Legal action against Nasdaq for abusing its dominant position

Facts: The Swedish Competition Authority is taking legal action against Nasdaq for abusing its dominant position (ref.no. 406/2015)

Brief summary of the investigation

On 27 May 2015, the Swedish Competition Authority submitted a summons application to Stockholm City Court with a claim for companies within the Nasdaq Group (Nasdaq) to jointly pay close to SEK 31 million in penalties/administrative fines for abusing their dominant position on the market for services relating to the trade of Swedish, Danish and Finnish equities.

Nasdaq abused its dominant market position in October 2010, when Nasdaq prevented a close competitor, Burgundy AB (Burgundy), from placing its matching engine in the Verizon data centre in Lunda outside of Stockholm by using coercive methods against Verizon Sweden AB (Verizon). This data centre contained Nasdaq's own matching engine, as well as the trading equipment of a large number of securities traders. If Burgundy had been able to place their matching engine at the Lunda data centre, actual and potential clients of Burgundy would have been able to communicate faster and cheaper with Burgundy. Nasdaq's coercion of Verizon was intended to raise the entry barriers to a close competitor, which was also the obtained result.

The Swedish Competition Authority opened an investigation into the matter in December 2010 after receiving a complaint from Burgundy. In June 2011, the Swedish Competition Authority carried out an unannounced inspection (also referred to as a dawn raid) of the Verizon and Nasdaq premises, where evidence of Nasdaq's coercion of Verizon to prevent Burgundy from being allowed to lease space in the Verizon data centre was secured.

The investigation in more detail

OMX AB is the parent company of the European branch of the Nasdaq Group, which in turn is the largest exchange company in the world. The Swedish Competition Authority's summons application refers to OMX AB and a few other companies within the Nasdaq Group. These companies will hereafter be referred to as “Nasdaq”. The Nasdaq companies referred to in the Swedish Competition Authority's summons application operate activities that include the Stockholm Stock Exchange, the Copenhagen Stock Exchange and the Helsinki Stock Exchange. Up until 2007, these stock exchanges had a legal or de facto monopoly on services relating to the trade of Swedish, Danish and Finnish equities respectively.

Pursuant to the EU Markets in Financial Instruments Directive (MiFID), which entered into force in 2007, the former national stock exchange monopolies in Europe were exposed to competition. The traditional stock exchanges in Europe faced competition primarily from newly started multilateral trading platforms (MTFs).

Despite the new regulations, the entry barriers for such trading platforms are still high. A decisive competitive tool is the liquidity offered by a marketplace. Good liquidity means that there are plenty of orders with attractive buying and selling prices throughout the trading day. This reduces the costs of trading and contributes to attracting more traders. When MiFID was introduced, Nasdaq had close to 100 per cent of all order book based trading in Swedish, Danish and Finnish equities. It is difficult for a new trading platform to achieve the liquidity needed to exercise efficient competitive pressure on the traditional stock exchanges.

Address S-103 85 Stockholm
Telephone +46-8-700 16 00
Fax +46-8-24 55 43
konkurrensverket@kkv.se

KONKURRENSVERKET
Swedish Competition Authority

The multilateral trading platforms that have challenged the former stock exchange monopolies have achieved only modest market shares in most cases.

In 2010, Nasdaq had approximately 75 per cent of the order book based trading in Swedish equities, 73 per cent in Finnish equities and 86 per cent in Danish equities. In 2010 and 2011, Nasdaq maintained a dominant position in terms of services relating to order book based trading in equities listed in Sweden, Denmark and Finland.

In 2009, a Stockholm-based multilateral trading platform called Burgundy was launched. Burgundy was formed by a number of Nordic banks. The Burgundy ownership structure gave the platform a large potential client base, especially with respect to brokers. However, the owners had limited possibilities of moving trade from Nasdaq to Burgundy as long as the trade on Burgundy was not sufficiently liquid to guarantee satisfactory order execution. In order to increase the liquidity on Burgundy, it was vital for Burgundy to get more trading participants.

A marketplace must attract different types of traders to achieve good liquidity. A type of trader that has become increasingly important for marketplaces in this respect are the high-frequency traders (HFTs). For the HFTs, it is important to communicate at maximal speed with the marketplaces they are connected to, i.e. they need low latency in the communication with marketplaces.

Higher latency entails a higher risk for the trader. A trader who wishes to minimise the time it takes to communicate with a marketplace needs to place their trading equipment at the same data centre as the marketplace matching engine. This is also referred to as co-location. In general, co-location is a complex concept, and it entails significant costs for the traders. The traders can therefore make large efficiency gains if several marketplaces put their matching engines in the same data centre. The possibility for customers to co-locate with multiple marketplaces in the same data centre is available in several places outside of the Nordic countries.

In the autumn of 2010, a large number of customers, including HFTs specialising in providing liquidity, had co-located trading equipment with Nasdaq's matching engine at the Verizon data centre in Lunda. Several of Burgundy's owners had trading engines in Lunda. Some of them leased space in the Nasdaq co-location area, and some of them leased space from Verizon in the parts of the data centre that Verizon did not lease to Nasdaq.

In order to come into close physical proximity with the customers' trading equipment in Lunda, Burgundy decided to move its matching engine to the data centre in Lunda. In October 2010, Burgundy had finalised negotiations with Verizon, via their technology supplier Cinnober, and the parties had agreed that space would be leased in Lunda for Burgundy's matching engine. When Nasdaq heard of this agreement, they contacted Verizon demanding to be the sole marketplace offering trading services in Nordic equities in Lunda. Nasdaq told Verizon that if Verizon allocated space to the Burgundy matching engine at their data centre in Lunda, Nasdaq would remove their own primary matching engine and their co-location service from that centre. Such an agreement with Burgundy/Cinnober could also have an impact on Verizon's global collaboration with Nasdaq. Verizon accepted Nasdaq's demands, and terminated the deal with Burgundy/Cinnober. By putting pressure on Verizon in October 2010, Nasdaq prevented Burgundy from placing their matching engine at the data centre in Lunda.

For Burgundy, all other options were not as good as the planned move to the Lunda data centre. Burgundy was forced to place their matching engine at a different data centre, where no actual or potential clients had placed their trading equipment. Nasdaq's actions made it more expensive for many of Burgundy's actual and potential clients with trading equipment in Lunda to connect to and trade on Burgundy and delayed their communications to and from the Burgundy matching engine, meaning that they increased latency. Certain latency-sensitive trade strategies would also entail a higher financial risk when applied on the Burgundy platform, due to the physical distance between Nasdaq and Burgundy.

Nasdaq's actions were intended to create a competitive disadvantage for Burgundy, without in any way improving what Nasdaq was offering their clients. Their actions created an artificial entry barrier to a market where competition was already fragile. This prevented, or was intended to prevent, the development of effective competition. In its summons application, the Swedish Competition Authority argues that this course of action constituted an abuse of a dominant position, in violation of Chapter 2, Section 7 of the Competition Act and Article 102 of the Treaty on the Functioning of the European Union.

What happens now

Once the Swedish Competition Authority has submitted a summons application to Stockholm City Court, the latter will make a decision on the Swedish Competition Authority's claim for penalties/administrative fines. The City Court's ruling in the case will then be open to appeal to the Swedish Market Court, which is the highest court of appeal in matters of competition cases.

Address S-103 85 Stockholm
Telephone +46-8-700 16 00
Fax +46-8-24 55 43
konkurrensverket@kkv.se