THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Tenth Edition

Editor
Aidan Synnott

THE LAWREVIEWS

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TENTH EDITION

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THE MERGER CONTROL REVIEW

THE MERGERS AND ACQUISITIONS REVIEW

THE MINING LAW REVIEW

THE OIL AND GAS LAW REVIEW

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THE PUBLIC COMPETITION ENFORCEMENT REVIEW

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CONTENTS

PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention. We also see the evolution and refinement of approaches to competition law enforcement in several jurisdictions. Particularly notable this year are the chapters from the United Kingdom and Argentina: the authorities in the United Kingdom are surely busy adapting for a post-Brexit enforcement regime, while those in Argentina are 'pushing for the issuance of a new antitrust law ... with several major changes'. Indeed, in the report that follows, we read of many areas where the new Argentine administration has stepped up enforcement activities. South Africa is also proposing 'substantial changes' to its competition law.

Cartel enforcement remains robust. In the pages that follow, we read of numerous matters before Brazilian enforcers; a notable new emphasis on cartel enforcement in Argentina; and in Australia, the imposition of a fine in 'the first criminal prosecution for cartel conduct'. We also read of the continued use of leniency programmes in several jurisdictions. However, the chapter on the European Union reports that leniency applications have appreciably declined, which, the authors note, 'raises the question of the effectiveness of the leniency programme itself and of other detection methods'. Still, the report from France details the first use of that country's leniency programme in conjunction with a new settlement procedure. The authors note that 'the recent new settlement procedure may accelerate proceedings as more companies may be willing to settle'. The report from Argentina describes a proposed leniency programme there.

The above-referenced French case involved an alleged cartel of manufacturers of PVC and linoleum floor coverings. (The Chinese also fined manufacturers of PVC.) In Australia, the authorities moved against an alleged cartel of suppliers of roof sheeting. Fines were imposed upon cement companies in Italy and Australia. The EU and United Kingdom chapters discuss the use of pricing algorithms by cartels. Both the United Kingdom and the United States brought actions concerning alleged cartels relating to the sale of real estate: the United States continued its enforcement activities against real estate auction bid-rigging, and the UK brought an action against agents alleged to have engaged in a cartel related to their services.

In the areas of restrictive agreements and abuse of dominance, several jurisdictions continued to police firms in the pharmaceutical industry. The chapters from China, France and the United Kingdom describe several of these enforcement efforts. Moreover, the French authorities launched a broader inquiry into several areas in the healthcare sector. Additionally, in France a gas supplier was fined for abuse of its dominant position. In the United Kingdom, the Competition and Markets Authority continued its work against resale price maintenance,

a practice that was also met with scrutiny by authorities in India. In addition, there are pending appeals in cases involving payment cards in both the United States and the United Kingdom, and a resolution of a payment card case in Argentina. More generally, the report from Argentina notes 'heightened activity in conduct investigations', and the chapter from Australia details two amendments to that country's Competition and Consumer Act relating to misuse of market power and 'concerted practices'. The discussion on loyalty rebates and exclusivity in the EU Overview will be of interest to many.

Merger review and enforcement activity remains robust. The chapters that follow note activity in many sectors ranging from banking in Brazil to online property advertising platforms in France. French authorities also revisited conditions placed on earlier pay-television and free-television mergers in light of changing competitive conditions. Indeed, our French contributors note an increasing amount of merger activity there; and from Argentina, we read that 'significant steps have been taken towards a more proactive merger control system', along with an acceleration of the pace at which the Antitrust Commission reviews cases. In Brazil, '[t]here has been an increase in the number of mergers reviewed by' the authority there, 'as well as in the number of transactions subjected to substantial scrutiny and opposition, and even effectively blocked by the authority'. The *AT&T/Time Warner* deal is being challenged in the United States, but was cleared – with certain conditions – in Brazil, where 'AT&T owns [a] pay-tv services operator ... and TimeWarner licenses channels to pay-tv operators'. The report from China notes several enforcement actions arising out of merger process violations, such as the failure to properly report transactions, along with conditional approvals of acquisitions involving printing and container transport.

Last, but certainly not least, readers will be quite interested in the informative discussion of '[t]he biggest talking point for UK competition law' – Brexit – in the chapter from the United Kingdom. Here, the authors discuss the potential consequences of Brexit on the UK's competition enforcement regime, while noting that the 'future ... remains unclear'. We will watch with interest to see how evolving proposals for Brexit may affect competition enforcement in the United Kingdom and the European Union.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
March 2018

Chapter 22

SWEDEN

Peter Forsberg, Haris Catovic and David Olander[1]

I OVERVIEW

The Swedish Competition Act (Competition Act)[2] entered into force on 1 November 2008. The Competition Act governs all types of actions that may distort effective competition and aims to assimilate EU competition law as far as possible. The Competition Act is therefore interpreted in accordance with precedents from the Court of Justice of the European Union (ECJ).

The Swedish Competition Authority (SCA) is the central administrative authority for the administration and enforcement of competition law in Sweden. The SCA plays a key role in the competition field and is entrusted with investigative powers as well as rights of intervention, albeit limited decision-making powers. The powers of the SCA stem from the provisions in Chapter 5 of the Competition Act. The SCA investigates possible infringements of the Competition Act and may require an undertaking to terminate practices that are found to be contrary to competition law. If the undertaking fails to comply with an order from the SCA, an administrative fine may be imposed on the undertaking for non-compliance. As of 1 September 2016, a new court system for competition law matters and merger control proceedings was established. The Patent and Market Court (PMC) was established as a division within the Stockholm District Court (SDC) as the first instance in competition law and merger control matters. In situations where the SCA has established the existence of an infringement of the Competition Act, it is the PMC, and not the SCA, that may impose a fine of up to 10 per cent of the infringing companies' aggregate worldwide group turnover. Decisions and judgments by the PMC can be appealed to the Patent and Market Court of Appeal (PMCA), which replaced the Market Court (MC) as the second, and in practice highest, instance. A precondition for the PMCA to hear and conduct an examination of an appealed case or matter is that the court grants leave to appeal.

The SCA has for the past few years prioritised cartel detection by devoting greater resources to develop its *ex officio* cartel detection methods. Additionally, the SCA has become more proactive by using media to convey its activities against anticompetitive behaviour. In particular, it has emphasised the potential risks an undertaking may be exposed to by participating in a cartel or acting abusively as a dominant player, such as heavy fines, bad goodwill and exclusion from participation in public procurement procedures. Through intensified activity in the media, the SCA aims to increase awareness of the Competition Act.

1 Peter Forsberg is a partner and Haris Catovic and David Olander are associates at Hannes Snellman Attorneys Ltd.

2 The Swedish Competition Act (2008:579).

Breach of the competition rules is not a criminal offence in Sweden. However, a trading prohibition may be imposed on an individual in cases of particularly serious cartel infringements. Only in situations where it is considered to be in the public interest and the individual has seriously failed to fulfil the obligations will the SCA seek a trading prohibition. In circumstances where either the company benefits from leniency or the individual has contributed and personally cooperated to a significant extent, the SCA may grant immunity from a trading prohibition.[3]

On 1 January 2018, the Competition Act was amended to grant the SCA power to independently adopt decisions in merger control cases. As to cases concerning anticompetitive agreements or abuse of dominant position, the SCA still has to file a complaint with the PMC, which remains the first instance with power to adopt infringement decisions.

In December 2016, the EU Directive on Antitrust Damages Actions was implemented through the enactment of the new Antitrust Damages Act (Antitrust Damages Act).[4] The purpose of the reform is to facilitate the making of damages claims by parties that have suffered from a violation of competition law. The Antitrust Damages Act is material to clarifying and simplifying procedures for both damages claims and court proceedings in antitrust damages actions. The Antitrust Damages Act introduces several new reforms, such as a rebuttable presumption that cartels cause harm and clearer limitation periods, and that a final infringement decision will constitute full proof of the occurrence of a competition law violation.

The SCA will also continue its focus on cartel enforcement, reviewing mergers and actions against undertakings abusing their dominant position. In 2017, the SCA conducted investigations in, for example, the markets for insurance services, do-it-yourself (DIY) building materials, food retail and distribution, as well as the lottery market.

II CARTELS

The substantive provisions of relevance to cartel enforcement are found in Chapter 2 of the Competition Act, which covers anticompetitive agreements. Chapter 2, Section 1 and Chapter 2, Section 2 are modelled after Article 101(1) and 101(3) of the Treaty on the Functioning of the European Union (TFEU). Section 1 strictly prohibits cooperation between undertakings that has as its object or effect the prevention, restriction or distortion of competition in the market to an appreciable extent, whereas Section 2 sets out the possible exemptions to the prohibition found in Section 1.

The Swedish leniency programme was amended in 2014 to better reflect the EU leniency system. The new leniency regime introduced a marker system whereby a company may apply for a marker and submit limited information about an ongoing infringement. The minimum requirement to obtain a marker is to submit information on the market affected by the infringement, the other companies involved and the nature of the infringement. To secure the marker, the company must, within a specified period, submit a complete notification. Unless the company with the marker fails to submit the outstanding information, another company cannot jump the queue for immunity.

3 KKVFS 2012:2.

4 The Antitrust Damages Act (2016:964).

i Significant cases

Data communications links in Gothenburg – bid-rigging cartel[5]

The SCA sued TeliaSonera, Sweden's largest telecommunications operator, and Göteborg Energi GothNet, a local network operator in Gothenburg, at the SDC, requesting a total fine of 35 million kronor for having formed a bid-rigging cartel prior to a public procurement procedure by the City of Gothenburg in 2009. The SCA claimed that when the City of Gothenburg procured data communication services, TeliaSonera and GothNet agreed that TeliaSonera would refrain from submitting a tender offer in the procurement, despite the fact that GothNet and TeliaSonera are major competitors on the market. Subsequently winning the bid, GothNet contracted TeliaSonera as a subcontractor. The PMC ruled in favour of the SCA's claim and ordered each of the parties to pay 8 million kronor in fines. The judgment has been appealed and the case is pending before the PMCA.

Healthcare services – bid-rigging cartel[6]

In December 2015, three companies within the healthcare and nursing sector, Aleris Diagnostik, Capio S:t Görans Sjukhus and Hjärtkärlgruppen i Sverige, were sued by the SCA for alleged collusion during a public procurement of clinical physiology. The SCA requested fines amounting to a total of 41 million kronor. Aleris had, prior to the companies submitting their respective tender offers, agreed to share the contract with the other two, regardless of which company eventually would be awarded the contract. The SDC found that the practice was anticompetitive by object and imposed fines on the healthcare companies. The case was appealed to the PMCA, which set aside the SDC's judgment and ruled in the healthcare companies' favour. According to the PMCA, the agreements between the companies imposed an obligation on the winning party to, on request, appoint a losing party as subcontractor. The PMCA established that the agreements did not stipulate which volume a subcontractor would be awarded, which, according to the court, meant that the parties had not agreed to share a certain volume of the market. The PMCA also pointed out that the decisive criteria to award the winner in the public tender had been the lowest price. Under those circumstances, the PMCA concluded that the agreements could not be held anticompetitive by object and that the SCA had not presented sufficient evidence to establish that the agreements had anticompetitive effects.

Moving companies – market sharing?[7]

In 2014, the SCA sued three companies in the moving company sector, Alfa Quality Moving, NFB Transport Systems and ICM Kungsholms AB, requesting approximately 42 million kronor in fines. The companies had in two subsequent transactions included non-compete clauses in the share purchase agreements, which, according to the SCA, were too far-reaching and could not be considered to be ancillary restrictions. The SCA claimed that the clauses constituted market-sharing and were unlawful. This was the first case where too far-reaching ancillary restraints have been interpreted as being able to create potential anticompetitive agreements, giving rise to fines. Although the PMC agreed with the SCA that the five-year non-compete clauses were too far-reaching, the court found that the purpose of the clauses

5 Case No. 848/2014, T 17299-14.

6 Case No. 483/2013.

7 Case No. 511/2014, T 10057-14.

had been reasonable and that the SCA had not been able to show any negative effects on competition as a result of the agreements. The SCA appealed the case to the PMCA, which held that for the successful implementation of a transaction, non-compete clauses may be necessary as long as they are directly related to the merger. The PMCA ruled that such clauses are a form of 'loyalty guarantee' between the seller and the purchaser, providing the buyer with a certain degree of security. The SCA argued that the moving companies had knowingly planned on non-compete clauses exceeding the three-year period outlined in the Commission's guiding notice on ancillary restraints. However, the PMCA found that the three-year time frame only reflects the duration under which companies normally can assume to be protected under the Commission notice rather than the maximum duration allowed for a non-compete clause. The court did not find any evidence in support of the claim that the non-compete clauses were anticompetitive by object. The PMCA further concluded that the SCA did not provide any evidence proving that the clauses had anticompetitive effects. Consequently, the PMCA dismissed the SCA's appeal and fully upheld the SDC ruling.

Kitchen equipment – bid-rigging[8]

Following a third-party complaint, Electrolux and seven of its exclusive distributors were subject to an investigation by the SCA concerning potential bid-rigging in connection to a public tender of institutional kitchen equipment. The investigation showed that Electrolux and the distributors had entered into exclusive distribution agreements that prohibited each distributor from making active sales and marketing campaigns into a geographic area that was exclusively allocated for another distributor within Electrolux's exclusive distribution network. The exclusive geographic areas coincided with the counties-based division in the public tender. The distributors had submitted tender offers only in the counties that were allocated for each individual distributor according to the exclusive distribution agreements with Electrolux. The SCA found that it was not established that the practice restricted competition and harmed consumers. As a result of the SCA's investigation, Electrolux developed new guidance for its exclusive distributors' future practices in public tenders. The SCA decided not to take any further actions and closed the investigation.

Insurance services – bid-rigging cartel

In April and June 2017, the SCA performed unannounced on-site inspections against the insurance companies Söderberg & Partners, AIG, If, Trygg-Hansa and Folksam for suspected collusion in public tenders of insurance services. The SCA is currently examining whether Söderberg & Partners informed the insurance companies about their progress in public tenders, which Söderberg & Partners was handling in the capacity as insurance broker, and advised them on when to adjust their tender offers. During the unannounced on-site inspection at Söderberg & Partners and following the company's consent, the SCA decided to index and mirror digital material at the authority's premises. Söderberg & Partners appealed the SCA's decision to the PMC, arguing that the SCA acted outside of its investigatory powers when the authority copied and confiscated the digital material. The PMC ruled that the SCA's conduct during unannounced on-site inspections is not admissible for judicial review under Swedish law; therefore, it rejected the company's appeal. Söderberg & Partners challenged the

8 Case No. 741/2016.

ruling to the PMCA, arguing that the PMC's decision meant there was insufficient judicial review under Swedish competition law and that it was not compatible with EU case law. The PMCA rejected the appeal and upheld the PMC's ruling.

DIY building materials – price-fixing[9]

In October 2016, the SCA performed unannounced on-site inspections after suspicions of unlawful cooperation between several large DIY building material chains. The SCA suspected that the chains had agreed on minimum prices on bathroom ceramics, subsequently resulting in higher prices for consumers. In connection with this inspection, the SCA found indications of further cooperation in promotional activities between the chains. Consequently, the SCA performed an additional unannounced on-site inspection. The second investigation was concluded in March 2017, and showed that the companies had cooperated in several promotional activities in the form of local sales displays. However, the SCA found no conclusive evidence that the contacts between the undertakings had an anticompetitive effect and closed the investigation without taking any further actions.

The first investigation is still ongoing, and it remains to be seen what further actions the SCA may take.

Online travel agency services[10]

In 2015, the online travel agencies (OTA) Booking.com and Expedia were subject to parallel investigations in Sweden and a number of other EU Member States. The SCA investigated whether the OTAs applied anticompetitive parity clauses in relation to Swedish hotels. The investigations were closed after the OTAs made changes to the clauses. In 2016, 10 national competition authorities and the Commission evaluated what effect the changed agreements had on the OTA market. The final report was published in April 2017 and the SCA concluded that the new agreements had improved the conditions for competition between the OTAs.

ii Trends, developments and strategies

Although it varies from year to year, the SCA performs on average less than a handful of dawn raids per year. The SCA tends to prioritise those sectors where there is competitive imbalance. Sectors that have come under the SCA's scrutiny in the past are building and construction, the petrol market and the healthcare sector. Moreover, the SCA receives approximately five leniency applications per year, whereof approximately half are summary applications.[11] The SCA does not have any powers to impose fines on companies infringing the Competition Act: only the PMC and the PMCA have the power to impose fines on undertakings that have infringed the competition rules.

Furthermore, the question of mirroring has been one of the most debated topics within competition law for the past few years. The law has recently been changed to clarify when the SCA has the right to copy and examine digitally stored materials at its premises. From 1 January 2016, the SCA may copy and examine digitally stored material at its premises

9 Case No. 339/2015.

10 Case No. 596/2013.

11 During the period 2010–2014.

if the company under investigation has given its consent. Due to past legal uncertainties surrounding the rules of mirroring, the new legislation amending the Competition Act has been welcomed.

iii Outlook

The fight against cartels is one of the main priorities of the SCA, and measures relating to the detection of cartels has increased, especially concerning bid-rigging cartels in public procurement procedures. There are several ongoing investigations at the SCA into companies suspected of having collaborated at the bidding stage. The SCA has also announced that it will continue to focus on preventing and detecting cartels in public procurement procedures.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Chapter 2, Section 7 of the Competition Act sets out the prohibition against abuse of a dominant position. Section 7 is harmonised with Article 102 TFEU: hence, the assessment of whether an undertaking is dominant, the delimitation of the relevant market and whether a conduct constitutes abuse is made in accordance with the practice set out by the ECJ.

Even though there have been few court cases in Sweden on abuse of dominance in recent years, there has been quite a large number of alleged abuses since the introduction of the Competition Act. The cases most often concern deregulated markets.

i Significant cases

Stock exchange services – foreclosure of competitor[12]

The SCA sued Nasdaq OMX Stockholm, the operator of the Stockholm Stock Exchange, and requested that fines of 31 million kronor be imposed for abuse of a dominant position after a complaint by Burgundy. The alleged abusive conduct consisted of the foreclosure of Burgundy from a data centre provided by a third party, Verizon. The SCA claimed that Nasdaq had exerted pressure on Verizon to hinder Burgundy from accessing the data centre, which was an essential input for operators such as Burgundy. The SCA argued that Nasdaq, through the coercive methods, had induced Verizon to prevent Burgundy from directly linking its trade matching engine to its customers' trading equipment. The SCA held that Burgundy was thus facing a competitive disadvantage, as Burgundy missed out on the possibility to co-locate with actual and potential customers that had trading equipment at the data centre. Although the PMC found that Nasdaq held a dominant position on the EU and EEA-wide markets for trade services in transparent order books in Swedish, Danish and Finnish stocks, and that Nasdaq in fact had put pressure on Verizon to prevent Burgundy from localising its equipment in the data centre, the court rejected the SCA's claim that Nasdaq's conduct was abusive. Instead, the PMC found that Nasdaq had acted in accordance with its contractual rights and did not exploit the advantages of its dominant position. The court was not able to determine that Nasdaq's behaviour was specifically targeted at excluding Burgundy. Therefore, Nasdaq's behaviour was not an exertion of its market power, but rather enforcement of its contractual rights. The PMC fully rejected the SCA's claim. The ruling has been appealed by the SCA, and the case is pending before the PMCA.

12 Case No. 406/2015.

Foreclosure on the lottery market[13]

In 2013, the SCA received a complaint against Novamedia, the operator and organiser of the Swedish Postcode Lottery. The complainant submitted that Novamedia's agreements with the lottery's beneficiaries constituted an abuse of dominance as the agreements effectively hindered the beneficiaries from participating in other lotteries. As the Swedish Lottery Act[14] required a lottery to give its surplus to a non-profit beneficiary, the number of relevant beneficiaries in Sweden was limited as a result of Novamedia's agreements, thereby creating the alleged foreclosure. After extensive investigation and following Novamedia's modification of the agreements, the SCA closed its investigation in November 2017.

Locksmith services market

The SCA initiated an investigation following a review of Assa Sweden's acquisition of Prokey in 2013, during which suspicions arose that companies within the Assa Abloy Group, including Assa Sweden, abused their dominant position. During the review of Assa Sweden's acquisition of Prokey, the SCA found agreements that raised concerns about whether Copiax, a company within the Assa Abloy group, applied volume commitments, loyalty rebates and exclusivity conditions in customer agreements with locksmiths and security companies, which risked the foreclosure of competitors on the locksmith wholesale market. The SCA also looked into whether the Assa Abloy companies applied prices that could have constituted a margin squeeze against rival locksmith wholesalers. However, since the beginning of the investigation, the problematic customer agreements had been amended. As of 2014, the agreements no longer include binding volume commitments or individual discounts linked to exclusivity requirements. The SCA's investigation revealed that previous competition concerns had been alleviated; therefore, the authority decided not to proceed with the case.

Tobacco fridges labelling system[15]

In 2014, the SCA sued Swedish Match, a tobacco company, at the SDC for abusing its dominant position. The SCA requested that Swedish Match receive a fine of 38 million kronor for acting anti-competitively when implementing a labelling regime in its retail fridges for *snus*, a popular tobacco product. Swedish Match provided space in its fridges to other manufactures of *snus* and the new regime set a standard for label design, thereby restricting competitors' possibility to design their own labels. The labels constituted an important marketing and communication tool for *snus* manufacturers, particularly in relation to price and brand differentiation. The SCA found that the labelling regime was likely to reduce competitive pressure on Swedish Match. In February 2017, the PMC found that Swedish Match's conduct constituted an abuse, and thus imposed a fine of 38 million kronor. The judgement has been appealed to the PMCA.

Dairy market[16]

Sweden's largest dairy products manufacturer, the cooperative association Arla, announced in 2015 that it was going to decrease the volume of ecological milk that associated milk

13 Case No. 203/2013.

14 The Swedish Lottery Act (1994:1000).

15 Case No. 815/2014, T 9131/13.

16 Case No. 630/2015.

producers were allowed to deliver to dairy factories other than Arla's. Arla also increased the time in which producers had to notify Arla in advance if they wished to deliver milk to others rather than Arla. Following Arla's announcement, the SCA launched an investigation to establish whether these new conditions constituted an abuse of a dominant position. The SCA concluded that, although Arla's new conditions limited the volume of milk accessible to competing dairy factories, competitors would still have access to sufficient volumes to maintain their production of dairy products. As a result of those findings, the SCA closed the investigation in May 2017.

ii Trends, developments and strategies

The SCA is continuing to investigate markets and sectors at risk of competition concerns. Certain sectors are more closely scrutinised by the SCA due to previous regulations that have created structural imbalances in the market (such as the pharmacies and telecommunications sectors). As abuse of dominance cases are difficult to prove, the SCA has formed a division specialised in such anticompetitive behaviours.

iii Outlook

In Sweden, many sectors have previously been characterised by a monopoly or few companies dominating the market. Many of these markets are now in the process of being, or have recently been, deregulated, which has often resulted in a market with non-existent, or low, competition. Therefore, the SCA has focused its efforts on these markets. Of particular interest is the market for passenger transport – both public transport in the cities and nationwide transportation of passengers.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

E-commerce and the sharing economy[17]

In 2016, the SCA analysed the Swedish e-commerce and sharing economy sectors, and concluded that the emergence of these industries has resulted in increased price transparency and competition in pricing, which is beneficial for consumers. Swedish e-commerce companies are facing increased foreign competition, as these sectors have grown significantly over the past few years, largely due to the development of secure digital payment solutions. The technical development of digital payment infrastructure and digital identification services has made it more secure for consumers to purchase products or services online. The SCA's investigation found that a large majority of the sales in the retail sector are still made in physical stores, but that e-commerce constitutes a competitive restraint for trade through physical stores. The SCA concluded that the increased digitalisation and technical improvement of the e-economy has resulted in new challenges for competition authorities to tackle: for instance, the higher degree of price transparency facilitates the possibilities for companies to concert their pricing policies. Geo-blocking practices make it more difficult for consumers to make online purchases of goods and services from other EU Member States.

17 Report series 2017:2.

The SCA indicated that the increased digitalisation of companies' business models in the e-commerce and sharing economy sectors will require the SCA to implement more advanced and sophisticated investigation routines.

The investigation found that the sharing economy sector is largely based on digital platforms, which give rise to network effects. The services provided within the sharing economy increase the supply on the market, which results in lower prices and increased choice for consumers. A platform can decide to offer its services for a low price or without charging for its services at all in order to expand more rapidly. A large number of users and collection of user data can give a platform significant market power, which might not be reflected by its revenue figures. The SCA's investigation found that there is a risk that the current merger control regime does not cover concentrations between platform companies with low revenue but that have significant market power and the potential to impede or hinder the development of effective competition. The SCA has indicated that one solution could be to complement the current turnover thresholds with a 'size of transaction' system.

ii Trends, developments and strategies

The SCA may commence a market investigation regarding a certain sector *ex officio*, or after complaints. The sector investigation may result in an additional investigation of a specific undertaking or the provision of guidance to the undertakings concerned so that they can modify their behaviour in order to avoid an additional investigation.

iii Outlook

Similarly to the Commission, one of the SCA's priorities in 2017 concerned the development of the e-economy and sharing economy, and how the growth of these sectors will affect the competition authorities' enforcement function and the risk for anticompetitive conduct. The SCA has pointed out that the growth of the e-economy has, for instance, resulted in increased price transparency, which is beneficial for consumers as it increases price competition but, correspondingly, facilitates the risk of collusion between companies. The SCA has recognised that the authority's investigation methods are challenged with the increased digitalisation of the economy as the competition rules need to be applied to digitalised (rather than offline) market conditions. It can be expected that the development of the e-economy and sharing economy will remain one of the SCA's main priorities.

V STATE AID

There is no specific national legislation concerning state aid. However, Articles 107–109 TFEU have been implemented through *lex specialis* on the application of EU state aid (2013:338), which entered into force in July 2013. In addition, the Local Government Act[18] states that giving support and financial aid to individual businesses is forbidden. According to Chapter 2 Article 8 of the Local Government Act, municipalities and counties are allowed to implement measures to promote local business in general, but not to target their efforts towards a specific company.

18 The Local Government Act (1991:900).

The Swedish Transparency Act[19] is based on the state aid rules, and requires reporting to the Commission of all publicly owned or financed operations reaching certain thresholds.

i Significant cases

State aid cases are not very common in Swedish courts. Most cases concern the sale of facilities or businesses from municipalities to private operators for prices significantly lower than the market price. Sweden has also been under review of the Commission multiple times, as only the Commission can approve targeted state aid.

The Supreme Administrative Court has on two occasions in recent years heard cases on state aid.

Sale of a property

The municipality of Karlskrona decided in February 2008 to sell a property to the construction company NCC for 5 million kronor, despite a higher bid for the property from another interested buyer.[20] The Supreme Administrative Court stated in its judgment that the municipality had failed to conduct an independent valuation of the property, and not taken the higher bid into account. The Supreme Administrative Court therefore concluded that the agreement entailed individually targeted support to NCC, and that the contract with NCC therefore was contrary to Chapter 2 Article 8 of the Local Government Act.

In the second case, which was announced simultaneously to that above-mentioned, the Supreme Administrative Court concluded that that there was no question of illegal state aid.[21] In March 2008, the City Council of Årjäng decided, through an exchange contract with a natural person, to transfer a property for 650,000 kronor and to acquire another property for 4.9 million kronor. An independent valuation was not conducted, and the sale of the property was not publicly announced. Shortly after the transaction, the municipality made an independent valuation of the properties through an independent valuation company. The first property was then valued at 600,000 kronor and the latter at 5.5 million kronor. The court found that the municipality had not intended to directly support the acquiring company and that the transaction in itself did not constitute such support. Hence, the appeal was dismissed.

Publicly owned company[22]

In February 2009, a company owned by the municipality of Vänersborg purchased a factory consisting of two properties for 17 million kronor from a private operator. Six months later, the municipality sold the properties to Hammar Nordic Plugg AB, which only three weeks later resold the properties for 40 million kronor. After a complaint to the Commission, the Commission decided that the difference between the price should be repaid to the municipality. The case was appealed to the ECJ, which upheld the decision of the Commission.

19 The Swedish Transparency Act (2005:590).

20 Supreme Administrative Court 2010 ref 119.

21 Supreme Administrative Court 2010 ref 119 II.

22 Case T-253/12 *Hammar Nordic Plugg AB v. Commission* [2015].

The Commission approving Swedish state aid

In recent years, the Commission has on several occasions approved financial support from Swedish municipalities for different infrastructure projects. For example, in 2013, the Commission authorised the municipality of Uppsala to co-finance a new multi-purpose arena.[23] The Commission stated that the public financing was proportional to the objectives pursued. Furthermore, in 2014, the Commission approved state aid granted by Sweden to the operator of Västerås Airport in the form of capital injections from its public shareholders, and under a national scheme for aid to regional airports.[24] In 2016, the Commission also approved state aid granted by Sweden to the operator of the two airports of Sundsvall and Skellefteå.[25]

ii Trends, developments and strategies

As made evident from the above, the majority of state aid cases in Sweden are related to municipalities selling property at significantly lower prices than market value. There has, however, been a decrease in the number of such cases in recent years.

The SCA has considered it unnecessary to submit a report to the Commission in accordance with the Transparency Act when the state or the municipalities do not control manufacturing undertakings with a turnover exceeding €40 million.

iii Outlook

Certain projects concerning infrastructure facilities in the more remote areas of Sweden are dependent on financial support and state aid. Those projects will depend heavily on authorisation from the Commission.

VI MERGER REVIEW

During 2017, the SCA received 80 merger notifications. Two cases went to Phase II, and both were cleared following the in-depth investigation.

A concentration meets the thresholds and needs to be notified to the SCA if the combined aggregate turnover in Sweden of all undertakings concerned exceeds 1 billion kronor; and at least each of two undertakings concerned has a turnover in Sweden exceeding 200 million kronor.

Where the first threshold of 1 billion kronor is met, but the second threshold is not, the SCA may order a party to the concentration to file if there are particular grounds for doing so. Such grounds may be when an undertaking already holds a strong market position and acquires a smaller or newly established undertaking. The acquirer may also in such circumstances submit a filing voluntarily. In general, the SCA encourages undertakings to make voluntary notifications of mergers.

23 State aid: Commission authorises public co-financing of Uppsala arena in Sweden. www.europa.eu/rapid/press-release_IP-13-394_en.htm (2 May 2013).

24 State aid: Commission decisions on public financing of airports and airlines in Germany, Belgium, Italy and Sweden – further details. www.europa.eu/rapid/press-release_MEMO-14-544_en.htm (1 October 2014).

25 State aid: Commission approves public service aid to Sundsvall Timrå and Skellefteå airports in Sweden. www.europa.eu/rapid/press-release_IP-16-103_en.htm (19 January 2016).

i Significant cases

Water and sewer construction material[26]

In June 2017, Ahlsell, a wholesale provider of a wide range of tools and building products, notified its intention to acquire Viacon VA, a wholesale provider of water and sewer materials, a market that both companies were active on. The SCA initiated a Phase II investigation, which indicated that the merger would not significantly impede the existence or development of effective competition, and the matter was closed in September 2017 without any further actions.

Dairy market[27]

In June 2017, Sweden's largest dairy products manufacturer, the cooperative association Arla, notified its intention to acquire Gefleorten, a regional dairy products manufacturer. As the parties' respective businesses overlapped, the SCA initiated a Phase II investigation. Despite Arla's dominant position on the relevant market and the fact that the transaction would strengthen that position, the SCA noted that Gefleorten exercised almost no competitive constraint on Arla and that Gefleorten's sales were weak with a declining trend. The SCA concluded that the concentration would not significantly impede the existence or development of effective competition on the market. The matter was closed in October 2017 without any further actions.

Heating products[28]

In November 2016, the SCA initiated a Phase II investigation to examine Nibe's notified acquisition of Enertech. Both Nibe and Enertech are manufacturers of heating products and energy efficiency solutions for residential and commercial use. The SCA's initial investigation indicated that the market for production of heating products was characterised by barriers to entry, particularly in the form of brand preferences by end consumers, and that distributors and installers are hesitant to change suppliers. Taking into account that Nibe and Enertech are close competitors, the SCA was concerned that the new entity would acquire high market shares and thus gain a strong position in relation to wholesalers, which potentially could result in higher prices and impair the quality of the marketed products, thus harming consumers.

Following the SCA's Phase II investigation, the SCA segmented the relevant market into primary heating systems for residential use (further segmented based on the type of heating system), primary heating systems for commercial use and complementary heating systems. The SCA found that the new entity would acquire high market shares in some sub-segments on the market for primary heating systems for residential and commercial use, respectively, and that the new entity would have incentives to increase prices. However, the Phase II investigation did not indicate that the merger would significantly impede the existence or development of effective competition. The SCA focused on the conditions of competition post-transaction, and found that wholesalers would still have possibilities to change suppliers and that competitors had the capacity and technical know-how to increase production if needed. In addition, the SCA analysed the barriers to entry and expansion on the market, and held that the new entity would not enjoy any technical or regulatory

26 Case No. 383/2013.

27 Case No. 393/2017.

28 Case No. 630/2016.

advantages, or have access to essential facilities or intellectual property rights which would make it difficult for competitors to enter or expand on the market. Against this background, the SCA concluded that the concentration would not significantly impede the existence or development of effective competition, and the matter was closed without any further actions.

Confectionery products[29]

In March 2017, Cloetta, a producer and wholesaler of confectionery products and natural snacks, notified its intended acquisition of Candyking, a wholesaler of bulk confectionery products and natural snacks. Both Cloetta and Candyking are wholesalers of bulk confectionery products and natural snacks. The investigation also showed a vertical relationship between the parties, as Cloetta produced and supplied Candyking and other wholesalers downstream with bulk confectionery products, which in turn were used by Candyking in their wholesale concept offer to customers. The SCA segmented the relevant market into the wholesale of bulk confectionery products to food retailers and the convenience store sector, and the wholesale of natural snacks to food retailers and the convenience store sector. The SCA's review of the transaction found that the new entity would acquire significant market shares on the market for wholesale of bulk confectionery products. However, the investigation also showed that the market is characterised by tenders by the large retail chains and that, as a consequence, the market shares may fluctuate. In addition, the SCA held that the new entity would post-transaction experience competitive pressure from various competing wholesalers, that the market is not characterised by barriers to entry or expansion, and that the customers are large retail chains holding significant buyer power. In relation to the market for wholesale natural snacks, the SCA held that the parties' combined market shares did not exceed such a level where competition concerns could be presumed, and that the remaining competitors would still exercise competitive pressure on the new merged entity. As to the vertical relationship between Cloetta and Candyking, the SCA identified two hypothetical theories of harm. The first was whether Cloetta would have incentives to refuse to supply its own-produced confectionery products to competing wholesalers or sell these on substantially deteriorated contract terms. The SCA's investigation showed that Cloetta's sales to competing wholesalers accounted for a considerable part of Cloetta's revenue as to bulk confectionery products, and that a refusal to supply would therefore result in a significant loss of revenue.

The second theory of harm concerned whether Cloetta would foreclose other producers of confectionery products from the market or limit their access to a significant pool of customers by (wholly or partially) excluding competing producers' products in Cloetta's wholesale offer. The SCA investigated the market conditions and found that wholesalers have certain confectionery products that have to be included in their bulk confectionery assortment in order to be sufficiently attractive for customers. Against this background, the SCA concluded that the concentration would not significantly impede the existence or development of effective competition, and the matter was closed without any further actions.

District heating pipes[30]

In October 2015, the SCA initiated a Phase II investigation to examine the notified acquisition by Logstor of Powerpipe. The relevant market was the market for the production

29 Case No. 122/2017.

30 Case No. 578/2015.

and sale of district heating pipes. In February 2016, the SCA filed a lawsuit to the SDC requesting it to prohibit the concentration. The SDC found that the merger would not significantly impede the existence or development of effective competition on the market for the production and sale of district heating pipes and dismissed the SCA's action in its entirety. The judgment was appealed by the SCA to the PMCA, where the key issue was the definition of the relevant geographic market. The SCA argued that the relevant geographic market solely covered the Swedish market. The PMCA found that the relevant geographic market comprised the EEA and Switzerland. The PMCA found that the new merged entity would neither acquire a dominant position on this market; nor did other circumstances exist to indicate that the concentration would significantly impede the existence or development of effective competition. Consequently, the PMCA dismissed the SCA's action in its entirety. It is highly uncommon for the SCA to lose an action to prohibit a concentration due to the definition of the relevant geographic market: this has never occurred in previous cases.

ii Trends, developments and strategies

In comparison to previous years, the number of notifications to the SCA has increased steadily in Sweden and a majority of the notifications have been cleared in Phase I. In cases where there is an absence of vertical links and horizontal overlaps, the matter is often prioritised by the SCA and a decision may be received significantly quicker than 25 working days.

Another topic of interest is that the Swedish merger control regime makes it possible for the SCA to request a transaction to be notified if there are particular reasons to so do, and even if the turnover thresholds are not exceeded. The acquirer may also in such circumstances decide to submit a notification voluntarily. The SCA has issued guidance in this regard. and explains that a voluntary notification should be considered if the transaction can be expected to awaken fears and criticism among customers or competitors. The feature of voluntary notification is a particular mechanism in Swedish merger control.

In 2015, the SCA introduced further guidance for notifications and the assessment of concentrations. The guidance is an update of earlier guidance issued in 2010, and contains more accurate and updated information on merger control based on previous experience of the SCA. The purpose of the guidance is to improve awareness of the investigations of the SCA, contribute to greater predictability and ensure good conditions for cooperation between the parties and the SCA, contributing to a more efficient and effective investigation.

iii Outlook

As of 1 January 2018, the Competition Act was amended to grant the SCA extended decision-making powers in merger control cases. The SCA has been provided with the power to prohibit mergers and impose sanctions on companies not complying with the merger control rules.

The reform did not receive a uniformly positive response. One argument for increased decision-making powers for the SCA is to increase conformity of the Swedish competition control with the Commission and other EU Member States. On the other hand, there have also been signals indicating that the SCA's decisions are not always in line with the courts'. At the moment, the safeguards around the SCA's decision-making process are not as sophisticated and well-developed as, for example, the Commission's. There is therefore a risk that increased powers for the SCA may lead to a decrease in legal certainty.

VII CONCLUSIONS

As of September 2016, a new court system for intellectual property, competition law and merger control proceedings was established. The PMC was established as a division within the SDC as the first instance in intellectual property, competition law and merger control matters. Decisions and judgments by the PMC can be appealed to the PMCA, which replaced the MC as the highest instance. The reorganisation of the court system was deemed necessary due to the complex and comprehensive nature of intellectual property and competition law cases. The intention is to obtain a more uniform examination and handling of these kinds of cases, and thereby increase legal certainty and reduce the risks of discrepancies in how the relevant legal provisions are interpreted.

When compared to other jurisdictions, the private enforcement of competition law has not had an impact in Sweden yet. There have been relatively few cases for private damages actions for cartel behaviour; these are, however, expected to become more frequent with the introduction of the new Antitrust Damages Act, which increases the possibilities of injured parties to claim damages based on competition law violations.

Appendix 1

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