Sweden: Competition Authority

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Introduction

The Swedish Competition Authority continues to deliver concrete results across its portfolio of activities in its work to promote effective markets to the benefit of consumers. At the same time, we recognise the need to continuously develop our working methods and tools based on new knowledge, new case law and new challenges. We are taking measures to promote efficient case handling and clear case prioritisation, and look forward to the introduction of new, more powerful enforcement tools. All this will lay the foundations for an even more robust and agile enforcement of the competition rules.

Anticompetitive agreements

Enforcing the rules against anticompetitive agreements is a key focus for the Authority, and we have concluded a number of cases during the past year.

In November 2019, we brought to a close an investigation into exchanges of information regarding production volumes between companies in the asphalt industry. The companies submitted commitments not to exchange the type of information in question with competing firms, which we approved. As a result, we were able to close the investigation.

We took interim measures in late 2019 to order a company that provides training services via an app not to apply exclusivity agreements with certain fitness studios. Our investigation found that the application of these agreements was

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likely to constitute a violation of the competition rules, and that there were particular grounds to prohibit the company from applying them while the investigation continues. The Patent and Market Court upheld our interim decision and the appeal court did not grant leave to appeal.

This case is the first time we have adopted an interim decision since 2012. I believe that when it comes to fast-moving markets, we must be ready to act swiftly to protect competition, and interim measures may sometimes be necessary to achieve this. We continue to investigate the matter and have launched parallel investigations into similar exclusivity agreements used by other actors.

An investigation initiated in 2018 into alleged price maintenance of musical instruments was ultimately closed, without us taking any further action, in February 2020. The investigation found indications that some suppliers of musical instruments had taken measures to raise margins on the retail level as a result of pricing pressure from increased e-commerce. When retailers marketed online prices that diverged from the suppliers' stated prices, it sometimes led to other retailers reporting those divergences. The investigation found some examples of the supplier reacting and contacting the retailer in question. However, the investigation did not show that the contacts between suppliers and retailers amounted to a concurrence of wills, and so it did not identify grounds to find an anticompetitive agreement or coordination of pricing to end customers between the companies.

At time of writing, the Authority has a number of matters under investigation regarding alleged horizontal and vertical anticompetitive agreements, and it is my intention, as Director General, that some of these investigations will soon be brought to completion.

Abuse of dominance

Two cases of alleged abuse of dominance reached the Patent and Market Court of Appeal during the past year, and in both cases the Court reached a different conclusion than the one argued by the Authority.

In the *Nasdaq* case, the company was held not to have abused its dominant position in its actions to prevent its competitor, Burgundy, gaining access to a data centre. Meanwhile, in February 2020, the final judgment was delivered in the Authority's action against the packaging and newspaper collection company FTI. The Authority had adopted a prohibition decision to prevent FTI from terminating an agreement that provided its competitor, TMR, access to recycling stations. The court of first instance had upheld the Authority's decision but this was ultimately overturned by the appeal court.

A very high burden of proof has been set by the courts in competition cases. Of the 11 public and private actions under the competition rules that have reached

the appeal court since its creation in its current form in 2016, none has been upheld. Seven of the 11 cases have led to the court of first instance's decision being overturned.

The Authority has a vital role in developing competition law in Sweden and in seeking to have new issues clarified. At the same time, it is important that we follow and take into account the case law that exists. We follow legal developments very carefully and continue to engage in discussions with our sister agencies in the European Competition Network (ECN).

Mergers

A significant development with respect to merger control was the Authority's first prohibition decision since being granted this decision-making power in 2018. Prior to 2018, the Authority was obliged to bring an action in court to prohibit harmful mergers. The merger in question involved the planned acquisition by three dairy companies of joint control over a company that owned and managed the trademarks for three well-known and popular cheeses. A stated aim of the acquisition was to protect the trademarks and ensure the quality of the cheeses. However, the Authority found that there were other and less anticompetitive means to ensure quality, and held that the deal would significantly impede effective competition.

The decision was appealed to the Patent and Market Court and a hearing was held in September 2019. However, before the Court could issue its decision, obstacles arose to the implementation of the merger owing to an arbitration decision. The Court found, therefore, that a ruling on the substance of the case would involve making a judgment on a hypothetical situation, and the case was dismissed.

Ensuring effective prioritisation and case handling

An ever-relevant task for the Authority is to ensure that our competition enforcement is efficient and effective. An important aspect of this is continuing work within the authority to sharpen our working methods. Another vital component is making sure that we prioritise clearly and have well-defined investigations. My ambition is that the Authority will take action against more competition infringements, and come to a decision faster in the cases that we prioritise for a closer investigation.

For a number of years, the Authority has based prioritisation of cases on a publicly available prioritisation policy. We believe that the policy is an important tool both for our sake and for that of those who contact us with tip-offs and complaints. The Authority has revised its policy as required based on relevant new developments, and began a process of revision by holding roundtable discussions with stakeholders in autumn 2019. Based on the comments received,

experiences drawn from our investigations, and valuable recommendations from the National Audit Office, an updated policy was launched in February 2020.

For the first time, we make clear in our policy that the number and size of current investigations can affect our decision on whether or not to prioritise a case, since this is inevitably a factor that is given weight. However, we are clear that we will never turn down cases of serious infringements on grounds of insufficient resources.

It is important to bear in mind that questions of prioritisation are complex, and the Authority's policy should be seen as a guiding document rather than one that prescribes every possible set of circumstances. It is also important to emphasise that the policy is used during the initial stages of deciding whether a case should be investigated more thoroughly. Although we continually assess whether a prioritised case should continue to be investigated, this may not be based on the same grounds. As an investigation continues, a greater focus is placed on whether there are grounds for the original suspicions and whether there is sufficient evidence of an infringement.

The main factors raised in the policy relate to whether a problem causes harm to competition and consumers, if the conditions exist to investigate and remedy the issue effectively under the competition rules, the importance of securing a guiding precedent, and whether the Authority is best suited to intervene. Harm to competition and consumers is the factor that carries the greatest weight in our decisions on whether or not to prioritise a matter, and our policy outlines how this can be applied to different types of conduct.

Cartels and anticompetitive agreements remain a central priority for us. We are particularly aware of the importance of procurement markets, and in these markets we will also strongly prioritise cases that show signs of links to economic crime and corruption. With respect to cartels, we believe that it is important to act decisively, which can mean taking strong, deterrent action even in the case of smaller or shorter infringements.

In vertical cases, we look at, among other things, the share of the market affected, the market power of the parties and market concentration. An obvious candidate for prioritisation, for example, would be a case with signs of clear, systematic retail price maintenance covering a large share of the market.

As regards abuse of dominance, we give particular attention to exclusionary abuses, although we do not rule out taking up cases of exploitative abuses. In this age of digital platforms, for example, we may choose to prioritise an investigation into suspicions of behaviour on a new platform market in which an early mover gains market power to such a level that it can prevent platform competition through exclusionary conduct.

Digitalisation

Digitalisation continues to have a significant bearing on our work, and is one of our strategic priority areas for the coming years. Our case experience already shows that digital markets have become increasingly relevant to our enforcement work, and we know that the trend will continue in the future. I have been clear that we need to ensure we have the right tools and expertise to keep pace with these developments, and we have already taken several steps to address this.

When we are faced with novel and complex markets, it is important that we take a proactive approach to building a greater understanding of how they operate. We are currently undertaking a market study on digital platforms, and this will help us understand whether there is any need to take further measures to promote competition. We aim to publish the report in autumn 2020. We are also continuing a long tradition of joint Nordic initiatives in the field of competition by looking more closely at digital platforms from a consumer perspective.

Furthermore, by intensifying our cooperation with the Swedish Consumer Agency and the Data Protection Authority, we are broadening our collective understanding of digital markets and their implication for consumers and market actors.

Crucially, we need to stay ahead of the curve in terms of the technology and methods we employ for investigating competition infringements. We are continuing to invest in modernising our methods and tools so that we can effectively investigate and gather information. We recently adopted an artificial intelligence (AI) strategy as a first step towards developing AI-based solutions that could help us improve the process of data analysis and make our enforcement action more efficient.

We also need to improve our understanding of how algorithms may affect competition and have funded research into looking at the question of algorithms that collude on prices.

Legislative developments

As the deadline for implementation of the ECN+ Directive approaches (Directive (EU) 2019/1 must be implemented by February 2021), the Authority will continue to prepare for the additional possibilities afforded by the new rules. As a result of the transposition of the Directive, companies will, for example, have stronger incentives to cooperate with our investigations, which may contribute to reducing the time taken to handle cases. We will also consider whether there are grounds to review our methods for calculating competition fines to ensure that they have the deterrent effect intended by the rules.

Alongside the government's proposals for implementing the ECN+ Directive, it has also proposed granting the Authority decision-making powers for

competition fines and investigative fines. Currently, a judicial model applies in Sweden, meaning that we must generally bring an action in court for fines. At the time of writing, the proposals are under consultation; however, we have been consistent in our view to lawmakers and stakeholders that it is essential to have effective powers to ensure efficient and legally certain enforcement that leads to high-quality decisions. We need to be able to decide on sanctions within a reasonable time after an infringement, otherwise these sanctions risk being less effective. It bears repeating that we are one of only a very small minority of authorities in the European Union that lack these decision-making powers.

We are also engaging with the European Commission's reviews of different elements of the competition rules. In the reviews of the Vertical Block Exemption Regulation and the Market Definition Notice, for example, there may be a need to take greater account of digitalisation and platforms. Furthermore, the current review of the horizontal block exemptions and guidelines will also be a good opportunity to ensure that the legal framework is kept up to date with new developments.

The future of the European Union's competition policy

A great deal of time has been dedicated in recent months to discussions about possible broader reforms of the competition policy framework within the European Union. We have seen a range of proposals from different quarters about how competition policy should react to different challenges posed by digitalisation and globalisation.

We support the Commission's continuing reviews and recognise that further clarity may be useful, for example, in terms of guidelines for the application of the legal framework. However, we believe that the existing competition regime within the European Union is fundamentally sound and have stressed the importance of consumer welfare remaining the cornerstone of competition policy in the European Union. Indeed, I have strongly argued for a strict merger regime that is free from political interference, and issued a joint statement to this effect in June 2019 with my counterparts in the Nordic region. And while competition policy must inevitably keep pace with new developments, the explicit integration of other policy objectives into the work of competition authorities is something I believe should be approached with care.

These questions remain extremely relevant given the recent publication of the Commission's industrial strategy. We look forward to engaging further with these issues in the coming months.

International cooperation

I am pleased that the new Nordic cooperation agreement is now in force, giving us the ability to cooperate even more closely with our neighbouring authorities. I also look forward to the agreement entering into force in Iceland. It adds

important new cooperation tools to make our investigations even more effective. Looking forward, I believe we will see the agreement being utilised more often and producing concrete results in our enforcement work.

The Authority remains committed to wider international cooperation. We have engaged constructively in the work of the Organisation for Economic Co-operation and Development during the revising and drafting of recommendations in the field of competition. As one of the current co-chairs of the ICN Agency Effectiveness Working Group, we have also been actively involved in work that the International Competition Network has done in the area of procedural fairness. The Authority was one of the founding members of the ICN Framework for Competition Agency Procedures in May 2019.

Advocacy

Our advocacy work is an intrinsic part of our efforts to promote effective competition in the public and private sectors. By responding to official consultations, for example, the Authority can be a strong voice for competition in the preparation of policies and legislative proposals. The Authority issued 123 such consultation responses during 2019.

Market studies help us to understand markets better and offer targeted proposals to improve competitive conditions. For example, a report on car insurance and the market for car repairs was published in June 2019. In the study, the Authority reported, among other things, that car owners' ability to choose which repair shop to use is limited by the fact that insurance companies often decide which garages should carry out repairs. In this way, independent auto repair shops' ability to compete can be hampered.

In some cases, advocacy can usefully complement our enforcement work. During 2018 and 2019, the Authority carried out an investigation into conduct by the incumbent rail operator, SJ, in not allowing competitors to sell their tickets through SJ's digital sales channels. The competitors alleged that this amounted to an abuse of dominant position or a breach of the rules against anticompetitive public sales activities. The Authority concluded that the competition problems that had been identified could be more effectively resolved by other measures than competition enforcement, such as through a change in the regulation of the sale of rail tickets.

The Authority therefore proposed to the government that it initiate a review of the current rules and consider the need for regulation of the sale of rail tickets. A government-appointed inquiry subsequently published a report in April 2020, which made a proposal to the government to ensure that there is a neutral, non-discriminatory sales channel for all public transport in Sweden.

Communication

We understand how important it is for the Authority to communicate clearly and spread knowledge about the competition rules. This remains a core goal. Our decisions help to guide market participants in how to act and have an important deterrent effect. But through clear and welltargeted communication, we can amplify our messages. Among other things, we have improved information on our website about which cases we are currently investigating and why they have been prioritised.

We continuously evaluate the most appropriate ways to reach out to different stakeholder groups across different channels. As well as utilising social media effectively, we have livestreamed various seminars which can also be viewed after the event. Our podcast series goes from strength to strength, and now boasts a back catalogue of 46 episodes. Our most important channel for communication is still our website, and we are in the process of developing a new site that will be more user-friendly, functional, accessible and fit for the new demands of digitalisation.

Covid-19

At time of writing, we are in the unique and challenging situation created by the new coronavirus pandemic. With the other authorities in the European Competition Network, we have responded to make clear that we are aware of the extraordinary circumstances and the possible consequences for companies. For example, we have communicated that we will not actively intervene against necessary and temporary measures to avoid a shortage of supply of scarce products. We are also available for informal guidance about the compatibility of any such cooperation initiatives during this time. We can still utilise the competition rules to take strong measures against companies that cartelise or abuse their dominant position to take advantage of the current situation.