

Gathering, handling and assessing evidence

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The Swedish Competition Authority (SCA)

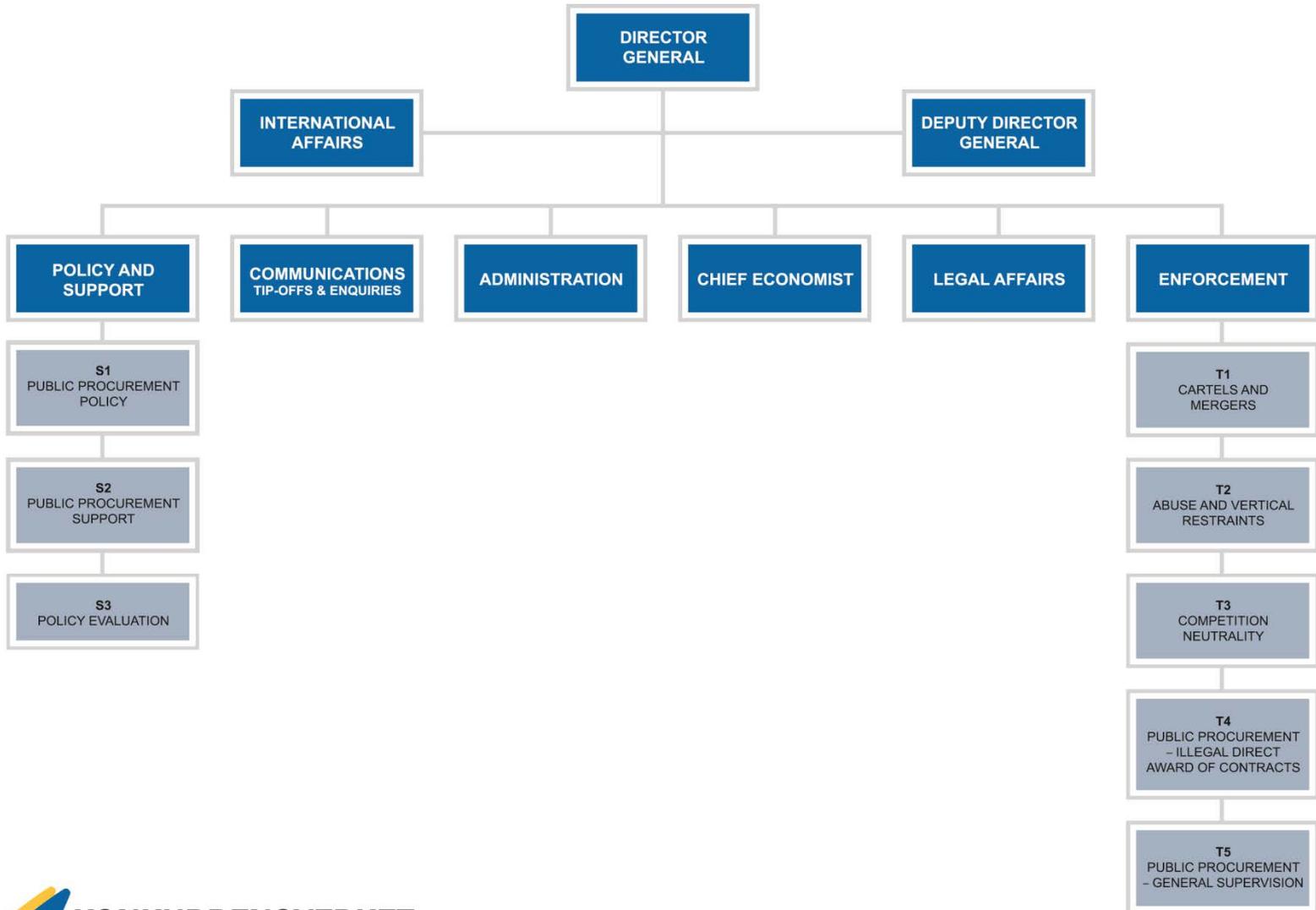
The Swedish Competition Authority is a state authority working to safeguard and promote competition and to supervise public procurement in Sweden

"Economic welfare through effective markets"

The SCA's areas of responsibility

- Enforcing Swedish and EU competition law
 - Anti-competitive agreements (including cartels)
 - Abuse of a dominant position
 - Anti-competitive sales activities by the public sector
 - Merger control
- Public procurement
 - Enforcing public procurement law
 - Giving advice and guidance on public procurement
- Etc.

SCA: Organisation



Today's presentation

- Investigations into anti-competitive conduct (anti-competitive agreements, abuse of dominance)
- Focus on gathering, handling and assessing **evidence**

Outline:

1. Prohibitions and sanctions
2. Stages of an investigation
3. Assessing evidence at preliminary stage
4. Gathering evidence
5. Assessing evidence at formal investigation stage
6. Handling evidence throughout the investigation

1. Prohibitions and Sanctions

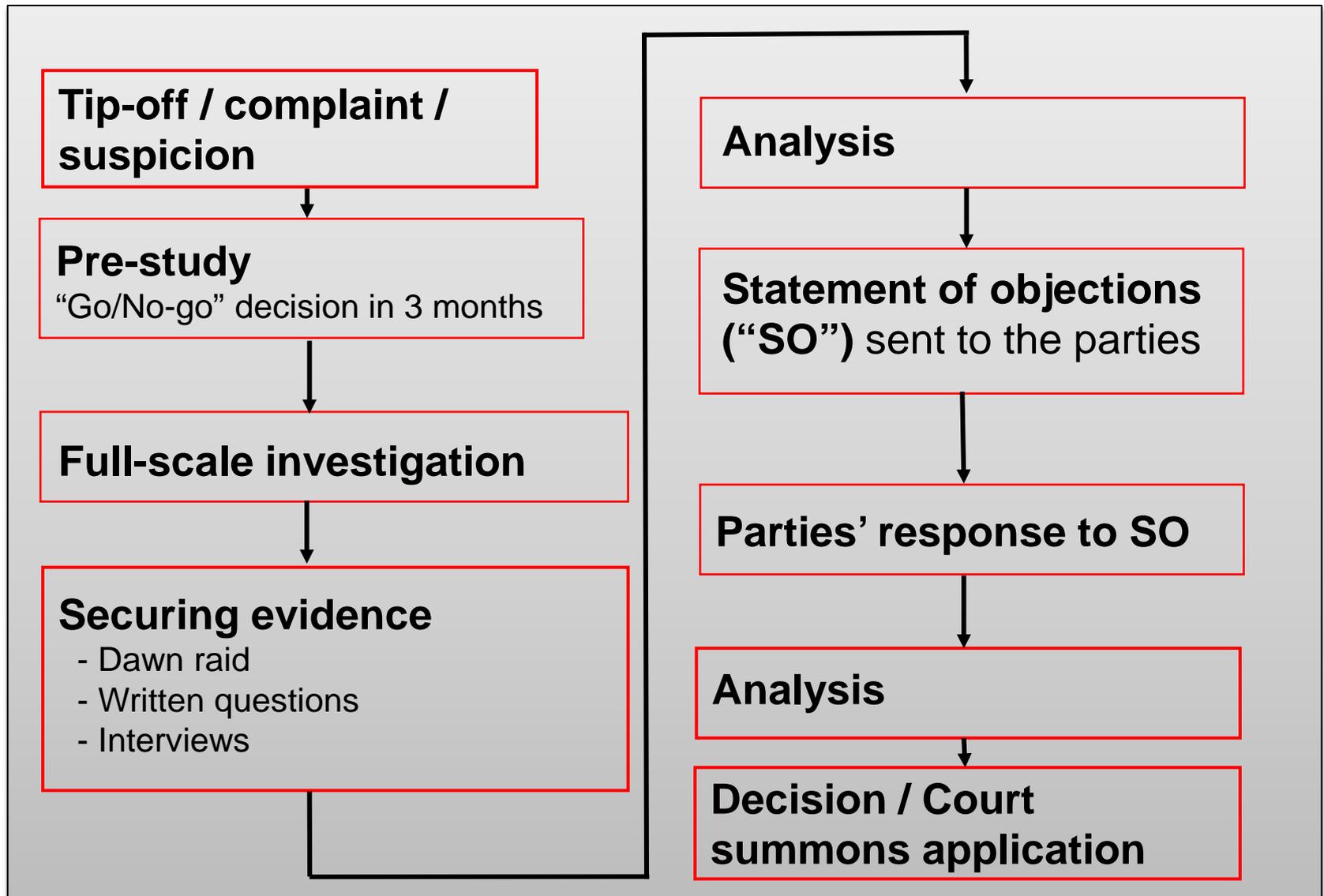
Relevant prohibitions (included in both Swedish & EU law)

- Anti-competitive agreements / concerted practices
 - E.g. cartels (price fixing, market sharing, output restrictions)
- Abuse of a dominant position
 - Exclusionary or exploitative unilateral conduct

Sanctions

- Administrative fines (by Court order)
- Fine orders by settlement (ordered by SCA upon agreement with the company)
- Voluntary commitments
- Trading prohibition – against individuals in cartel cases (by Court order)

2. Stages of an investigation



3. Assessing evidence at preliminary stage

How does a case start?

- Tip-off / complaint
- Leniency application
- Self-initiated based on internal analysis at SCA

Early case prioritisation

- Sufficient indication of a competition problem / infringement?
- Rough market analysis: How important is the market, how big are the companies on the market, how significant is the alleged problem?
- Likelihood of proving an infringement?

Enough evidence to ask for Court permission to conduct dawn raid?

- Requirement: Evidence giving “reason to suspect” an infringement

3. Assessing evidence at preliminary stage

Example: Economic cartel detection

Current SCA project: Cartel detection by economic analysis (“cartel screening”)

- Object: Reducing reliance on tip-offs / complaints / leniency applications
- Devising and testing methods to search for indicators of cartel behaviour in large economic data-sets
- Using database of public procurements (tenders) in Sweden 2009-2013
- Examples of indicators:
 - Same or very similar tender prices
 - Suspiciously high tender prices
 - Contractors “taking turns” to win tenders for a certain customer or region
 - Contractors not competing in each other’s areas
 - Deviation from expected bidding patterns, suggesting collusion among tenderers
- Sufficient indication to apply for permission to raid?

3. Assessing evidence at preliminary stage

Case example: Project “Midnight Sun”

- Tip-off about a bid-rigging cartel in the construction industry
- SCA’s statistical analysis of tender data corroborated tip-off – indicated collusion among tenderers
- Indications sufficient for Court to authorise a dawn raid
- Dawn raid conducted at 8 companies in January 2012
- No hard evidence found at raid – Case closed without finding of infringement in June 2012
- Standard of proof can vary between different stages of the investigation

4. Gathering evidence: Dawn raids

Unannounced site inspection (“dawn raid”) is an invasive measure

- ... but can be justified where there is a risk that evidence could be destroyed or withheld
- Court authorisation required

Types of evidence searched and seized at dawn raids:

- Paper documents, including handwritten notes
- Emails, files on computers / servers
- Data on mobile phones

Transparency when conducting dawn raids

- Company representative gets copy of Court authorisation, describing the SCA’s suspicion and the alleged infringement
- Company’s lawyers can be present
- Company gets copy of all documents seized

4. Gathering evidence: Main investigation phase

“Post-raid” investigation phase: Overt information-gathering

- Requests for information
 - Investigated companies
 - Competitors
 - Customers / Suppliers
 - Trade associations, industry experts
- Interviews
 - Formal interviews with parties
 - Information meetings with third parties
- Data gathering and analysis

4. Gathering evidence: Types of evidence

Depends on the nature of the investigated conduct:

- Cartels
 - Corporate statements and witness statements by leniency applicants
 - Evidence of collusion (meeting notes, phone records, emails...)
- Other anti-competitive agreements
 - Written agreements, contracts
 - Evidence of effects or likely effects on the relevant market (e.g. price data)
 - Evidence to establish relevant market and market shares
 - Evidence of any alleged pro-competitive effects of the agreement
- Abuse of dominance
 - Evidence to establish relevant market (e.g. sales data, customer surveys)
 - Evidence of a dominant position (e.g. market shares, views of customers)
 - Evidence of conduct (e.g. contracts, rebate schemes, cost/price data)

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UPPHANDLINGSPROTOKOLL

3. Förteckning över inkomna anbud

Anbud nr	Inkom datum	Anbudsgivare	Pris exkl moms (1)	Anmärkingar
1	01-02-22	Svenska Väg AB	35 600 000 kr	Alt 1, reserv 2/71, uppgift enl put i 2000:104 saknas
1	01-02-22	Svenska Väg AB	34 300 000 kr	Alt 2, reserv 2/71, uppgift enl publ 200
2	01-02-22	Vägverket Produktion Mitt	34 485 353 kr	Alt 1, reserv 2/71, 3/92, förskott 10%
2	01-02-22	Vägverket Produktion Mitt	32 199 078 kr	Alt 2, reserv 2/71, 3/92, förskott 10%
3	01-02-22	SKANSKA Sverige AB	34 144 000 kr	Alt 1, reserv 2/71, förskott 10%
3	01-02-22	SKANSKA Sverige AB	31 989 000 kr	Alt 2, reserv 2/71, förskott 10%
4	01-02-22	PEAB Asfalt AB, Sundsvall	35 200 000 kr	Alt 1, reserv 2/71, förskott 10%
4	01-02-22	PEAB Asfalt AB, Sundsvall	31 800 000 kr	Alt 2, reserv 2/71, förskott 10%
5	01-02-22	NCC Entreprenad, Linköping	32 900 000 kr	Alt 1
5	01-02-22	NCC Entreprenad, Linköping	30 800 000 kr	Alt 2
6	01-02-22	Kvalitätsasfalt i Mellansverige AB	34 895 616 kr	Alt 1, reserv 2/71, förskott 10%
6	01-02-22	Kvalitätsasfalt i Mellansverige AB	32 351 280 kr	Alt 2, reserv 2/71, förskott 10%

4. Beslut och motivering

Beslutsdatum: 2001-03-20
 Antaget anbud: NR 5 NCC ALTERNATIV 2
 Motivering: För Vägverket, förmånligaste anbudet

Beställarens underskrift: [Signature]
 Handläggarens underskrift: [Signature]
 Ulf Söderberg

04 februari 9 - HÅLLA LAGEN
 2001-02-22 OK OK DL

	NCC	SLG	PROD	PEAB	KVALITÄS
D 3 ALT 1	32900	33500	34600	35200	34900
ALT 2	30600	31000	32100	32800	32750
T 3	31900	7800	7700	8300	7900
UI	30900	30500	30600	29900	30500

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4. Gathering evidence:

Definition of relevant market

Qualitative methods

- Contacts with industry actors (competitors, customers...)
- Company's own strategy documents
- Guidance from previous case practice (Swedish and EU)

Quantitative methods

- Analysis of actual substitution between products (e.g. shock analysis)
- Company's own data and market surveys
- Customer surveys
- Transport cost analysis
- Price/cost data for econometric analysis

5. Assessing evidence at formal investigation stage

- SCA is not authorised to levy a fine (unless the companies settle)
- Must sue in Court and present thorough evidence of infringement
- Burden of proof lies with the SCA to establish the infringement
- SCA must also submit evidence supporting its calculation of the requested fine
- SCA must have robust, concrete and objective evidence of an infringement before suing for a fine
- Higher standard than in the case initiation/prioritisation phase

5. Assessing evidence at formal investigation stage: Case example – Tires

Bid rigging by tire companies; decision by Stockholm City Court, January 2014

- Two tire companies were fined for submitting joint bids in public tenders instead of competing for the contracts
- Court: SCA could not be expected to *disprove* conclusively that the investigated companies lacked capacity to bid independently
 - Parties have burden of proof in respect of facts alleged by them during trial

5. Assessing evidence at formal investigation stage: Quality controls and Objective review

- The SCA keeps a **case file** with all information relevant to the investigation – including both incriminatory and exculpatory evidence
- The results of the investigation are presented in an **investigation memo** which is an agency-internal document giving an objective account of the case
- The SCA has an internal “Devil’s advocate” procedure, testing the merits of a case before taking it to Court
- The **statement of objections** (“SO”) is sent to the investigated parties for comments or clarifications before Court action is started

6. Handling evidence: Transparency

Principles of transparency and due process are set out in Swedish public administration law

Benefits of transparency

- Gives the process legitimacy
 - Increases the SCA's credibility with stakeholders and the public
 - Helps the parties to understand the case and to give more relevant information
 - Ensures that any flaws in the SCA's analysis can be noticed in time, thereby reducing the risk for erroneous decisions
 - Helps to explain the reasons for the SCA's decision, thereby educating the industry on competition policy
 - Significantly increases the preventative effect of decisions
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6. Handling evidence: Access to the file

- Documents on the authority's case file are public information (as a general rule)
- Exceptions:
 - Commercially sensitive information
 - Documents which would prejudice the investigation if released
 - Agency-internal documents which are not final (preparatory documents)
- Access granted to:
 - Investigated parties
 - Other stakeholders (e.g. complainants)
 - General public / Media

6. Handling evidence: Engaging with the investigated parties

- Parties are invited to “state-of-play meetings” during the course of the investigation
 - SCA informs about the progress of the case, theories of harm etc.
- SCA sends the SO to the parties before going to Court
 - Including access to the case file and all evidence relied upon by the SCA
 - Opportunity to comment on the allegations and the evidence, clarify facts etc.
- Parties have a right to an oral hearing at the SCA, upon request
- Parties can defend their case in Court

Thank you for your attention

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