

# **Gathering, handling and assessing evidence**

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# The Swedish Competition Authority (SCA)

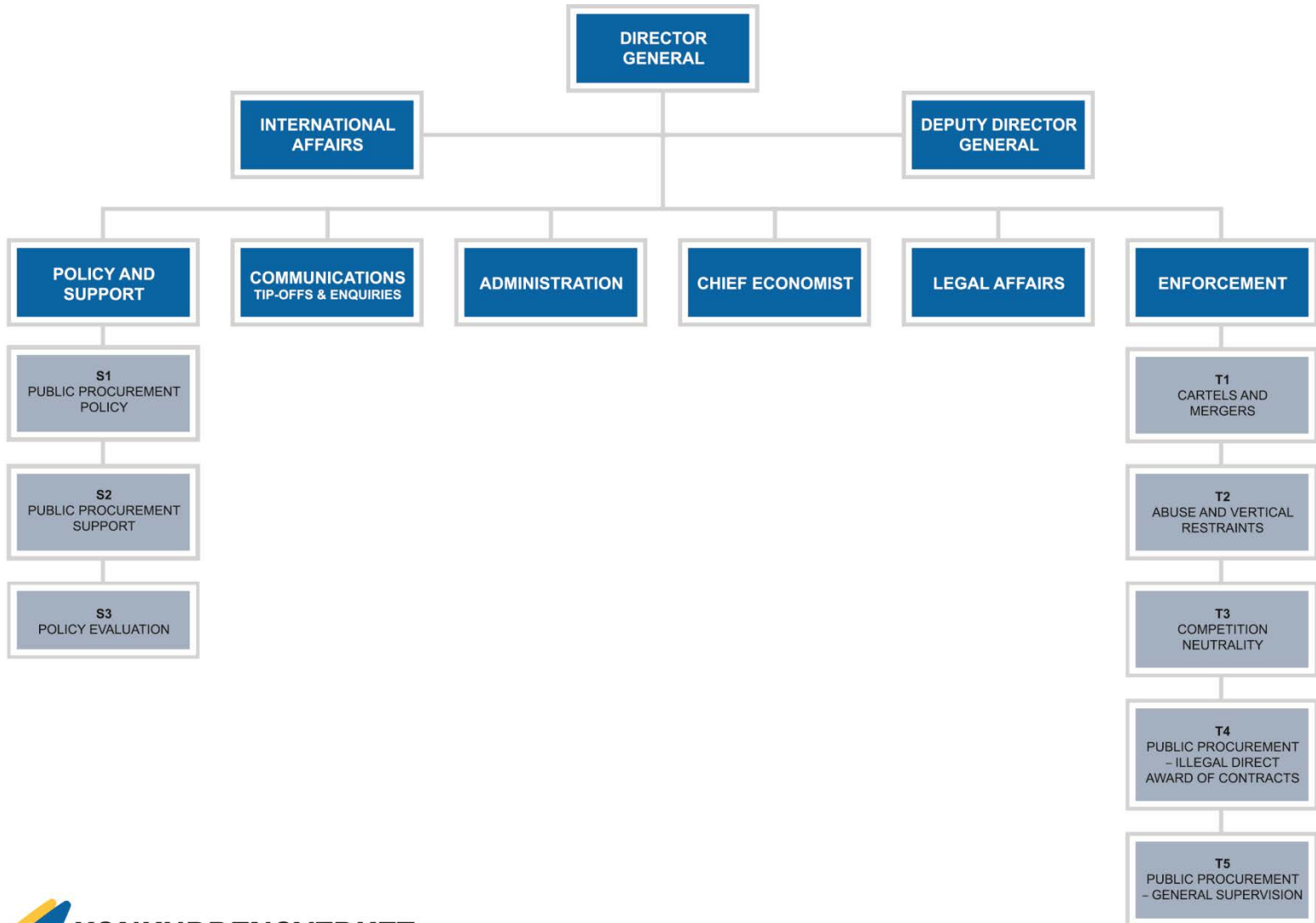
The Swedish Competition Authority is a state authority working to safeguard and promote competition and to supervise public procurement in Sweden

**"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

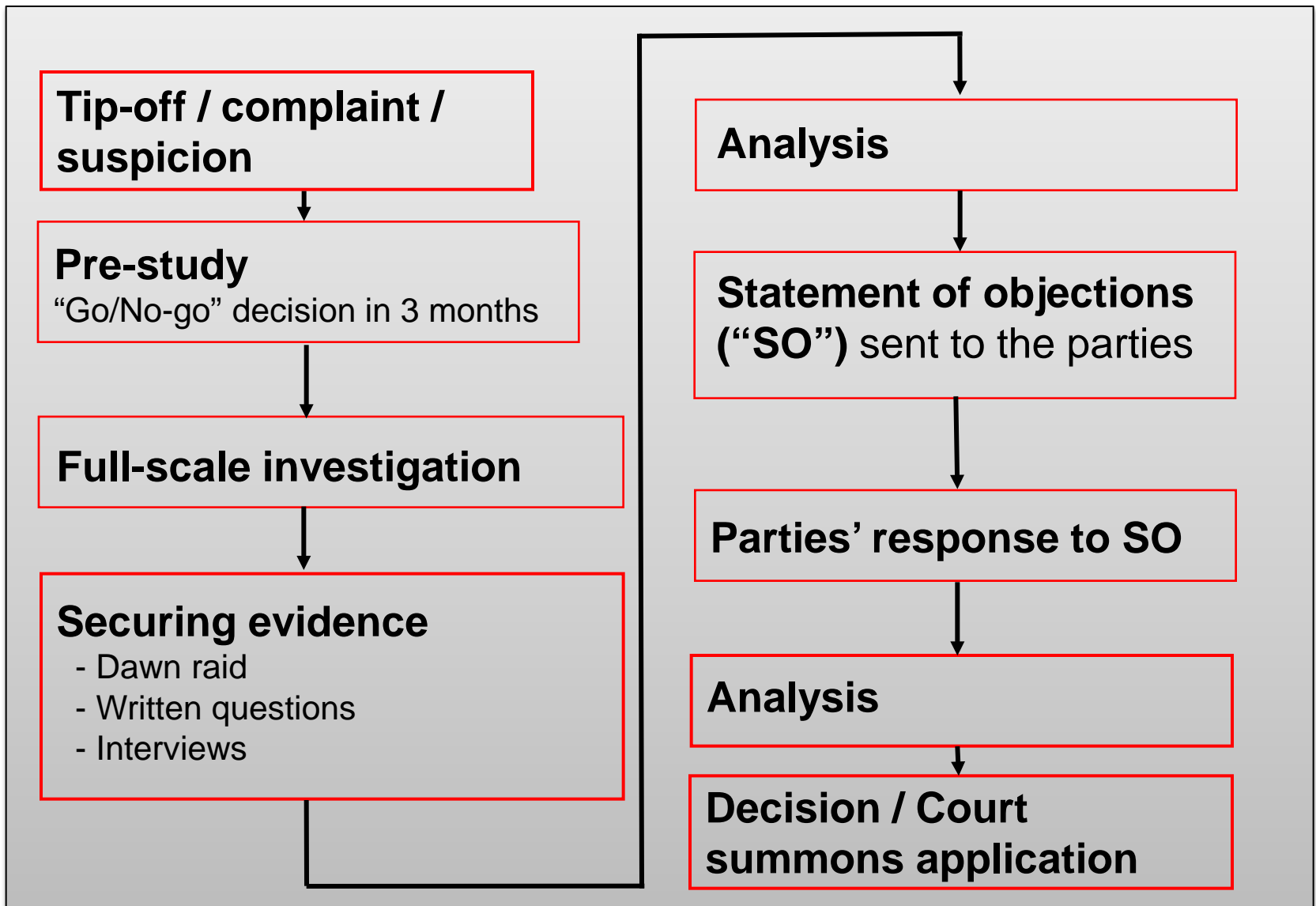
Relevant prohibitions (included in both Swedish & EU law)

- 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)


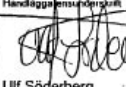
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3. Förteckning över inkomna anbud

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	

Beslutfattarens underskrift  Jan Jönsson	Handläggarens underskrift  Ulf Söderberg
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(1) Byta ej för sammanställningen görs på särskild blankett DB 160/11

04 februari 9 - HÅLLA LAGEN

2001-02-22 OK OK DL

	NCC	SLG	PROD	PEAB	KVALI
D 3 ALT 1	32900	33500	34600	35200	34900
ALT 2	30600	31000	32100	32800	32750
T 3	3190	7800	7700	8300	7900
UI	30900	30500	30600	29900	30500

221:199

350



AB 221: 50

### Faktura

Ab 492 023

Fakt nr / Kundnr  
98012 1008

Fakturadatum  
1998-06-25

Fakturaadress  
NCC AB  
Box 1061

Nr 2, m 7  
ANKOM  
1998-06-26

551 10 JÖNKÖPING

Er referens Konto: 77330-045  
Ert ordernr

Vår referens  
Betingsvillkor 30 dagar netto  
Förfallodatum 1998-07-25  
Dröjsmålränta 24,00 %

Uthyrning av komplett maskinlag inkl. arbetsledning

Perioden 25/5 - 29/5. 5 dagar á 30.000,-

150000,00

Leverantörnamn <b>ULF SÖDERBERG</b>		KVALITETS ASFALT AB		Fig	USER ASWA70
MASKINPOOL E-LAN		Avt/Ac EJA	Facknr F 55-00	73300	
Ankomstdag 98-06-26	Betalningsdag 98-07-27	Bankgiro 5188-7149	Leverantörreferens 98012	Verifikationsnr 87539734-1	
Kostnadsställe 77330-045	Kostnadslag/Resurser 430 0	Underkonto	Belopp 150,000	Individer	
Bokföringsdag 98-06-26	Växla	Kurs	Belopp utländsk växla	Moms 37,500	Ändringsdatum
Kvantitet	Pris	Altast	Totalbelopp 187,500	CBSI Åter UP-gruppen senast 98-07-22	

Netto	Exkl moms	Moms %	Moms kr	ATT BETALA
150000,00	150000,00	25,00	37500,00	187500,00

Anmärkningar ej gjorda inom 8 dagar från fakturadatum godkännes ej.

#### Kvalitetsasfalt AB

Adress  
Bråstagan 4 B  
733 30 SALA

Telefon  
0224-37550  
Fax  
0224-37559

Postgiro  
6199469-5  
Bankgiro  
6188-7149

Organisationsnr  
556537-5432

Innehar F-skattebevis



AD 221: 30  
Håkan Carlsson

Ab 492 C22

kvalitetsasfalt. Krossning 249 900 77330-226  
kompl. Alack 150 000 77330-045  
4099650 77330-045

# 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

## 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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