

New rules on dawn-raids – are you prepared if your company has unexpected visitors?

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On 1 January 2016 a new legislation enters into force which, under certain circumstances, gives the Swedish Competition Authority a legal right to, during a dawn-raid, bring mirrored hard disks from the company's premise to examine them at the authority's premises. Partner Elisabeth Eklund and senior associate Oscar Jansson below describes what the new legislation means for companies and why a company representative should carefully assess whether the Swedish Competition Authority should be authorized to move such information from the company's premise.

Dawn-raids and the inspection of electronic material – background

Around 20 unannounced inspections, or as more popularly known, dawn-raids, are executed at companies' premises in Sweden every year. The raids are performed in order to secure evidence when the Swedish Competition Authority or another European competition authority suspects that a company has infringed the competition rules. During a dawn-raid, the competition authority investigates information that the company possesses, regardless of whether it is stored in a physical or electronic form (for example information on computers, cell phones, USB memory sticks etc.). During a dawn-raid, huge amounts of electronic information are generally inspected. The electronic information is either inspected by the competition authority at the premises of the company by using native search options at the computers belonging to employees that are suspected of being part of the suspected infringement or, more commonly, a forensic electronic inspection is carried out. The competition authority will during a forensic inspection copy the entire hard disk bit-by-bit, known as mirroring, and it will thereafter index all information

recovered from the hard disk on the authority's own computer or server. By using this process the authority will get access to both normally "visible" and deleted data. The information is indexed by using forensic software and stored in a database. The inspectors will thereafter use search words to find relevant documents that are extracted from the database and added to the inspection's file. The search possibilities are truly powerful if several mirrored hard disks are added to the same database as the inspectors then will get access to all information that the relevant people at the company have access to.

There are however certain limitations on what information the Swedish Competition Authority can access. The material extracted from the database has to fall within the scope of the inspection decision. The delimitation is made in three dimensions; as regards products/services, the geographical area and the time of the suspected infringement. In addition the authority may not review information protected by client-attorney privilege. The Swedish Competition Authority may not at all read information that is protected by client-attorney privilege (applicable to external counsels but not in-house counsels) and is only authorized to read other documents to the extent required to verify whether it falls within or outside by the scope of the inspection.

The Swedish Competition Authority's possibility to bring mirrored hard disks back to the premises of the authority

The process of indexing and reviewing the information is relatively time consuming wherefore the Swedish Competition Authority has, for a long time, claimed that it has the legal right to bring mirrored hard disks back to the

premises of the authority to index and conduct the searches. The Swedish Competition Authority has also claimed that this will be beneficial for the company as the authority will leave the company's premises more quickly and the business can revert to its normal state. It should, in this regard, be noted that the Commission normally reviews the material on the premises of the company.

However, many companies and lawyers have objected that this action lacks legal ground. The question has been discussed in several legislative initiatives during the last couple of years. Delphi has, together with several contributors during consultations, objected that such a right is not in accordance with the competition legislation or the companies' fundamental rights as information protected by client-attorney privilege and any information falling outside of the inspection scope is not excluded. The legislator has several times avoided taking a stand in this question which in part has been due to the contributors' objections. During 2014, an investigation was tasked with investigating this matter and the Parliament has now, in accordance with the Government's proposal, decided that from 1 January 2016 the Swedish Competition Authority shall have the right to bring mirrored information to its premises if the company consents thereto.

Why is it important to carefully evaluate if consent should be given?

Our recommendation at the present time is that the company should not give the Swedish Competition Authority consent to remove mirrored information from the company's premises to the authority's premises. We want to emphasize the following reasons for this recommendation.

The Swedish Competition Authority will remove information from the company's premises that can be subject to client-attorney privilege and the authority is not allowed to read such information. The authority's process for how this unfiltered information will be handled is not clear. Furthermore, in research-intensive companies this can also mean that very detailed technical business secrets would be among the information that would be stored outside of the company's premises. There is always a risk when information is removed outside of the ambit of the company's own premises that such information goes astray. We are not aware of any such incidents but the risk must be considered.

Furthermore, it is an open question whether the information should be regarded as public documents. The general principle in Swedish administrative law is that all documents that are submitted to an authority become a public document, which in turn enables a third party to request copies of them. The authority can only deny such a request if there is legal support for confidentiality whereby the entire document or parts of a document may not be disclosed to the applicant. A decision on confidentiality can be appealed to the Administrative Court of Appeal. It is, at present, not certain whether information on the mirrored hard disks becomes public documents when they are taken to the premises of the Swedish Competition Authority. If information on the hard drives is considered as public documents, e.g. a competitor can at a later stage request the information in accordance with the rules on public documents. The document is however initially covered by inspection confidentiality. Since all decisions on confidentiality can be appealed, the Swedish Competition Authority cannot guarantee that all information will be protected by confidentiality when it moves the information to its premises. Bearing in mind that a lot of information on a company computer is sensitive by its very nature and as certain information is of a private nature referring to employees, it can cause harm for both the company and the individual if the information is disclosed. Our hope is however that the Swedish Competition Authority will only regard the documents that fall within the scope of inspection and which are added to the inspection file as submitted to the authority (and thus public documents).

For these reasons it is difficult for the company to overview the consequences of giving consent.

If the company is considering giving consent it is underlined in the preparatory works to the applicable clause in the Swedish Competition Act that it is important that the Swedish Competition Authority obtains consent from the person authorized to represent the company in question, that the consent is properly documented and that the person giving consent understand the meaning hereof.

Furthermore, we recommend that the company should, as well as during the dawn-raid, have a legal counsel present when the Swedish Competition Authority is reviewing the information at its premises. In the legislation there is a right for the entity subject to the dawn-raid to "follow the measures that the Swedish Competition Authority is taking". This means that the person

or its representative have the right to follow the authority's inspection and receive copies or excerpts that the authority takes of information covered by the scope of the investigation as indicated in the Stockholm District Court's decision.

New case-law that limits the Competition Authority's possibilities to extend the scope of the dawn-raid

Previously it has been uncertain whether the Swedish Competition Authority can use information uncovered in a dawn-raid and based on this information extend its searches in the mirrored material that has been brought to its premises with appropriate consent. The Swedish Market Court answered this question in a recently issued judgment, MD 2015:15, Assa AB v the Swedish Competition Authority, by stating that it was not possible – when a mirrored material has been transferred to the Swedish Competition Authority's premises – to grant a new inspection application in the material collecting during the first dawn-raid based on suspicions in the material found in the first dawn-raid.

Final remarks

We would rather have seen that the possibility to give consent had not been inserted into the Swedish Competition Act but the Government and the Parliament thought differently. It is however positive that question has now been regulated – it is always better to have a legal framework than to let an authority act in a grey area.

Nevertheless, the regulation that will come enter into force on 1 January 2016 will lead to that a company subject to a dawn-raid will face a choice as regards handling of mirrored hard drives, a choice which it cannot foresee the full consequences of. For this reason, we believe that the review of electronic information should be carried out at the company's premises despite the fact that this causes inconvenience in the day-to-day operations for an extended period of time. Our recommendation is thus not to give consent to the electronic material being transported to the Swedish Competition Authority's premises.