

Danish Competition Law Society
October 29, 2009

Enforcement of the Swedish Competition Law
- with a Special view on sanctions -

Charlotte Zackari, Head of Legal Department
Swedish Competition Authority

Overview

- I Sanctions in the Swedish Competition Act (2008:579)
 - II The legislative history
 - III Reflections on the functioning of our system of sanctions
-

I Sanctions in the Swedish Competition Act

Art. 3:1 Obligation to terminate an infringement
(ålägganden)

Art. 3:5 An administrative fine (konkurrensskadeavgift)

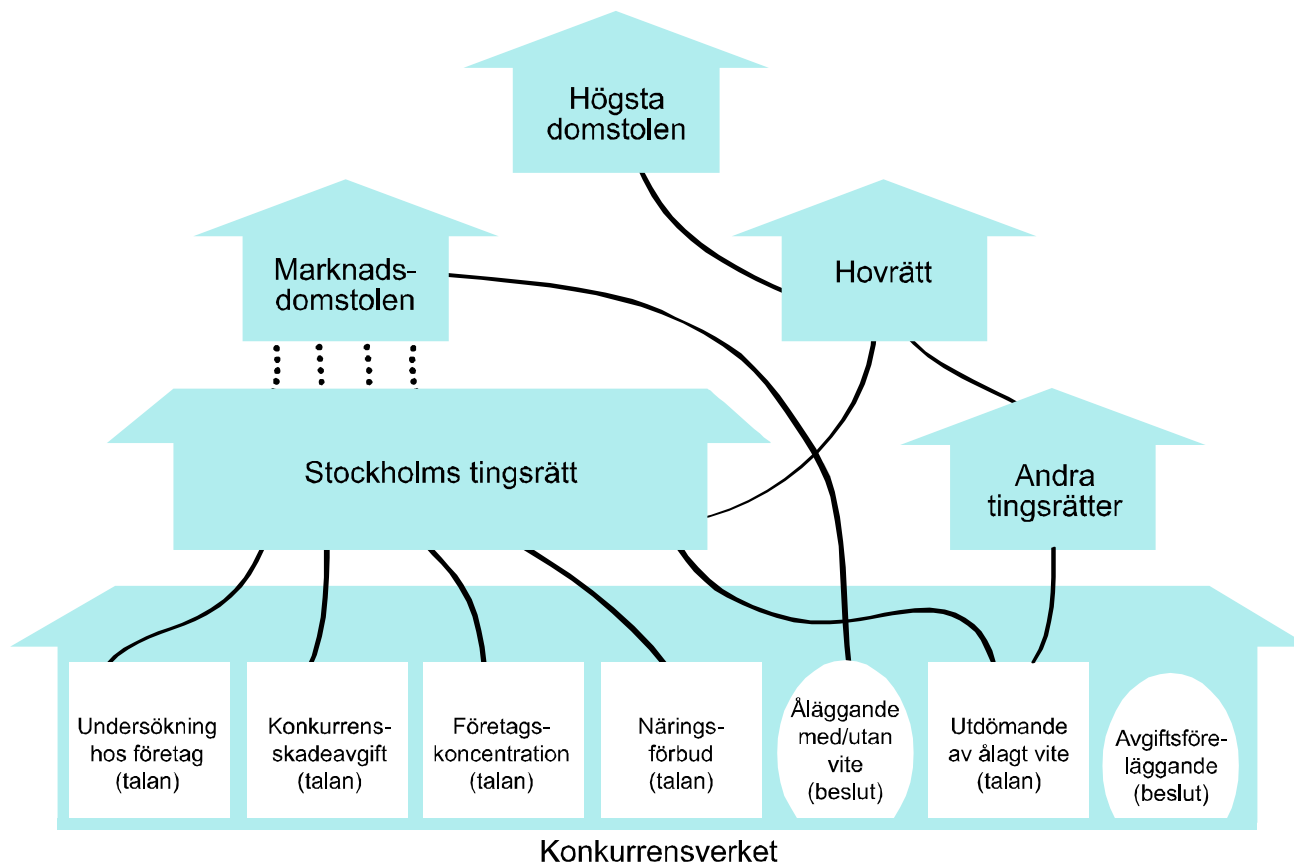
Art. 3:16 A fine order (avgiftsföreläggande)

Art 3:24 Trading prohibition (näringsförbud)

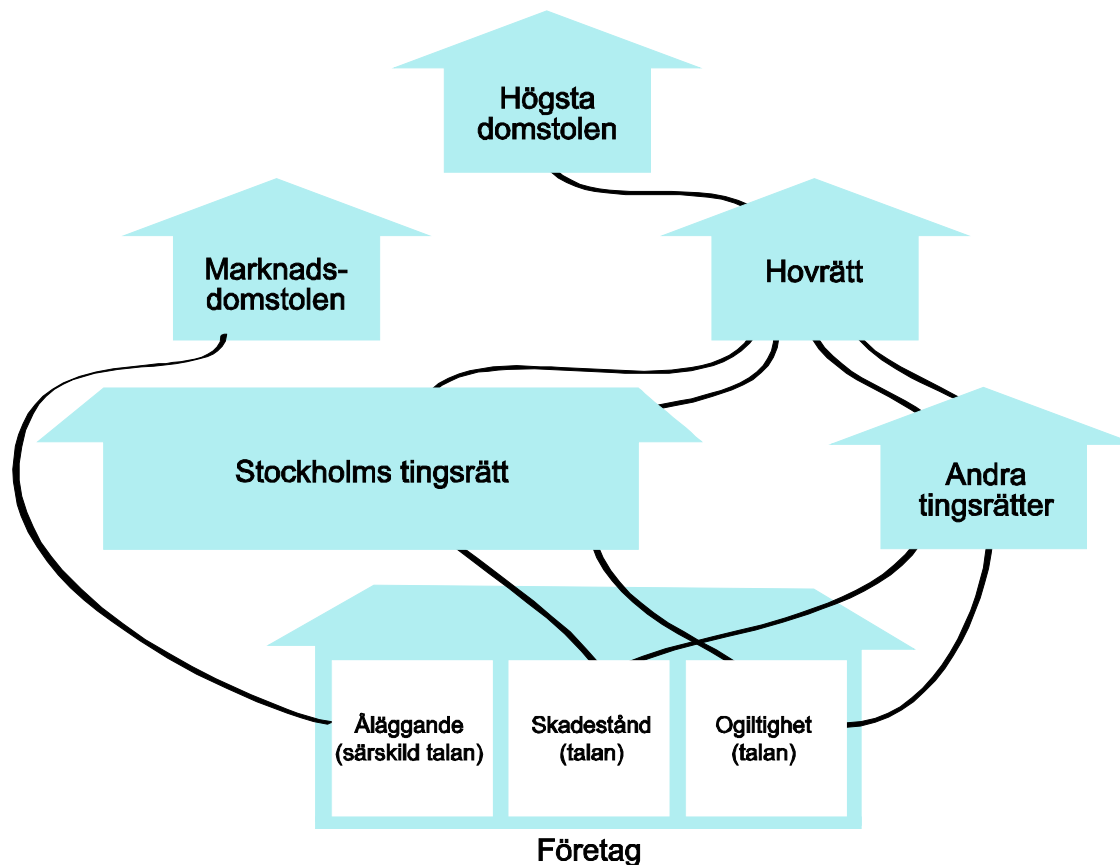
Private enforcement

Art. 3:16 Nullity

Art. 3:25 Damages



Instansordningen enligt konkurrenslagen i de ärenden där Konkurrensverket fattar beslut alternativt väcker talan.



Instansordningen enligt konkurrenslagen när företag väcker talan.

II The Legislative history- overview

- | | |
|------|---|
| 1953 | Act on Restriction of Competition |
| 1982 | Competition Act |
| 1992 | Competition Act |
| 2000 | Competition Authority Report |
| 2001 | committee report Fighting Cartels -> Bill without proposal -> Parliament wants new proposal |
| 2004 | committee report Competition Crimes, a legislative model -> Parliament negative |
-

II The legislative history

1953 Act on restrictions of competition

Price-fixing in procurement	criminal offense
Resale price maintenance	criminal offense
1 year of prison	

1982 Competition Act

The same criminal offenses – also if negligent
2 years of prison

cont. The legislative history

1992 Competition Act

- a shift to administrative system

2000 Report from the Swedish Competition Authority

2001 Committee on Combating Cartels interim report (SOU 2001:74)

Committee on combating cartels (2001:74)

Points of departure for criminalization:

1. The activity creates substantial harm/ risk of harm **YES**
2. No alternative sanctions **UNCLEAR**

Sanction

3. - needed in view of the gravity of the action **NO**
 4. - an efficient tool for deterrence **RESOURCES?**
 5. - can be handled by courts etc./OK workload **-”-**
-

Committee on Combating Cartels (2001:74)

6 reasons against criminalization:

1. The new administrative fine not tested yet
 2. Resource-demanding
 3. Legal certainty at risk as it might be difficult to draw a line between crime <-> not crime
 4. Might violate *ne bis in idem*
 5. More difficult to cooperate in EU/ECN
 6. Difficult in view of the leniency programme
-

Cont. the legislative history

Government bill (2001/02:167)

No proposal

Parliament requests amendment/proposal

The task of the Committee on Modernization of the Competition Rules which presents its report (SOU 2004:131) *Competition crimes: A legislative model*

Committee on Modernization (2004:131)

Proposal for criminalization rules:

- Horizontal cartels
 - Jail max 2 years. If severe - max 6 years.
 - Swedish Economic Crime Authority (EBM) prosecutor - acting on request of the Swedish Competition Authority
-

Committee on Modernization (2004:131)

5 negative aspects/risks:

1. Difficulty in applying the rules
 2. The leniency programme will not operate effectively
 3. Priority for criminal investigations
 4. Resources on parallel investigations and also risking non-conformative decisions
 5. Swedish participation in the ECN
-

The Heckscher committee (SOU 2006:99)

Reasons in favour of criminalization:

- State signals: The conduct unacceptable!
 - Deter those who don't want the "prison stigma"
 - Administrative fines cannot be set high enough to be deterrent as companies calculate on risk/cost/profit
 - Another factor for making cartels unstable which increases efficiency of the leniency programme
-

The Heckscher committee (SOU 2006:99)

Final 5 step test:

- 1) Do cartels cause harm? **YES**

 - 2) Alternative sanctions? **COMPANY AND PERSONS**

 - 3) Are the infringements so serious that they call for a criminalization? **NO**
-

4) Is criminalization an efficient tool to hinder infringements

LOOK AT TOTAL EFFICIENCY!

Legal security (often difficult to assess who shall be punished, to find evidence etc) **LACK**

Efficiency of the system as a whole. Problems with a parallel application of the leniency system. Risk that leniency will be less effective and that cooperation within the ECN might be harmed. **NEGATIVE**

Government bill (2007/08:135)

Horizontal cartels **YES** (essential harm and legal certainty)

Efficient?

NO

Risk that persons will not come forward

Not enough experience from the lenience programme.

Parallel action negative aspects – risk of delays.

Risk of no strong deterrent effect

ECN-cooperation at risk

The Heckscher committee (SOU 2006:99) ->
The bill (2007/08:135) ->
the new Competition Act art. 3:24

NEW TRADING PROHIBITION

An alternative the inquiry proposed a ban on trading /disqualification orders for certain serious infringements of competition rules.

Trading prohibition 3:24

WHAT	horizontal cartels
WHO	persons who exercise legal or actual management of infringing undertakings
WHEN	the person has “grossly disregarded” his/her obligations and a prohibition required “in the public interest”

Reflections

Preventive/deterrent effect?

Risk for the leniency programme?

Parallel investigations - investigative tools?

Difficulty to handle crime-investigations in parallel
