

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

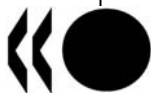
ROUNDTABLE ON PROMOTING COMPLIANCE WITH COMPETITION LAW

-- Note by the Delegation of Sweden --

This note is submitted by the delegation of Sweden to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 29-30 June 2011.

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ROUNDTABLE ON PROMOTING COMPLIANCE WITH COMPETITION LAW

-- Note by Sweden --

1. In this contribution, the Swedish Competition Authority (SCA) focuses on the use of complementary strategies to promote compliance, which may be used alongside law enforcement. In this context, the note discusses the SCA's campaign to raise awareness of competition law among trade associations, which included the development of a web-based, interactive tool aimed at assisting trade associations and their members to self-assess their practices.

1. Introduction

2. Trade associations are commonplace in Sweden and count a very large number of companies among their members. Their practices therefore have a considerable impact on the economy. Trade associations perform a number of important functions which benefit the market and, ultimately, the consumer. For instance, they can provide support to SMEs, help to educate and update businesses on applicable rules and regulations, or enhance consumer protection by developing standard terms and conditions, product safety standards or technical norms, etc.

3. However, there are also inherent risks in the operation of trade associations since, by their nature, they bring together a number of – in some cases even all – competitors in a particular sector. They can therefore provide a forum for horizontal coordination which may be detrimental to consumers and infringe the prohibition against anti-competitive agreements in the Swedish Competition Act¹ as well as Article 101 of the Treaty on the Functioning of the European Union (TFEU).

4. Some forms of cooperation within trade associations are almost invariably prohibited; most notably price recommendations and price lists. However, whether or not other types of practice are caught by the competition rules will often depend on the circumstances in each specific case, such as the structure and the level of concentration of the relevant market. The SCA has discovered that many trade associations operate in this grey area, where they must self-assess their practices' compliance with the competition rules.²

5. In order to offer guidance to trade associations, and to raise awareness of the competition rules as they apply to trade associations, the SCA launched a campaign including a web-based interactive guidance tool and a series of advocacy lectures at trade association meetings. This note describes the SCA's work on the campaign.

¹ Chapter 2, Article 1, SFS 2008:579

² Since the entry into force, on 1 May 2004, of Council Regulation (EC) No 1/2003 which abolished the notification system previously in place, companies are referred to make their own assessment whether an agreement is in accordance with Swedish and EU competition law or not.

2. SCA report on trade associations 2008

6. In 2006 the SCA distributed a questionnaire to 880 trade associations active in Sweden.³ The purpose of the study was to increase the SCA's understanding of the number of trade associations in Sweden; their membership; their activities; the services they offer to members; and the extent to which those activities and services comply with competition laws.

7. The questionnaire focused on three types of trade association activity, which may raise competition law concerns:

- price recommendations (also including standard price lists and price adjustment recommendations in response to changes in common costs);
- costing and pricing support (for instance by providing members with calculation templates with common costs pre-completed); and
- information sharing.

8. The SCA published the results of its study in 2008.⁴ The report indicated that approximately one third of the trade associations surveyed engage in one or more of the three activities identified above, and therefore find themselves in a grey area with respect to Article 101 TFEU.

9. The report concluded that there is a need to increase awareness among trade associations about how their practices may be caught by the competition rules. The European Commission's Horizontal Guidelines⁵ and the case law of the Swedish and EU courts provide important guidance; however the report identified a clear need for practical and accessible additional guidance aimed at trade associations and their members.

3. Web-based interactive tool

10. In response to the findings of the 2008 report, the SCA developed a web-based interactive tool which helps trade associations and member companies to self-assess their practices. The tool, accessed on the SCA's website,⁶ is named *Kör på grönt* ("Green is for 'Go'"). It is based on a "traffic light" system of assessment, where practices are categorised as "green" (compliant), "amber" (potentially non-compliant) and "red" (non-compliant).⁷

11. The tool is constructed as a flowchart, where the start page lists a range of types of practice, all categorised as either green, amber or red. The user can then click on the type of practice which they think

³ Of the responses received, 479 were from associations the purpose and activities of which were relevant to the study. These 479 responses form the basis for the results presented in the final report. Responses from, *inter alia*, small local associations with no relevant activities and professional bodies were thus excluded from the study.

⁴ *Samarbeten inom branschorganisationer*, Konkurrensverkets rapportserie: 2008:1, April 2008.

⁵ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01.

⁶ Available (in Swedish only) at: http://www.konkurrensverket.se/t/Page_4560.aspx

⁷ A traffic light system had previously been used by the Danish Competition Authority (DCA) as a way of explaining the competition rules to trade associations, as explained in the DCA's 2007 Competition Report and in its contribution to a previous roundtable of the OECD Competition Committee, autumn 2007.

applies to them, and is then taken through a number of questions designed to gauge the circumstances in the specific case, and whether they are likely to give rise to competition law concerns.

12. The **green** category includes practices such as education and training, information gathering, general lobbying, development of standard terms and condition (without pricing elements) and legal advice. These practices are described as being compliant with the competition rules. They are simply listed and not discussed further in the flowchart.

13. The **red** category includes price coordination, price recommendations, output or sales limitations and market sharing. Each of these activities link to a page where the anti-competitive nature of the relevant practice is explained further. In the case of price recommendations, there are further links providing examples of Swedish and EU case law on the issue, with brief descriptions of the facts.⁸ All of these practices are described as clear competition law infringements.

14. Naturally, the **amber** category is the most important, and therefore most detailed, part of the guidance. This category includes costing and pricing support and information sharing.

15. As regards costing and pricing support, the interactive questions focus on the extent to which the support template offered to members includes present or recommended prices, costs, margins, etc. Depending on the answers, the user will ultimately be shown a green or a red light. In the latter case, a description is given of the anti-competitive effects of the practice, along with examples from case law.⁹ The user can also click through to further information regarding the *de minimis* exception¹⁰ and the statutory exception, in Chapter 2, Article 2 of the Swedish Competition Act or Article 101.3 TFEU.

16. In the case of information sharing, the questions relate to whether the information shared is current or historic, individual or aggregated/anonymous, and whether it is publicly available. The user will either be shown a green or an amber light. In the latter case, the web page gives a fuller description of the various parameters which will affect whether an information exchange is compliant or not. It also includes links to some examples of cases in this area¹¹ and to the European Commission's Horizontal Guidelines. Again, the user can click through to further information about *de minimis* and the statutory exception.

17. Importantly, the introductory page of the web tool emphasises that this guidance is intended simply to raise awareness of competition law within trade associations and to flag issues of potential concern. It is no substitute for legal advice.

⁸ The European Commission's *FENEX* (COMP/34983, 5 June 1996) and *Belgian Architects* (COMP/38.549, 24 June 2004) decisions and the Swedish Market Court's *VVS-installatörerna* decision (MD 2005:5, 9 February 2005).

⁹ The European Commission's *BDS* decision (80/257/ECSC, 8 February 1980) and the Swedish Market Court's *Vivo* decision (MD 1997:11, 10 June 1997).

¹⁰ See the SCA's guidance, *Konkurrensverkets allmänna råd om avtal av mindre betydelse (bagatellavtal) som inte omfattas av förbudet i 2 kap. 1 § konkurrenslagen (2008:579)*, KKVFS 2009:1, 28 January 2009.

¹¹ The European Commission's *UK Tractor* (COMP/31.370 and COMP/31.446, 17 February 1992), *Cobelpa/VNP* (COMP/312-366, 8 September 1977) and *CEPI/Cartonboard* (COMP/34.936/E1, 19 October 1996) decisions.

4. Advocacy lectures

18. In addition to the *Kör på grönt* interactive tool, the SCA has actively sought opportunities to visit trade associations to speak about competition law as it applies to trade associations and their members. Since 2008, we have delivered a purpose-built presentation at approximately 20 trade association meetings.

5. Results

19. Since the launch of the *Kör på grönt* tool on the SCA website on 20 April 2009, it has been visited 6,220 times.¹² Use of the interactive test is completely anonymous, and no test results are stored by the SCA. Therefore, it cannot be used to measure compliance, but simply as a means to raise awareness and increase businesses' knowledge of the competition rules.

20. Likewise, the main thrust of the advocacy lectures is to raise awareness.

21. So, are there signs of increasing competition law awareness among trade associations? For the past 18 years, the SCA has commissioned an annual survey charting the level of awareness of competition laws among various stakeholders on the market (company executives, in-house lawyers, trade association executives, etc.), as well as their attitude towards competition law and the SCA. The latest survey, conducted in 2010, indicated a significant rise in awareness of competition law and knowledge of the rules among trade association executives/officials, as compared with previous years. For instance, in 2010, 90 per cent of respondents said they were aware that competition law infringements could result in fines (compared to 72 per cent in 2009) and 54 per cent of respondents said they were aware of the SCA's leniency programme (compared to 36 per cent in 2009).

22. There was also significant improvement in the survey results as regards trade associations' knowledge and appreciation of the SCA.¹³ For instance, in 2010, 75 per cent of respondents knew that the SCA is the body responsible for the enforcement of the Swedish competition rules (compared to 37 per cent in 2009), and 61 per cent of respondents indicated they had confidence in the SCA (up from 42 per cent in 2009).

¹² Statistics as at 31 May 2011. The launch was advertised in the trade press, and the first week alone over 1,000 users visited the *Kör på grönt* webpage.

¹³ The following are examples of the survey results in the trade association segment: (i) in 2010, 75 per cent of respondents knew that Konkurrensverket (the Swedish Competition Authority) is responsible for the enforcement of the Swedish competition rules (up from 37 per cent in 2009); (ii) in 2010, 45 per cent of respondents were of the view that Konkurrensverket is an open and transparent authority with good service (up from 30 per cent in 2009); (iii) in 2010, 61 per cent of respondents indicated they had confidence in Konkurrensverket (up from 42 per cent in 2009).