

Sweden: Worth Noting from the Implementation of the Trademark Directive

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[David Leffler \(Cirio Law Firm\)](#)

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On 1 January 2019, the amendments to the Swedish Trademark Act enter into force. In many aspects, the implementation is straightforward and what anyone familiar with EU trademark law would expect. This includes the removal of the requirement for graphical representation, the possibility for the applicant to require an opponent to prove use of an earlier mark as well as change of relevant date of application as well as renewal. There are, however, a few things that may surprise a non-Swedish trademark lawyer.

- *Bad faith* will not be implemented as set out in the directive. Instead Sweden will keep bad faith as a relative ground that could only be invoked where the applied mark *can be confused with a symbol which, at the time of the application, was being used by a third party in this country or abroad and is still in use, if the applicant was acting in bad faith at the time of the application*. This means that Sweden will still only have a very limited bad faith provision and that, for instance, re-filing (i.e. the Pelican case) will not fit in the Swedish provision.
- Cancellation actions will not be assessed by the Swedish Patent and Registration Office (PRV). Sweden will keep the already implemented “mail box” provision for cancellations. This means that where a cancellation action is brought at PRV against a registered mark, PRV will only be able to

cancel the mark if the action is not contested by the proprietor of the mark. If the action is contested, PRV must refer the cancellation applicant to the Patent and Market Court.

- Sweden keeps its ex officio examination of relative grounds as well as the possibility to file oppositions on absolute grounds. The latter part is most likely a consequence of the fact that there will not be a true cancellation process. Hence, by allowing oppositions on absolute grounds, there is a hope that cancellation actions brought to the court will be limited.
- Distinctiveness and descriptiveness will still be intertwined. Holding true to Swedish legislative tradition, there will be no word by word implementation of these absolute grounds of refusal. Instead, descriptiveness will therefore still be part of the distinctiveness assessment in the act. It should however be noted that the Patent and Market Appeal Court on 13 February 2018 in case PMÖÄ 10702-16 stated that the Trademark Directive shall govern the interpretation of the Swedish Trademark Act in this regard. The court did, nevertheless, point out that it is up to the Swedish legislator to align the Swedish terminology to the Trademark Directive, something that the legislator chose not to do.
- Swedish company names continue to have a strong position in relation to trademarks. As such, a registered Swedish company name will allow its owner to prohibit the registration of a confusingly similar trademark application and possibly also to prohibit the use of such a trademark. In addition, there will be no requirement for the proprietor of a company name to show use of the company name as a sign identifying the commercial origin of goods and/or services when opposing a trademark application. A revocation action due to non-use may be filed against company names. However, company names cannot be partially revoked following non-use and as such it will be enough for the proprietor to show only partial use for the dismissal of the revocation action in full. Finally, it should be noted that according to the current practice of the Swedish Companies Registration Office, the threshold for distinctiveness for registering company names is rather low and this can create unusual barriers for trademark owners trying to establish themselves on the Swedish market.

This author contributed to the position of SFIR (the Swedish Intellectual Property Association) in its referral body paper during the legislative process. SFIR

commented on all of the above points and it is therefore with a not negligible bit of disappointment that these matters have not been dealt with. As to the relationship between trademarks and company names, one could even question whether or not the system in Sweden is compliant with the Trademark Directive. Hopefully, this can be resolved through a referral to the CJEU in the near future.