ENFORCER HUB

Sweden

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JANUARY 2021

GCR INSIGHT

The past year has seen a diverse and broad use of competition economics in competition cases. The emergence of cases with a digital profile has characterised the work of practitioners in most areas of competition law, ranging from vertical agreements to abuse of dominance and mergers. In November 2019, the Swedish Competition Authority (SCA) launched a market study on the functioning regarding competition on digital platforms to enhance knowledge in digital markets and understand the challenges faced by companies. Besides the cases discussed below, the market study (which is still ongoing at the time of writing this article) has kept companies and practitioners busy throughout the year.

This article is based on interviews with prominent Swedish competition lawyers from the law firms Baker McKenzie, Bokwall Rislund, Cederquist, Cirio, Delphi, Eric Ericsson, Front Advokater, Gernandt & Danielsson, Hammarskiöld & Co, Hannes Snellman, Kastell, Mannheimer Swartling, Roschier, Per Karlsson & Co, Vinge, as well as with the Director-General and management of the SCA.

Mergers and acquisitions

Competition economics continues to play an important role in complex mergers. Economists are often engaged early on in complex merger processes, but also later on in the case of unexpected Phase II investigations. In addition, several mergers with Swedish companies involved have been notified to the Commission, and economic evidence has had a prominent role in these investigations. Furthermore, some lawyers have noticed increased third-party activity in relation to merger investigations. Over the past year, the SCA has handled 74 merger filings, out of which four entered into Phase II assessments.

Four of these cases are of particular interest.

The first case concerns a deal between the two largest suppliers of live technical broadcasting services at remote locations in Sweden. After investigations in Phase II, the SCA found that the potential anticompetitive effects of the merger would be mitigated sufficiently by low barriers to entry and countervailing buying power. Economic analysis played an important role in the parties' arguments and the SCA cleared the merger without remedies in autumn 2019.

The second case concerns three dairy companies planning to acquire a company owning the brands for "Swedish Classics" cheeses. The acquisition was prohibited by the SCA after a Phase II investigation owing to a perceived risk of exclusion or limitation of competitors from using the licence of the relevant cheese brands. Upon appeal by the merging parties, the Patent and Market Court annulled the SCA's prohibition decision. The decision by the court, however, was not related to competition law but based on a separate legal matter in the Co-operative Societies Act. Moreover, the ruling of the Patent and Market Court did not conclude that the annulment constituted an acquittal of the parties. In the spring of 2020, the Patent and Market Court of Appeal decided that the annulment of the SCA's decision in fact constituted an acquittal of the parties, and thus that they had the right of compensation for legal charges.

The third case concerns an acquisition in the market for payments solutions for parking (parking apps), where the SCA required a formal filing although the companies involved did not meet the turnover threshold. The SCA has the power to order notification if the transaction concerns companies below the threshold value of 200 million krona per company, if "particular reasons" exist as to why the transaction could harm competition. With this tool, the SCA can investigate potential "killer acquisitions" or below-threshold concentrations in markets with specific characteristics, such as "tipping markets" with strong network effects. This may become increasingly important with the current focus on digital markets. After a Phase II investigation, the acquisition was cleared without remedies in the spring of 2020.

In the fourth case, the SCA cleared an acquisition between the two largest energy companies in the market for liquefied natural gas (LNG) in Sweden. The SCA accepted voluntary commitments by the parties, entailing that third parties would be granted access to the terminal for LNG on the east coast of Sweden. As such, the acquisition was cleared in Phase I, demonstrating that behavioural remedies can be regarded as sufficient to alleviate competition concerns, even in concentrated markets.

As in previous years, several lawyers praised the SCA's efficiency in merger filings, in particular when they engage in constructive dialogue about the potential complications of the concentration early on in the process. At times, however, the lawyers would welcome more transparency and clearer communication on the specific theory of harm being investigated by the SCA.

Abuse of dominance and anticompetitive public sales activities

Since the summer of 2019, the Patent and Market Court of Appeal has produced three judgments relating to abuse of dominance and anticompetitive public sales activities. In two of these judgments, the Patent and Market Court of Appeal overturned or annulled the judgments of the Patent and Market Court in favour of the dominant company and against the SCA.

First, in June 2019, the Patent and Market Court of Appeal confirmed the Patent and Market Court's previous judgment clearing Nasdaq from the SCA's charges of abuse of dominance by preventing a competing stock exchange from accessing its data centre.

In a second judgment in January 2020, the Patent and Market Court of Appeal annulled the Patent and Market Court's judgment in a case where a municipality had denied concession for a private fibre company. The judgment by the Patent and Market Court was deemed ambiguous on several points, for example, the prohibition was not sufficiently well defined by the Patent and Market Court. The Patent and Market Court of Appeal thus referred the case back to the Patent and Market Court for continued processing.

In the third case in February 2020, the Patent and Market Court of Appeal overturned the ruling by the Patent and Market Court that a dominant company in the field of packaging recycling should grant competitors access to its collection infrastructure. The collection infrastructure provided by the dominant company was not considered to be an essential facility by the Patent and Market Court of Appeal, as the evidence presented did not sufficiently support that a parallel system could not be established by the competitor.

The common theme for these three judgments is that the evidence (not the legal argumentation) presented by the party with the burden of proof, was considered insufficient by the court.

Anticompetitive agreements and damages

In line with its increased focus on digital markets, the SCA took an interim decision in December 2019 concerning a mobile app-based training aggregator not to apply exclusivity agreements to specific training studios. The decision was upheld by the Patent and Market Court in January 2020, and the eight-month investigation closed in July 2020 after the acceptance by the SCA of voluntary commitments by the parties. The SCA's reasoning behind the interim decision was that, in fast moving markets, it may be necessary to act swiftly to protect competition and consumers. As in most digital markets with substantial network effects, there is a risk of tipping the market in favour of a single company. There is a general belief among practitioners that interim decisions will play a more prominent role in the future.

In 2017, the SCA conducted a number of dawn raids against insurance companies providing insurances for municipalities. This investigation is still ongoing but has been narrowed down substantially since the time of the dawn raids. Furthermore, the SCA conducted a few dawn raids in the past year. The number of injunctions in the form of data requests has increased during the year, potentially reducing the need for dawn raids to launch investigations or retrieve data.

During the year, the SCA has conducted several investigations into alleged vertical and horizontal anticompetitive agreements. Notably, the SCA closed an investigation related to resale price maintenance (concerning retailers selling music instruments) as the evidence was not found sufficient to substantiate any claims of anticompetitive agreements or coordination of prices. There are still several investigations ongoing at the SCA.

Effects of covid-19 on the competition landscape

In the spring of 2020, the covid-19 pandemic brought the world economy to near halt. This has entailed a shift in priorities for the national competition authorities as well as the European Commission. Most prominently, merger activity has decreased significantly with fewer merger notifications during the spring of 2020.

Most lawyers believe this to be a temporary contraction in merger activity, and some even believe that the new market conditions could result in mergers that were not possible prior to the crisis.

Lawyers have also seen increased activity in state aid matters, mostly guiding small and medium-sized enterprises and large companies with regards to the Temporary Framework outlined by the European Commission. Another prediction by lawyers is that the requirement for more extensive legal and economic analysis could be

instrumental for the extended phase of the crisis, as the scrutiny for compatible state aid will be less formalistic and more effects-based.

Economic evidence and the burden of proof in courts

The recent judgments in the Patent and Market Court of Appeal have led to a debate among competition law practitioners in Sweden about the burden of proof and legal certainty in competition cases. Notably, there is a perceived uncertainty among legal practitioners regarding what quality of evidence the Patent and Market Court of Appeal deems sufficient in proving anticompetitive conduct. Since the Patent and Market Court of Appeal was established in 2016, no party has even been able to prove a restriction of competition with evidence based on competition economic analysis. In every instance, the upper court has rejected the presented economic evidence as insufficient or inconclusive. In the long run, some argue that this may weaken the deterrence effect of the competition rules in Sweden.

Nonetheless, most lawyers have confidence in the judicial system and welcome high standards for economic evidence as it provides legal certainty and ensures that judgments are robust to scrutiny. In the long run, however, the weakened deterrence mechanism could result in under-enforcement or necessitate more resources for providing economic support in such cases.

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