

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

ROUNDTABLE ON COMPETITION AND SPORTS

-- Note by the delegation of Sweden --

This note is submitted by the delegation of Sweden to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 16 - 17 June 2010

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ROUNDTABLE ON COMPETITION AND SPORTS

-- Note by Sweden --

1. In this contribution the Swedish Competition Authority (SCA) focuses on two issues:

- Exclusive broadcasting rights
- Barriers to entry

1. Exclusive Broadcasting Rights

2. The SCA has dealt with the issue regarding exclusive broadcasting rights to sporting events in a case regarding a notified acquisition. During the year prior to the acquisition the two companies involved had acquired nearly 50% of all the broadcasting rights to sporting events sold in Sweden during that year. The SCA investigated the potential effects on competition on the market for acquisition of broadcasting rights to sporting events.

1.1 TV4 AB's Acquisition of C More Group AB

1.1.1 Observed Problems for Competition

3. When TV4 AB (TV4) acquired C More Group Entertainment AB (C More) it meant that two companies controlling a major part of the broadcasting rights to sporting events on the Swedish market became one. The SCA investigated whether TV4's strong position that would follow the acquisition could have any negative effects on competition. The two companies involved in the acquisition were considered to be competitors, not only on the upstream market but also on the downstream market. The fact that TV4 primarily offers free TV channels and C More primarily offers premium pay TV channels did not affect the SCA's assessment since the SCA found that the substitutability between TV channels depends on the content and not on the form.

1.1.2 Facts of the Case

4. In July 2008 the SCA received a notification regarding TV4's acquisition of C More. The SCA decided to carry out a second phase investigation of the concentration (one plus three months). The acquisition was also notified to the Norwegian and Finnish competition authorities.

5. TV4 is the leading TV company in Sweden. It is active on the programme channel market with a number of specialised channels alongside Sweden's biggest television channel TV4. The TV4 channel is provided to consumers through distributors and financed by advertisements.

6. C More is one of the leading premium pay TV providers in the Nordic region. C More provides premium Pay TV under the brand CANAL+ and the concept builds on exclusive premium rights for sports, movies and series. CANAL+ is provided to subscribers through distributors for a monthly fee.

1.1.3 *Relevant Markets*

7. Both companies were active on the market for acquisition of broadcasting rights (the upstream market), as well as the market for offering channel packages to distributors (the downstream market). The upstream market is in relation to the downstream market a vertical market and the two markets are closely interlinked.

8. The SCA defined the relevant geographic market to be the territory of Sweden.

1.1.4 *The Market for Acquisition of Broadcasting Rights to Sporting Events (Upstream Market)*

9. The upstream market may be divided into several markets, for example the acquisition of broadcasting rights for premium films, different football and sporting events and TV series.

10. According to the SCA's investigation the acquisition did however neither seem to reinforce nor create a dominant position on any of the markets for acquisition of broadcasting rights for older films and series or the market for acquisition of broadcasting rights for premium films. However, since both companies were considerable customers on the market for acquisition of broadcasting rights to sporting events, the SCA chose to investigate the effects of the concentration on that specific market.

11. Broadcasting rights for sporting events represent a so-called "key right" for existing and potential programme companies. The European Commission (Commission) has particularly emphasised that important football events makes it possible to create and develop a strong trademark for a TV channel. The Commission has, moreover, defined the relevant market for acquisition of broadcasting rights to football events with respect to different types of events, for example continuous season long events like national football leagues and recurring events like the World Cup.

12. According to a survey the most popular sports in Sweden are football and ice hockey. The broadcasting rights to the Swedish national football league (Allsvenskan) and Swedish national ice hockey league (Elitserien) are two "key rights" since they are two of the most attractive and expensive broadcasting rights on the Swedish market. On basis of the Swedish viewers' preferences and the criteria the Commission has developed and adopted in previous cases the acquisition of broadcasting rights to football and ice hockey could be defined as two separate relevant markets.

1.1.5 *The Market for Offering Channel Packages to Distributors (the Downstream Market)*

13. The companies involved in the acquisition argued that their activities on the downstream market were not overlapping since they regarded themselves active on different relevant product markets. According to their arguments premium pay TV channels should be considered as complimentary to free TV channels rather than substitutable. The SCA's analysis did not however support such arguments. On the contrary, the SCA considered that TV channels are substitutes, both from a consumer's and a distributor's point of view, depending on the contents. According to the SCA's investigation the companies involved in the acquisition consequently competed on the downstream market for offering channel packages to distributors.

1.1.6 *Dominant Position and Competition Test*

14. During 2007 TV4 and C More acquired nearly 50% of all the broadcasting rights to sporting events sold in Sweden. The two companies owned some of the most attractive and expensive broadcasting rights to sporting events, for example Allsvenskan, Elitserien and the English Premier League. The SCA's

investigation showed that there was an actual barrier to entry since it would be necessary for a potential customer of broadcasting rights to sporting events to have a well established position on the downstream market.

15. TV4 and C More argued that the market for acquisition of broadcasting rights to sporting events is a so called “bidding market”. Historical market shares will therefore not have any effects on future bidding procedures. The SCA’s investigation did, however, indicate the opposite. The owner of broadcasting rights could have an advantage in future tenders since they had built a customer network together with the distributors. Moreover, customer mobility is limited due to lengthy subscription deals. Existing market shares is therefore an indication of future market positions since the evaluation of the broadcasting rights depends on the customers’ possibilities to commercialise the broadcasting rights on the downstream market.

16. The SCA found that TV4 would probably be in a dominant position following the acquisition on the basis of market shares, distribution of the most attractive and expensive broadcasting rights and the barrier to entry.

1.2 Conclusion

17. Nevertheless, even if TV4 could enjoy advantages in future tenders because of the present allocation of broadcasting rights, the SCA concluded that the number of strong competitors downstream on the Swedish market would be enough to neutralise any restrictions of competition on the upstream market. The downstream market is not only characterised by strong selling companies but also by strong distributors as customers. In addition, a programme company does not only offer sports in their channels. Popular films and TV series are examples of alternatives to sports. Taking this into account, the SCA found that TV4’s negotiating position would not change to such an extent, as a result of the acquisition, that TV4 could shut out competitors or increase consumer prices. The remaining competition power on the market was accordingly considered to be sufficient to maintain an effective competition even after the acquisition.

1.3 Postscript

18. The broadcasting rights to the English Premier League, which the SCA considers to be a so-called key right, were sold again last year. TV4, which had acquired the broadcasting rights through the acquisition of C More, then lost the rights to one of its main competitors.

2. Barriers to Entry

19. The SCA is currently investigating whether the rules and statutes of organisers of motor sports events restrict competition in a way that cannot be justified. The restriction of competition consists of hindering competing races. In practice it may be difficult for newcomers to organise racing competitions because it can be hard to get access to officials, drivers and racing tracks which can result in an entry barrier.

2.1 The Motorsport Case

2.1.1 Facts of the Case

20. The motorsport case was initiated after a complaint concerning the Swedish Automobile Sports Federation (SBF) and the Swedish Motorcycle and Snowmobile Federation (SVEMO).

21. The conducts at issue are as follows:

- Withdrawing officials' licenses
- Withdrawing drivers' licenses
- Hindering organisers and owners of racing tracks

2.1.2 *Relevant Background to the Case*

22. The Swedish Sports Confederation (RF) is the nationwide umbrella organisation for Swedish sports. For each specific sport there is a so-called Specialised Sports Federation (SF) and in the field of motorsport the SFs are SBF and SVEMO. All SFs are non-profit organisations and they grant permits to organise competitions, including the Swedish Championships.

23. According to the statutes of SBF and SVEMO, in order to be permitted to organise or participate in competitions there is a requirement to hold a license issued by SF. Such licenses are sold to drivers and to owners of motorsport racing tracks by SBF and SVEMO. An important part of the license is that it automatically gives the licensee an insurance policy. In addition, SBF and SVEMO amongst other things organise courses for drivers and also officials who are also required to hold a license issued by SBF or SVEMO.

24. SBF and SVEMO, respectively, are in their capacity as SFs part of the pyramidal structure of sports through which they are also connected to the Fédération Internationale de l'Automobile (FIA) and the Fédération Internationale de motorcyclisme (FIM).

25. SBF's¹ and SVEMO's² members are motor clubs, in which drivers and officials are members. Motor sport competitions are organised by the motor clubs.

26. The membership in a motor club is voluntary and any member may at any time choose to terminate his or her membership. But as long as you are a member of the organisation, you must comply with the statutes and competition rules which exist within the SBF and SVEMO organisations.

27. SBF and SVEMO require their members to remain loyal to the organisation. The so-called loyalty rule is expressed in their respective sets of rules which also refer to RF's statutes. According to the loyalty rule a member can only participate in events organised by other actors, other than SBF or SVEMO, if SBF or SVEMO approve such participation. If a member participates in an event organised by another actor without previous approval from SBF or SVEMO, he or she may risk being punished.

2.1.3 *Competition Law Issues*

28. The Swedish Competition Act prohibits restrictive agreements between competitors and abuse of a dominant position. The SCA also applies the competition rules of the European Union.

29. In this particular case, both Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) seem to be applicable.

30. The case law of the European Court of Justice has established that competition law also applies to sports, to the extent it constitutes an economic activity. According to the Meca-Medina³ ruling, a restriction

1 SBF has 450 motor clubs which altogether have 110 000 members.

2 SVEMO has 600 motor clubs which altogether have 140 000-150 000 members.

to competition may not be incompatible with competition law as long as it has a legitimate objective. However, it has to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them on a case-by-case basis.

31. The Commission has indicated some examples of rules that are likely to infringe the rules of competition. The Commission adds that it is however not possible to establish an exhaustive list of examples of such rules which can be justified by legitimate objectives.⁴ One of the examples of rules likely to infringe competition law is rules that protect organisations from competition.

32. The SCA's preliminary assessment is that the loyalty rule impedes the possibility to compete and should be considered to be a restriction of competition. It could be difficult for newcomers to gain access to officials, participants and courses, which mean an entry barrier. The members have no real option to leave SBF or SVEMO since it will not be possible to participate in the majority of events held in Sweden, including national championship races.

33. Further the SCA has noticed that according to the rules of appeals that SBF and SVEMO apply, a member is restricted to an internal procedure. The rules consequently prevent members to turn to courts of law with their appeals. The Commission has also identified such rules likely to constitute an infringement of competition law.⁵

34. One of the main issues the SCA is currently dealing with is the application of the Meca-Medina test. The SCA has to decide whether the objectives we have identified are legitimate or not.

35. The SCA has identified two possible objectives that also could be legitimate. The first legitimate objective is to maintain a high level of security and the second legitimate objective is to ensure good order and uniform rules, both nationally and internationally. However, it remains to consider whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them.

2.2 Conclusions

36. A key issue in the SCA investigation is the assessment of legitimate objectives which could outweigh the restrictions of competition identified. The case law within the European Union is furthermore rather limited. Should the SCA come to the conclusion that the rules of these two motor sport organisations, and the way in which they are applied, violate the EC competition rules, this could have an impact on rules on loyalty etc in other areas of sports as well. However, it is still too early to tell whether or not that will be the final position of the SCA.

- What experiences have other countries to determine what constitutes legitimate objectives in the field of sports?
- Loyalty clauses seem to be a general problem in several different sports in Sweden. Are such loyalty clauses commonly used in other countries?

3 Case C-519/04, David Meca-Medina and Igor Majcen v. Commission, REG 2006 s. I-6991.

4 The European Commission's staff working document, The EU and Sport: Background and context, accompanying document to the White Paper on Sport, SEC (2007) 935.

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