



Lars Henriksson

Professor of Law, LL.D., M.Sc. Econ



Handelshögskolan i Stockholm
Stockholm School of Economics



Development of Competition law in Sweden 2016–2017

Photo: Vasil Stoecklin



What's up in Sweden?

- **New legislation in force**
- **New court system - first year**
- **New cases**
 - Some very interesting cases
 - Very few concentration cases



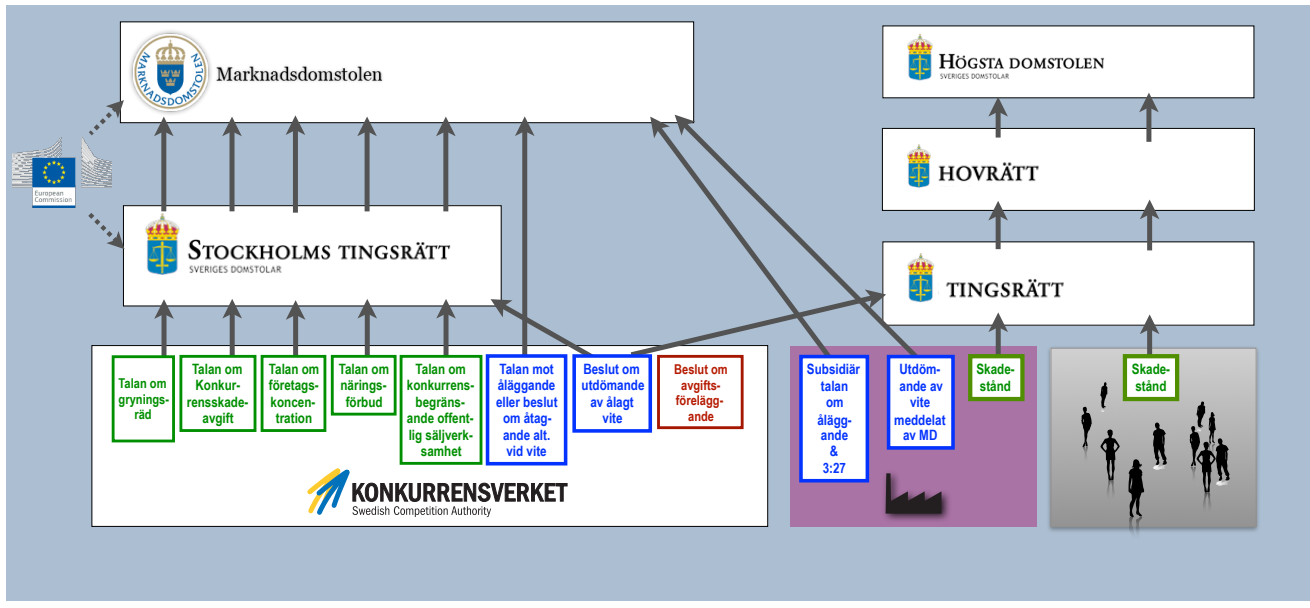
The new Court system

- **The Patents and Market Court**
 - Patent- och marknadsdomstolen (PMD)
- **The Patents and Market Court of Appeal**
 - Patent- och marknadsöverdomstolen (PMÖD)

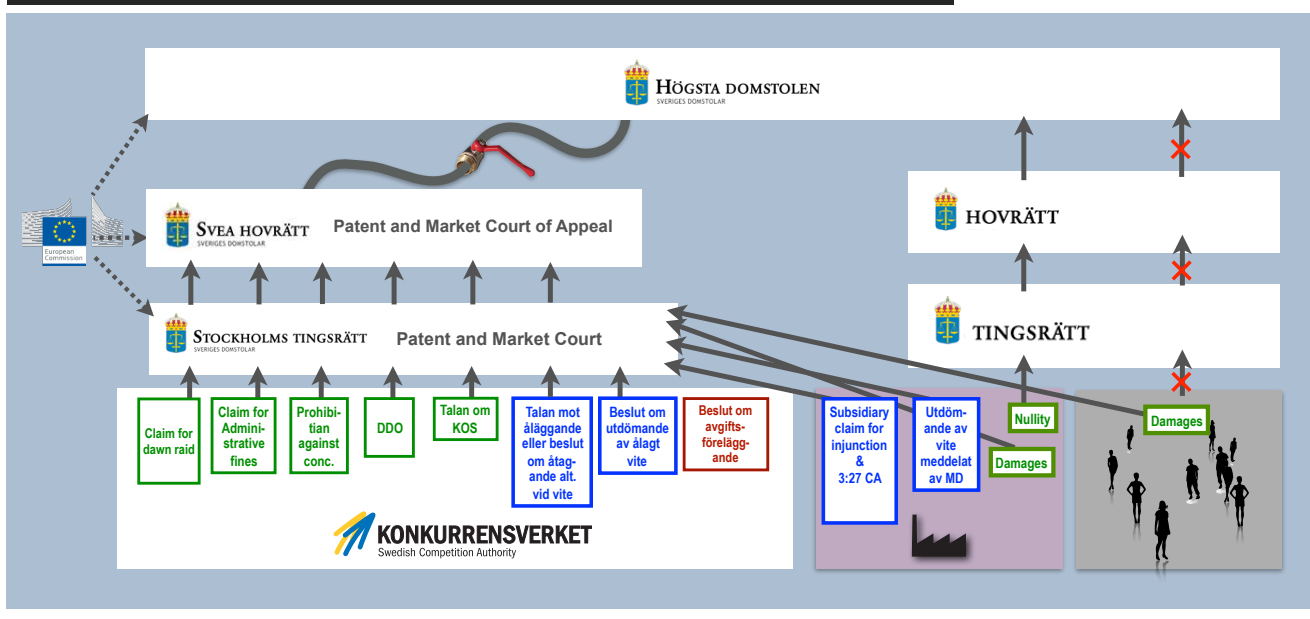




Sweden - old procedural overview



Sweden - current procedural overview



New legislation in force

- **The Antitrust Damages Act, ADA**
 - **Konkurrensskadelagen**
- **Editorial changes *en masse* due to the ADA and new Court systems**



New legislation under way...

- **Possibility for the SCA to take decisions in the first instance**
 - **Will apply to concentration decisions only - not anti-competitive agreements and abuse of dominance**
- **Repealing the block exemption law for the insurance sector**
- **Editorial changes in the Swedish law for the application of EU state aid rules**
- **Complementary rules on confidentiality in the ADA and the Public Access to Information and Secrecy Act**



Decided competition cases

- **Abuse of dominance**
 - Feb. 2017 - Swedish Match - Fine: 38 million SEK
 - Labels for snuff coolers
 - Yarps Network Services AB (i likvidation) v Telia Company AB of 29 June 2017
- **Anti-competitive agreements**
 - The Aleris et al-case
 - Accepted Fine Order (FO) / Summary imposition of fine
 - Ragn-Sells AB and Bilfrakt Bothnia AB
 - 4,5 million SEK
 - "Att företagen godkänner Konkurrensverkets krav innebär att en kostsam och långdragen domstolsprocess undviks. Processen blir effektivare och det sparar pengar åt både företagen och state", K. Geiger, SCA



Pending competition cases

- **Pending cases**
 - The Nasdaq/OMX-case
 - Pending - January 2018
 - The AQM-case
 - In a merger, is a non-compete clause with duration of > 2 year a restriction by object?
 - Pending - 29 November
 - The GothNet/TeliaSonera-case
 - Tele2 Sverige AB v N Telia Company AB of 26 May 2016
 - Net at Once v GothNet



Concentrations

- **148 decided cases (approvals)**
- **4 pending cases**
- **No prohibitions 2017**
- **Decided case late 2016**
 - **The Logstor/Powerpipe merger**
 - Pre-insulated pipes and other equipment for district heating
 - Cleared by the Patent and Market Court of Appeal



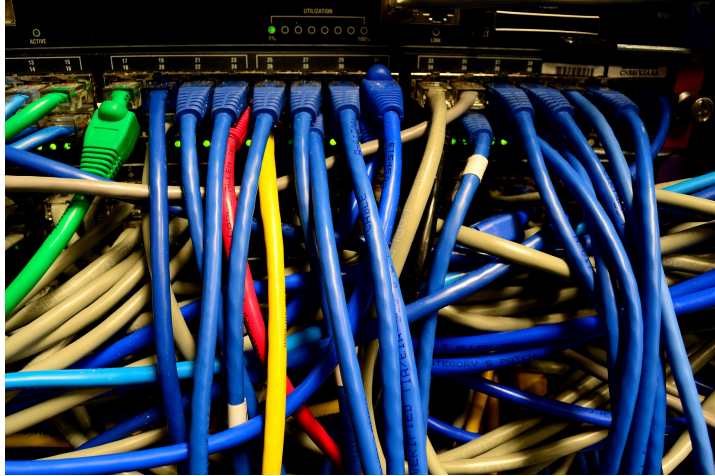
Anti-competitive sales activities by public entities

- **SCA v Hässleholms kommun**
 - **Claim: Prohibition against the community not to refuse to rent out access to land**
 - Not utility easement or land lease
 - How could refusal to sell amount to a sales activity?

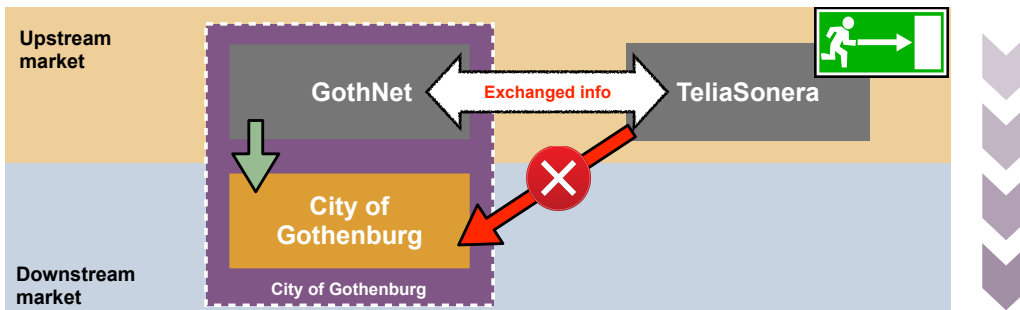


Case: PMT 17299-14, SCA v GothNet/TeliaSonera

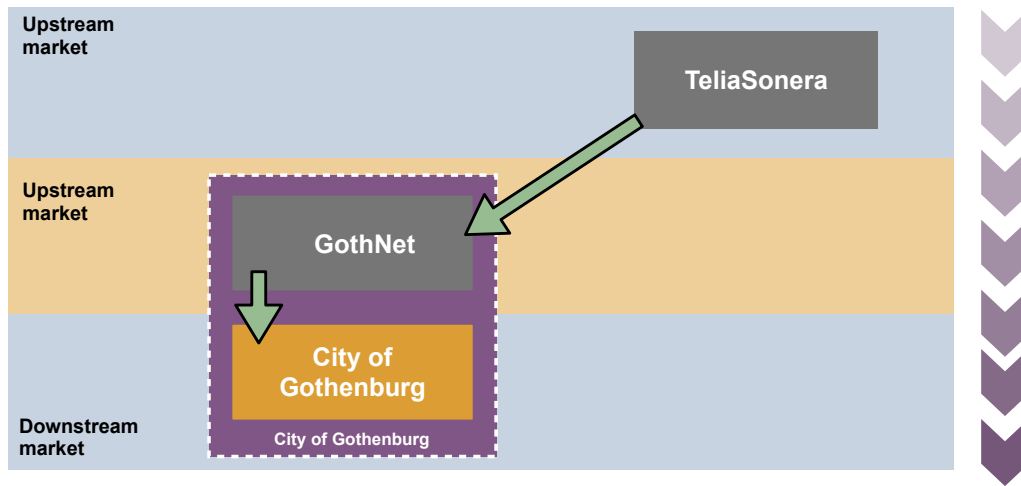
- Data communication services



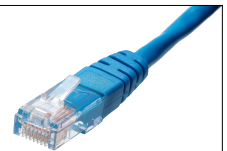
The case in a nutshell



The case in a nutshell



What markets were affected?



- **The relevant market**
 - TeliaSonera: OSI-model step 2–3
 - SCA: Fixed data communication services to end customers in Sweden
 - GothNet: 1,7 %
 - TeliaSonera: 36 %

Open Systems Interconnection model (OSI model)

Upper layers	7	Data	Application Layer Message format, Human-Machine Interfaces
	6	Data	Presentation Layer Coding into 1s and 0s, encryption, compression
	5	Data	Session Layer Authentication, permissions, session restoration
Lower layers	4	Segment	Transport Layer End-to-end error control
	3	Packs	Network Layer Network addressing; routing or switching
	2	Frames	Data Link Layer Error detection, flow control on physical link
	1	Bits	Physical Layer Bit stream: physical medium, method of representing bits

Green arrows point from 'TeliaDataNet' to layer 3 and from 'Telia Wan' to layer 2.

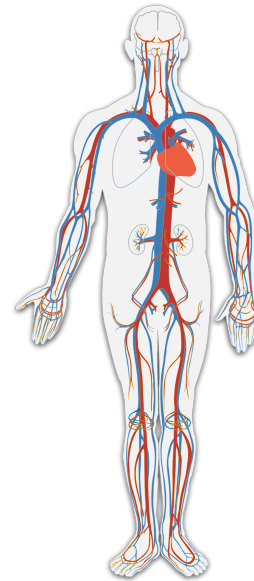


Case T-12304-13, SCA v Aleris et al



- **The market for clinical physiology**

- Medical specialty in health care with a special focus on the diagnosis of diseases in the heart and lung function, but also in other organs
- Support function for other medical care services
- Doctors within e.g. primary care units remits patients to a specialist in clinical physiology for examination of functions in e.g. heart, blood vessels, lungs or kidneys
- Assist the health service in interpreting symptoms and investigative findings and summarising the patient's condition in the form of a diagnosis.

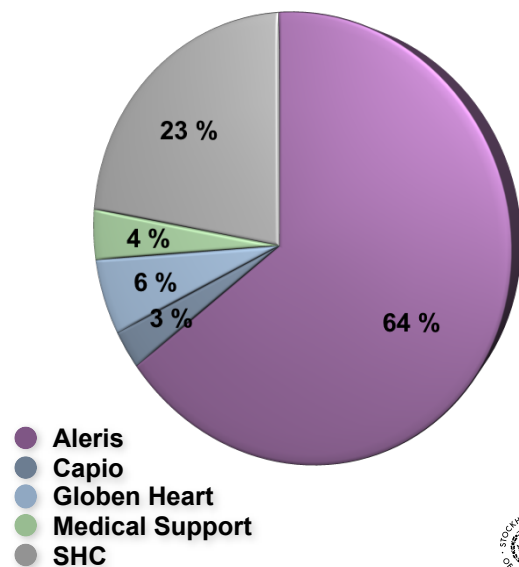


The Market



- **Who is on that market?**

- County-run hospitals; Södersjukhuset, Danderyds sjukhus, Karolinska, Tiohundra (Norrtälje)
- Private operators
 - Aleris, Capio, Stockholm Heart Center, Globen Heart, Medical Support
 - 90 % of services provided to the County (Stockholms Läns Landsting, SLL)
 - Private operators provide 90 % of SLL's requirements for clinical physiology
 - Public procurement of clinical health services

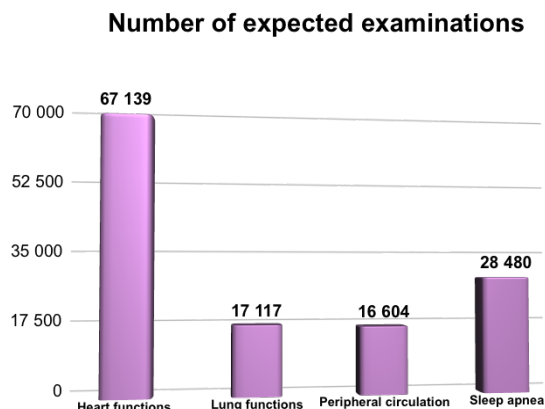




Procuring clinical physiology services

• Public Procurement of services in 2008

- Procurement of different areas or 'objects' including clinical physiology resulting in framework agreements for inter alia
 - Examinations of heart functions: occupational physiology and cardiac diagnosis + clinical physiology
 - Studies related to lung function diagnosis and blood analyses
 - Studies related to peripheral circulation diagnostics
 - Sleep apnea examinations
- Possibility to submit tenders on individual parts
- Estimated contract value: SEK 211 million ≈ €22 million
- Lowest price, 2 contracts to be awarded
 - Some operators would lose their current contract and would either exit the market or become sub-supplier to the winning operator(s)



The collusion



- A meeting was held between the private operators
- Co-operation agreement between Aleris & Capio + Aleris, Globen Heart & Medical Support
 - Right for losing party, but no duty, to become sub-supplier
 - Price: 98 % of the contracting price with SLL
 - Information exchange clause
- Contract award
 - Aleris & Capio the biggest losers
 - Globen Heart, Medical Support and Stockholm Heart Center were awarded framework agreement in Sept 2009 on services clinical physiology (all areas)
 - Capio was awarded a contract within Heart and Aleris within Sleep apnea
 - This triggered the co-operation agreements



Bad players...



- **SCA's view on restriction of competition**
 - **Market sharing agreement (volumes)**
 - Minimising risk of losing volumes, even for parties left without contract with SLL
 - **Information exchange on upcoming tenders**
 - **Adversely affected the parties incentives to fully compete for public contracts + reduced competition on price**
 - Commonality in cost structures etc., loser's guarantee for business...
 - **Theory of harm**
 - Higher costs for tax payers
 - Game theoretic approach - the agreement were designed to change the rules of the game



The Court's view



- **An agreement on restricting competition**
 - **Aleris+Capio: Volume sharing agreement**
 - **Aleris+Globen Heart+Medical Support: Volume sharing agreement**
 - Concerted practice at least
- **Restriction by object or effect?**
 - **The raison d'être of the agreements**
 - To protect the commercial interests of the losing (NB! not the winning) party
 - Not to ensure that patients could have a one stop shop
 - Primarily a defensive manoeuvre to ensure the commercial well being of the losing parties
 - Not a traditional sub-supplier agreement
 - **The agreements were typically designed**
 - to adversely affect price competition and designed to distort competition
 - to cement the prevailing market situation and reduce the dynamics of public procurement
 - in principle to diminish possibility to grow on the merits by surrendering business to others
 - Expansion, M&As or other co-operation agreement superfluous or impossible





What was the problem?

- **What about the legal and economic context?**
 - **Capio & HKG claimed that they lacked capacity**
 - Burden of proof: Companies must demonstrate that the agreement was necessary
 - Hybrid model of joint selling scheme
 - Lacking capacity: Companies must demonstrate that (objectively)
 - Contracting document did not indicate any certain capacity requirement + only award criteria was lowest price
 - Companies unable to demonstrate likelihood of lacking capacity
 - **SLL opened up for sub-contracting**
 - Should be identified in the tender
 - SLL perceived as a very tough buyer
 - SLL knew (or should have known) about the co-operation
 - Overt or not did not change the existence of an infringement

