



## Harmonising enforcement

### New powers for the Swedish Competition Authority

by **Trine Osen Bergqvist**

Early in 2021, the Swedish Competition Act will be amended in several important respects. The background to the amendments is Directive (EU) 2019/1 which aims to harmonise the investigative and sanctioning powers of the European competition authorities in their enforcement of the EU competition rules. Undertakings active in Sweden will be affected in several ways.

#### Background

Since 2004, the national competition authorities (NCAs) in the EU have been empowered by Regulation (EC) No 1/2003 to apply EU competition rules alongside those of the European Commission. For more than a decade, the Commission and the NCAs have enforced the EU's competition rules in close co-operation in the European Competition Network (ECN), which was created in 2004 for this purpose. When the decentralised enforcement was evaluated by the Commission in 2014, the Commission concluded that the enforcement of the NCAs had become a key pillar in relation to the application of the EU competition rules. However, it was apparent that not all NCAs had the means, resources and independence needed for efficient enforcement. To create a truly common competition law enforcement regime, it was thus necessary to harmonise the investigation and sanctioning powers of the NCAs. Directive 1/2019, also referred to as the "ECN+ Directive", was adopted on 11 December 2018. It sets out minimum harmonisation rules to ensure that all NCAs in the EU have the necessary resources and guarantees of independence, as well as the enforcement and sanctioning powers needed to apply Articles 101 and 102 TFEU effectively. The Directive is required to be transposed in all member states by 4 February 2021.

#### Amendments in the Swedish Competition Act

The Directive gives rise to several important changes and amendments in the Swedish Competition Act (CA) which will significantly extend the investigative and sanctioning powers of the Swedish Competition Authority (SCA). In addition to the amendments required to transpose the Directive to

Swedish law, the government has also proposed giving the SCA direct decision-making power in respect of fines.

The amendments concern the SCA's investigations of suspected infringements of the Swedish and/or EU prohibition of anti-competitive agreements and the prohibition of abuse of a dominant position. The Swedish rules on mergers and anti-competitive sales by public entities are not affected by the amendments.

The most important changes are summarised below:

- **Power to issue structural orders.** The SCA's power to order undertakings to terminate infringements of the competition rules will be extended to include structural orders. Thus, if necessary to end an infringement, the SCA may order undertakings to divest, inter alia, operations and trademarks.
- **Power to adopt infringement decisions.** The SCA will have the power to adopt infringement decisions, ie decide that an undertaking has infringed the competition rules, without taking any measures against the infringement. Such decisions, however, may have precedential value in competition damages cases.
- **Obligation to market test commitments.** An obligation for the SCA to market test commitments will be introduced. This means that before the SCA accepts an undertaking's commitments to end a suspected infringement of the competition rules, the affected undertakings must be given an opportunity to comment on the commitments.
- **Extended powers to impose fines.** The government has proposed that the SCA should be granted direct decision-making powers in respect of fines. It is not clear whether the government will go through will the proposal in this respect. The power to impose fines, which currently concerns infringements of the competition rules, will in any case be extended to non-compliance with the SCA's orders and/or commitments to cease infringements. A current provision which states that fines may not be imposed in minor cases will be removed. The maximum fine payable for an association of undertakings (eg a trade association) will be extended in cases where the

infringement relates to the activities of its members. In such cases, the maximum amount of the fine shall be 10 per cent of the sum of the total worldwide turnover of each member active on the market affected by the infringement of the association.

- **If the SCA gets decision-making powers in respect of fines, the rules on fine orders will be removed.** As a result of the proposal to give the SCA decision-making powers in respect of fines, it is proposed that the provisions governing fine orders are removed.
- **If the SCA gets decision-making powers in respect of fines, the parties' ability to claim compensation for litigation costs from the draft summons application will be removed.** According to the current procedure, parties may in some cases be compensated for reasonable litigation costs that have been incurred after the receipt of the SCA's draft summons application with a request for fines. As a result of the proposed change in decision-making procedure governing fines, it is proposed that this provision is removed.
- **The rules on leniency and reduction of fines will be aligned with the Commission's leniency rules.** Directive 1/2019 aligns the member states' programmes for leniency and reduction of fines with the EU Commission's leniency rules. In Sweden, this means, inter alia, that it will no longer be possible for associations of undertakings (eg trade associations) to be granted leniency. Further, the possibility of leniency for those who "in other ways have facilitated the investigation of the infringement to a very significant extent" will be removed. If an undertaking provides information that leads to an increase in the amount of the fines, eg information that the infringement had a longer duration than what was previously known, this information shall not be taken into account when determining the fines for the said undertaking.
- **Suspension of the limitation period during investigations in other member states.** The time limitation for imposing fines will be suspended when the Commission or an NCA in another member state investigates the same agreement or procedure that the SCA investigates or may investigate. The suspension of the limitation period will start from the notification of the first formal investigative measure to at least one undertaking subject to the enforcement proceedings. It will apply to all undertakings which have participated in the infringement.
- **Extended powers to hold members liable for a trade association's fines.** Where fines for a competition law infringement are imposed on an association of undertakings taking account of the turnover of its members, and the association is not able to pay the fines, the association will be obliged to call for contributions from its members to cover the fines. If full payment is not made, the SCA will be entitled to decide that one or more of the members represented in the

trade association's decision-making bodies at the time of the infringement shall pay the remaining part of the fine. If this does not lead to full payment, the SCA may decide that one or several other members shall pay the remaining part of the fine. However, payment shall not be required from undertakings which are able to show that they did not implement the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the investigation started.

- **Extended powers to conduct unannounced inspections.** The government proposes that the SCA's power to conduct unannounced inspections at undertakings' business premises (dawn raids), which under the current legislation may be authorised to investigate competition law infringements, should be extended to also include non-compliance with the SCA's orders and/or accepted commitments to cease infringements, and/or non-compliance with the SCA's administrative decisions during the SCA's investigation. The power to conduct inspections at other premises than the premises of the undertaking investigated will be extended to include not only legal persons, but also, inter alia, non-profit associations. The power to conduct inspections at the home of any board member and employee of the undertaking investigated will be extended to include investigations of all infringements and not only, as today, serious infringements.
- **Extended powers during inspections.** The SCA's powers during an inspection will also be extended. It will be clarified that the SCA has the right to access any information which is accessible to the entity subject to the inspection, irrespective of the medium on which the information is stored. A current limitation which entitles undertakings not to disclose trade secrets of a technical nature will be removed. The SCA will have the power to seal business premises, accounting and business documents, and it will also be entitled to bring (physical and digital) documents, including original documents and the storage material in which they are stored, to the SCA's premises or other designated premises for further review there, without the undertaking's consent. When the SCA examines documents in the SCA's premises or other designated premises, the undertaking investigated will be entitled to monitor the measures taken by the SCA.
- **Protection against self-incrimination.** Those who are required to provide information or are subject to an investigation under the CA shall not be forced to admit an infringement of the competition rules. By this amendment, it will be clarified that the protection against self-incrimination does not only apply in investigations that may lead to fines (which has already been clarified in case law) but also in investigations that can lead to orders under penalty of a fine to cease such violations.

- **Power to impose fines for non-compliance during the investigation.** A new type of administrative fine (“utredningsskadeavgift”) will be introduced. It may be imposed on undertakings that intentionally or negligently violate certain administrative decisions during the SCA’s investigation, eg by submitting incorrect, incomplete or misleading information, failing to ensure that a representative appears for interrogation, breaking a seal or otherwise obstructing an inspection. The fines for non-compliance may amount to a maximum of one per cent of the undertaking’s turnover during the previous financial year. According to the proposal, the SCA will have decision-making powers in respect of such fines.
- **Calculation of periodic penalties.** A new provision will clarify that periodic penalty payments shall be based on the undertaking’s average daily turnover in the previous financial year.
- **Protection of leniency applications, settlement submissions, etc.** Restrictions will be introduced in the possibility to submit certain documents as documentary evidence in cases and matters under the CA. A party who, in a proceeding before an NCA in the EU, has been given access to a leniency application or a settlement submission, will not be entitled to invoke such document in a case or matter under the CA, unless the case/matter concerns an appeal of an infringement decision and it is necessary for the party to invoke the document in order to conduct its defence. Further, during the competition authority’s proceedings, the party will not be entitled to invoke: (i) documents that others have produced specifically for the proceedings; (ii) documents produced by the competition authority and submitted to the parties; or (iii) revoked settlement submissions. A new provision will clarify that the SCA may only exchange leniency applications with the Commission and NCAs in other member states with the undertaking’s consent. According to a new provision in the Public Access and Secrecy Act (2009: 400) information in leniency applications and settlement submissions will be covered by absolute secrecy at the SCA.
- **Entry into force.** The amendments are proposed to enter into force on 4 February 2021.

Most of the proposed changes and amendments to the CA are necessary to transpose Directive 1/2019 and are thus likely to be adopted in accordance with the proposal. However,

as noted above, the Directive does not require NCAs to have decision-making powers in respect of fines and it remains to be seen whether the SCA will be granted such powers.

### Impact of the amendments

The implementation of Directive 1/2019 will extend the SCA’s powers considerably, regardless of whether the SCA will have decision-making powers in respect of fines. Firms that are active in Sweden will be affected in several ways. When subject to investigations, firms will face stricter requirements to co-operate with the SCA and risk being fined if they provide incorrect, incomplete or misleading information or otherwise obstruct the investigation. During inspections, it will be more difficult for firms to prevent the SCA from bringing digital (and physical) material to the SCA’s premises for further review, with the attendant risk of increased costs related to the monitoring of the SCA’s review. Moreover, the sanctions will be more severe for firms that, by themselves or through a trade association, infringe competition law, or an order or a commitment to cease an infringement.

The extended powers and sanctions will hopefully increase the effectiveness of the SCA’s enforcement and the deterrent effect of the competition rules. The enforcement activity in Sweden has been remarkably low over the past years. If the SCA continues on the same path, this will undoubtedly reduce the firms’ incentives to comply with the competition rules and report suspected infringements to the SCA. Providing the SCA with decision-making powers in respect of fines is not likely to solve the low enforcement rate, but the introduction of stricter sanctions for infringements and extended powers for the SCA may to some extent increase the deterrent effects of the rules. The possibility to sanction firms that obstruct the SCA’s decisions during the investigation will be particularly important. The threat of fines should increase the firm’s efforts to provide accurate, complete and timely information and improve both the effectiveness of the fact-finding process and the basis for the SCA’s decisions. But ultimately, the effect of the extended powers and sanctions will of course depend on how they are applied by the SCA.

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**Trine Osen Bergqvist** is senior competition law expert at Vinge in Stockholm ([www.vinge.se/en](http://www.vinge.se/en)). She was previously with the Swedish Competition Authority, where she was deputy head of the Market Abuse Unit and counsel in the Legal Department.