imposed a trading prohibition.

### Cease and Desist Order

The SCA can also issue injunctions, to the effect that companies are to cease a behaviour that is deemed to infringe Chapter 2, Section 1 of the

Act or Article 101 of the TFEU. The order can be combined with the imposition of a conditional fine.

The purpose is to restore competition to a non-distorted state, and the injunction cannot be more far reaching than is necessary to achieve this. Such an order can include both behavioural and structural remedies. It can, for example, include the discontinuation of the execution of an agreement or of a specific clause in an agreement, or the divestment of shares. The relevant court will impose the conditional fine if the order is not followed, or try the injunction on the merits if it is appealed.

The SCA may also issue a preliminary injunction pending a final decision, if it is justified by special reasons and it is prima facie sufficiently likely that the investigated conduct is unlawful. Since 2019, the SCA has imposed provisional cease and desist orders in three cases, of which one concerned anti-competitive co-ordination (imposed in 2019) and the other two, abuse of dominance (imposed in 2021 and 2022).

### 4.6 Relevance of “Effective Compliance Programmes”

The presence or otherwise of a compliance programme to prevent competition infringements from occurring is not a factor when the SCA or the Patent and Market Court decide on the level of a fine.

### 4.7 Mandatory Consumer Redress

Other than the related possibility for the Consumer Ombudsman to represent consumers in group actions (see 5.2 Collective Action), the SCA’s proceedings or the Patent and Market Court’s judgments do not result in any form of mandatory consumer redress.

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## 4.8 Available Forms of Judicial Review or Appeal

Fine decisions by the SCA can be appealed to the Patent and Market Court, and further, to the Patent and Market Court of Appeal. Leave to appeal to the Patent and Market Court of Appeal is required and will be granted in the following circumstances:

- if there are reasons to question the accuracy of the appealed decision;
- if it is necessary to determine the accuracy of the appealed decision;
- if the case involves questions for which the determination of the superior court could be important to set a precedent; or
- if other extraordinary reasons exist.

In order to appeal a case further, the Patent and Market Court of Appeal must give leave to appeal to the Supreme Court, which must then provide leave to appeal. This is very rare and only granted if the Supreme Court's determination would be important as a precedent.

All courts will review a case on its merits.

## 5. Private Civil Litigation Involving Alleged Cartels

### 5.1 Private Right of Action

The prerequisites for an action for damages, as described in the Competition Damages Act, are that:

- an infringement of Chapter 2, Sections 1 or 7 of the Act (or of Articles 101 or 102 of the TFEU) can be shown;
- the infringement has been committed with intent or negligence; and

- proximate cause can be shown between the infringement and the injuries sustained by the claimant.

In the case of cartels, Chapter 3, Section 4 of the Competition Damages Act provides a rebuttable presumption that the infringement has caused loss. However, the claimant will still need to show the degree of loss sustained.

The Patent and Market Courts hold the exclusive competence to hear antitrust damages actions. The procedural rules for such actions are the same as in other civil proceedings, with some exceptions.

A case must be brought before the court within five years of the infringing behaviour ending and the injured party gaining knowledge, or when the injured party could have been expected to have gained knowledge, of the infringement, the injuries it caused and the identities of the companies concerned.

Claimants can seek compensation for their losses. Being compensatory in nature, damages do not involve a punitive element. Pure economic loss is recoverable, such as losses and foregone profits caused by the infringement. Claimants can also seek an injunction to stop the infringing behaviour from continuing.

A decision of the SCA establishing an infringement (see 2.1 Initial Investigatory Steps) can be relevant in proceedings conducted in accordance with the Competition Damages Act.

### 5.2 Collective Action

Group actions are a form of class action and can be brought under the Group Proceedings Act (2002:599, as amended), which applies beyond the field of competition law. These actions

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involve a case being brought by a representative of a group, where the outcome has legal effects for members of that group even if they are not parties to the case itself.

There are three forms of group action:

- private, which can be brought by a natural person or legal entity;
- public, involving bodies expressly permitted to take such actions forward (which does not include the SCA); and
- organisational, which may be brought by non-profit organisations to protect consumers' or employees' interests.

In contrast to the standard rules for standing in Sweden, organisational and public group actions involve cases where the claimant has standing to sue without the dispute in any way affecting their own legal interests (a form of representative function). To take any form of group action forward, a number of conditions must be fulfilled, such as the action being founded on circumstances that are common or similar to all group members, and the appropriate definition of that group.

The procedural rules for such actions are the same as in other civil proceedings, with only minor exceptions.

### 5.3 Indirect Purchasers and “Passing-On” Defences

Indirect purchasers that have suffered loss caused by an infringement will, in principle, have standing to claim damages, because of the compensatory principles of the Swedish rules. Chapter 3, Section 5 of the Competition Damages Act also provides a rebuttable presumption that prices controlled by a cartel are passed on to indirect purchasers. The corollary of this is

that defendants will be permitted to argue, vis-à-vis direct purchasers, that their losses have been passed on downstream.

### 5.4 Admissibility of Evidence Obtained From Governmental Investigations/ Proceedings

In Sweden, virtually all evidence is generally admissible in court, which means that parties generally cannot argue that certain forms of evidence should be inadmissible. Parties are thus usually free to present information stemming from any source as evidence, although the Competition Damages Act and the Act provide for some specific exemptions.

### Investigative Powers

The scope for discovery in Swedish legal proceedings is not as broad as in some other jurisdictions, such as the USA. A Swedish court may issue an order to require a party to produce potentially relevant material, but in practice this is a somewhat limited tool as it is necessary to specify which document is sought and what it is intended to prove. This is reinforced by a special exemption in Chapter 5, Section 4, paragraph 1 of the Competition Damages Act, according to which, such orders can only be issued against the SCA if a document cannot be procured from another source without inconvenience. In addition, such an order will not be issued if its execution could seriously hamper the SCA's abilities to carry out its tasks. Documents held by the SCA that constitute a leniency applicant's explanation of cartel conduct or written settlement pleas cannot be subject to such orders at all.

An alternative route is to request access directly from the SCA through the right of public access to official documents. However, the SCA would no doubt seek to resist the most sensitive of such requests (ie, in relation to leniency mate-

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rials), relying as far as possible on the various forms of protection available under the Swedish Secrecy Act.

## Leniency Programme

The confidentiality protection generally afforded to the SCA's files ceases to be absolute when the investigation ends, which provides the opportunity for private claimants to seek access to at least some of the information in the SCA's files. However, specifically as regards leniency applications and settlement pleas, these are covered by absolute confidentiality. See **2.11 Leniency and/or Immunity Regime**.

Explanations of cartel conduct that a leniency applicant has provided to the SCA, the European Commission or another NCA within the EU are excluded from discovery in antitrust damages cases, and also in other cases before the SCA, even if the authorities' investigation in question has come to an end (see below).

## Inadmissible Evidence

If an investigation has come to an end, documents held by the SCA containing information provided by a natural or legal person in the course of the investigation and documents containing information that the authority has collected and handed over to the parties concerned in the investigation, can be accepted as evidence.

However, Chapter 5, Section 8 of the Competition Damages Act provides that certain documents kept by the SCA, the European Commission or another NCA within the EU, for the purposes of ongoing cartel infringement investigations, may not be presented as evidence in a private damages case. These are documents that contain explanations of cartel conduct provided by leniency applicants, written settlement pleas, information provided to the authority by

natural or legal persons in the course of the investigation, and information that the authority has collected and handed over to the parties of an investigation.

Furthermore, Chapter 8, Section 4 of the Act states that a leniency application or a settlement plea that a party has gained access to in a proceeding before an NCA or the European Commission, is inadmissible as evidence in a court proceeding or matter conducted in accordance with the Act, unless the proceeding concerns the review of a decision to issue fines for an infringement of the competition rules and the evidence is necessary for the party's right of defence.

This inadmissibility also applies to documents that others have produced specifically for a proceeding before an NCA or the European Commission, documents that the authority has produced and handed over to the parties during the proceeding, and settlement pleas that have been withdrawn. These exceptions apply until the proceedings have been terminated.

## 5.5 Frequency of Completion of Litigation

Swedish case law relating to antitrust damages is relatively limited compared to certain other jurisdictions. The introduction of the Competition Damages Act may lead to an increase, but this has not yet been realised.

The timeframe from filing to judgment can vary significantly, but processes tend to be somewhat lengthy. The case of Telesport/TeliaSonera, in which damages were denied, ended after almost four years of proceedings. Another case, Net at Once/Gothnet, also ended without an award of damages, and lasted slightly more than two years before judgment. Procedures spanning several years are considered normal.

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## 5.6 Compensation of Legal Representatives

Specification of costs is achieved in the same way as in other civil procedures under Swedish rules. Both parties specify their costs and the successful party is reimbursed by the other side. A party can dispute the other side's costs, and the court will then consider if the cost specification can be considered reasonable in the context of the length of time that a case has required and its complexity.

In Sweden, lawyers are normally not permitted to charge fees dependent on, for example, the size of reparation awarded or the degree of success in a case. In cases based on group actions, this general rule may not always apply, permitting compensation based on a quota of an award.

## 5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

See 5.6 Compensation of Legal Representatives.

## 5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

A Patent and Market Court's decision may be appealed to the Patent and Market Court of Appeal. Leave to appeal is required to appeal, and the Patent and Market Court of Appeal can rule on points of fact and/or law.

## 6. Supplementary Information

### 6.1 Other Pertinent Information

No further information is pertinent to an understanding of the process, scope and adjudication of claims involving alleged cartel conduct in Sweden.

### 6.2 Guides Published by Governmental Authorities

The SCA has published guidelines on agreements of minor importance that do not fall under the prohibition in Chapter 2, Section 1 of the Act ([KKVFS 2017:3](#)). The guidance mainly refers to the European Commission's De Minimis Notice.

The SCA has also published guidelines on its leniency policy ([KKVFS 2021:1](#)), see **2.11 Leniency and/or Immunity Regime**, and a notice on the setting of fines ([Dnr 21/2021](#)), see **4.5 Sanctions and Penalties Available in Civil Proceedings**.

Furthermore, the SCA has published general guidance on various topics on its [website](#), including its [prioritisation policy](#).



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