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# Dawn raids in Sweden during 2011

*During 2011 there have been several interesting developments as regards dawn raids and legal privilege. The Swedish Competition Authority carried out six dawn raids and assisted in ten other investigations. Swedish legislation requires that the Competition Authority applies to the Stockholm District Court for permission to conduct a dawn raid, a decision which can be appealed. The Stockholm District Court dismissed two applications for dawn raids, something which has previously been extremely rare, but both applications were approved on appeal to the Market Court. For the first time as far as we are aware a dawn raid was carried out by the Swedish Competition Authority in a private home. There is currently a debate amongst Swedish competition lawyers concerning the legality of mirroring hard disks during dawn raids. In addition, an interesting judgment was made by the Stockholm District Court which expanded the Swedish scope of legal privilege.*

## Legal requirements for a dawn raid in Sweden

For the Competition Authority to be able to conduct a dawn raid according to the Swedish Competition Act ("Competition Act") the authority must file an application to the Stockholm District Court. Chapter 5, Section 3 of the Competition Act provides that three cumulative conditions must be fulfilled in order for an application for a dawn raid to be granted:

a) There must be reason to believe that an infringement has taken place/is taking place;
b) the undertaking has not complied with an obligation to produce information set forth by the Competition Authority or there is a risk of evidence being withheld or tampered with; and
c) the measure must be proportional.

If the District Court denies the application, the Competition Authority may appeal the decision to the Market Court.

## Denied applications

### Posten

The Stockholm District Court denied two applications for dawn raids during 2011, something which has been very rare in the past. The first case concerned Posten Norden AB and two of its subsidiaries (Case Ä 5791-11, decision 27 April 2011). The Competition Authority applied for permission to conduct a dawn raid at the premises of the Posten companies regarding suspicions that Posten, the former national postal incumbent, had applied loyalty rebates contrary to the prohibition of abuse of a dominant position. The District Court stated in its decision, as grounds for not allowing the dawn raid (with reference to the preparatory works to the Competition Act), that it is required that there is a circumstance in the specific case that leads to a risk of evidence being withheld or tampered with in order for the main rule, a written request, to be set aside.

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It thereby took into account that Posten Meddelande AB, the company which was suspected of having undertaken the abusive action, had specified in prior correspondence with the regulatory body for postal services, the Post and Telecom Authority, the rebate which the Competition Authority considered as possibly abusive. The District Court stated that Posten would thus, in all likelihood, answer the Competition Authority's information requests and there was no risk of evidence being withheld or tampered with. The District Court thus denied the request.

The District Court's decision was appealed by the Competition Authority to the Market Court. The Market Court stated in its decision (Case Dnr A 2/11, decision 2 May 2011) that considering the nature of the suspected infringement, the risk that Posten Meddelanden AB may be ordered to pay fines and what the Competition Authority had submitted in the Market Court, it found that there was a risk that evidence was being withheld or tampered with. The Court considered that the importance of the investigation taking place balanced the nuisance or detriment which the measures meant.

OMX Stockholm Stock Exchange

The second dawn raid which was denied by the District Court but allowed by the Market Court concerned an investigation of the OMX Stockholm Stock Exchange. The suspected infringement concerned abuse of dominant position by refusal to supply or an anti-competitive agreement. OMX had denied access for server spaces to a competitor. The access was essential for providing low-latency trading which requires proximity to the servers used by the stock exchange. The Competition Authority stated that access was essential for providing a competitive service and that OMX had abused its dominant position by refusing access or that OMX and the owner of the server space had colluded to refuse access to OMX's competitor.

The District Court denied the application from the Competition Authority regarding a dawn raid as it did not consider that the possible infringement had been substantiated. The decision was appealed by the Competition Authority to the Market Court. The Market Court considered that the District Court's decision had been based on both an incorrect assumption as to which kind of abuse OMX had practiced and, as a result of that incorrect assumption, incorrect interpretations of irrelevant ECJ case-law. The Market Court stated that it cannot be required that the Competition Authority specify the exact nature of an anti-competitive agreement or action. It should suffice to have reason to believe that an infringement has taken place, which is in line with the requirements in the Competition Act. The Market Court thereby granted approval for the Competition Authority to carry out the dawn raid.

Debate regarding mirroring of hard disks

During the past year, legal practitioners have initiated a debate regarding the Competition Authority's practice of mirroring hard disks in conjunction with dawn-raids. The Competition Authority has used mirroring of hard disks on the premises of suspected infringers for several years, but the use of mirroring has escalated during the last couple of years. The question was brought before the District Court of Stockholm in connection with a dawn raid conducted on the premises of AstraZeneca in December 2010 that was initiated by the Dutch competition authority, Nederlandse Mededingingsautoriteit.

AstraZeneca did not object to the mirroring as such, but objected to the Competition Authority being able, without having removed legally privileged documents from the mirrored hard disks, to take the copies to the Competition Authority's premises for filtering and extraction. The right to copy documents relating to the possible infringement is especially sensitive in Sweden, as the Competition Authority can present any evidence

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regardless of how it was obtained and the court is free to appraise the evidence. A document upon which the Competition Authority and the raided party disagree whether it constitutes a legally privileged document must, according to the Competition Act, be presented to the District Court, which will decide whether it is privileged or not.

In this case, all of the mirrored disks would have to be presented to the court which would be practically impossible. The mirrored content amounted to 575 gigabytes (or around 14,000 boxes of printed paper) in total. AstraZeneca appealed the decision to the Market Court which dismissed the appeal as it regarded it as an executive measure which it could not rule upon. Although legally entitled to it, the Competition Authority did not ask the Swedish Enforcement Agency for help in executing the decision to bring the mirrored material to the Competition Authority. Instead, the Competition Authority applied to the District Court for a decision which would allow it to bring the mirrored content to its premises, on the grounds that it would be cost efficient and proportional. The District Court was of the opinion that although the question regarded an executive decision which was outside of the court's competence, the question should be appraised against fundamental EU principles.

The District Court circulated a draft request for a preliminary ruling to be tried by the ECJ regarding whether the court would have the competence to try whether mirroring is legal, despite the fact that no domestic rules give the court such competence. In response to the draft, the Competition Authority withdrew the application and conducted the investigation at the premises of AstraZeneca.

The practitioners involved in the debate have been critical of the legality of mirroring, but so far no cases have been decided and the Competition Authority has not responded. Delphi is of the opinion that mirroring is contrary inter alia to the rules on legal privilege.

Legal privilege more extensive in Sweden than under EU law – the Posten Case
During the dawn raid at Posten's premises, the Swedish Competition Authority found a memorandum prepared by one of Posten's in-house lawyers, who was an anti-trust specialist. The document existed in two copies, one was purely a printout of the memorandum and the other contained certain notes. The Posten companies claimed that the document could not be seized by the Competition Authority because it was covered by legal professional privilege, since it had been prepared after contacts with the companies' external lawyer with the direct purpose of obtaining legal advice from that lawyer.

The document concerned exactly the same issue as the Competition Authority was seeking information about. It was not clear from the document who had prepared it, from which company it originated or if it had been communicated to a lawyer. Since the parties had conflicting views as to whether the document could be seized in the investigation, it was submitted, in a sealed envelope, to the District Court of Stockholm for the matter to be tried. The District Court concluded initially in its decision that the rules on legal professional privilege (Chapter 5, Section 11 of the Competition Act) are based on what a lawyer or its counsel cannot be heard about as a witness under Chapter 36, Section 5 of the Code of Judicial Procedure. From the preparatory works to the Competition Act, it is evident that the provision is to be applied in accordance with EU law, a so-called EU compatible interpretation. There is also a reference to AM & S Europe in the preparatory works. However, the District Court held that since the AM & S Europe case tried to establish a lowest common denominator for legal professional privilege among the Member States, the protection level established by the ECJ could not be the maximum level. Nor does the minimum level stemming from EU law apply if Swedish law provides a more extensive protection. A higher level of national protection may therefore apply.

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The Swedish rules protect against seizure of material which has been given to a lawyer in confidence and this includes, in principle, all written documents which have been given to a lawyer in confidence within the scope of the lawyer's professional duties. In order not to erode this protection, the District Court held, with reference to two judgments from the Supreme Court (NJA 1990 p 527 and NJA 2010 p 122) that only a "modest level of evidence" is required in order for the document to be covered by legal professional privilege. The Posten companies' external lawyer had presented a copy of an email in which the disputed document had been delivered to him - the evidentiary requirement was therefore deemed to have been fulfilled. Since the counsel could never be questioned as a witness, the document could not be subject to seizure by the Competition Authority.

From this decision, we can conclude that Swedish protection is more extensive than under EU law and covers all documents which have been given to a lawyer in confidence within the scope of his/her professional duties. It should be noted that the Competition Authority chose not to appeal against the decision by the District Court.

### Dawn raid in private home

As under Article 21 Regulation 1/2003 the Swedish Competition Authority may carry out a dawn raid in private homes in cases where there are reasons to believe that evidence is being held in the home of the person the application concerns, and the person has not complied with an obligation to produce information set forth by the Competition Authority or it may be assumed that there is a risk of evidence being withheld or tampered with (Chapter 5, Section 5 of the Competition Act). This provision, which was introduced in 2008, had not as far as we are aware been applied until 2011 when it was applied during a dawn-raid on a wholesaler in the spare-parts market for motor boats in August 2011 (an investigation which was later shut down). One of the employees at one of the companies subject to the dawn raid had bought his former work-computer from the company. This was something which was discovered during the dawn raid, whereby the Authority made an application to the District Court in order to get permission to search the computer at this home. The application was approved since the District Court found that there were reasons to assume that the computer contained evidence since the employee was head of the aftermarket division. Furthermore the District Court argued that since the members of the cartel ran the risk of extensive fines, there was an imminent risk that evidence was being withheld or tampered with. Finally the District Court stated that the dawn raid would lose its meaning if the employee was given the opportunity to respond to the application.

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