THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Fourteenth Edition

Editor
Aidan Synnott

THE LAWREVIEWS

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CONTENTS

PREFACE

In the reports from around the world collected in this volume, we continue to see international overlap among the issues and industries attracting government enforcement attention. In the past year, we have also seen the emergence of cooperative policy efforts among several enforcement authorities. Two areas in particular – digital markets and pharmaceutical markets – have been the focus of cross-border initiatives. The G7 – Canada, France, Germany, Italy, Japan, the United Kingdom and the United States – along with Australia, India, South Africa, South Korea and the European Commission participated in a Digital Competition Enforcers Summit, which was hosted by the UK Competition and Markets Authority (CMA) in November 2021. Earlier in the year, the United States Federal Trade Commission, certain state attorneys general, the European Commission, the Canadian Competition Bureau and the CMA established a multilateral pharmaceutical working group.

In many jurisdictions, merger review and enforcement activity remain robust. Indeed, the United States agencies are dealing with an exceptionally high number of merger filings, reflecting a marked increase in deal activity. Meanwhile, in France, the Competition Authority (FCA) also saw a significant increase in merger activity and blocked a merger in the pipeline industry. According to our authors, this is only the second time the FCA has blocked a merger. Merger reviews were also up in Brazil. At the same time, however, the report from the United Kingdom notes that expectations for an increase in merger review activity at the CMA have so far not been realised and 'there is no evidence, as yet, of the expected Brexit boom in notifications'. In Japan, the Fair Trade Commission (JFTC) 'maintained a steady level' of merger enforcement activity.

The policing of cartels continues to be a focus of several competition agencies around the globe. Many jurisdictions with active anti-cartel enforcement programmes have seen the return of dawn raids, which had been largely suspended in several countries after the onset of the covid-19 pandemic. For example, dawn raids in Japan targeted the utilities sector, which, as we read in that country's submission, appears to be an area of focus for the JFTC. In Portugal, 2021 was 'record year for dawn raids', according to our authors. Authorities there targeted the financial, energy, healthcare and information services sectors. The Swedish Competition Authority conducted a dawn raid related to alleged price-fixing for covid-19 PCR tests. Our authors from Greece note that in the second half of 2021, authorities there conducted dawn raids on companies in 'an impressive range of markets'.

Digital platforms have continued to attract scrutiny and regulatory action worldwide. In the United Kingdom, the CMA is establishing a Digital Markets Unit and has proposed legislation aimed at digital companies with 'strategic market status'. Similarly, the European Commission has proposed a Digital Markets Act to regulate that sector in the European Union; and competition authorities of Member States have been involved in the negotiation

of that legislation. Numerous legislative proposals introduced in the United States are aimed at digital platforms, and the agencies here are continuing with litigation against several platform companies. Numerous other jurisdictions are engaged in legislative and enforcement activity in this area, including Japan, where the Digital Platform Transaction Transparency Act recently came into force. Companies operating in digital markets were also the subjects of enforcement activity in several other jurisdictions, including Argentina, Canada, France and Turkey. In addition to digital platforms, pharmaceutical companies are also seeing attention from competition enforcement authorities around the globe, including in the United Kingdom, the United States and Japan.

A number of agencies have continued to bring actions against resale price maintenance (RPM). Indeed, as we read in the chapter from the United Kingdom, it is clear that RPM (particularly as it relates to online pricing restrictions) remains a top priority for the CMA. Indeed, following several fines imposed in 2020, the CMA issued a statement of objections to a lighting company. Swedish authorities also fined a lighting supplier. Elsewhere, French authorities fined eyewear manufacturers and companies involved in video surveillance, and Turkish authorities levied fines on fuel distributors. It is also notable that enforcement activity in labour markets appears to be increasing in several jurisdictions, including in the United States. The Turkish Competition Board and the Portuguese Competition Authority are also examining labour market issues.

In the coming year, we will watch with interest to see how competition regulation and enforcement continues to evolve around the globe.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
March 2022

Chapter 13

SWEDEN

Peter Forsberg, David Olander and Oskar Helsing[1]

I OVERVIEW

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

The Swedish Competition Authority (SCA) is the central administrative authority for enforcement of competition law in Sweden. It is entrusted with investigative and adjudicative powers, both of which are being expanded. Following an amendment to the Competition Act on 1 January 2018, the SCA can adopt decisions to prohibit mergers that harm competition. And, in January 2021, the Swedish parliament passed a government bill that extends the SCA's adjudicative powers to behavioural cases (i.e., anticompetitive agreements and abuses of dominant positions), including the finding of an infringement and the imposition of corporate fines of up to 10 per cent of company turnover. Despite having been criticised during the law-making consultation process for decreasing both procedural efficiency and safeguards, the government stood by its bill, highlighting the need for conformity with the competition proceedings at the EU level and in other EU Member States. However, the new powers do not include the right to impose director disqualifications for 'hard core' cartel conduct (i.e., price-fixing, bid rigging, output restrictions and market sharing), where the SCA will still have to make its case before a court. The bill, which entered into force on 1 March 2021, also implements the ECN+ Directive,[3] including, inter alia, extended investigative powers for the SCA during dawn raids and the introduction of fines for procedural breaches in behavioural cases, such as submitting incorrect, misleading or incomplete information, breaking a seal at dawn raids or otherwise obstructing the investigation.

The SCA's decisions can be appealed to the Patent and Market Court (PMC). The PMC's decisions and judgments can, in turn, be appealed to the Patent and Market Court of Appeal (PMCA). Leave to appeal is required if the PMCA is to hear a case. The PMCA is, in general, the court of final instance. However, in certain instances, the PMCA can grant leave for a judgment or decision to be appealed to the Supreme Court. If that were to happen, the Supreme Court would also need to grant leave to appeal before the case could be heard.

1 Peter Forsberg is a partner, David Olander is a senior associate and Oskar Helsing is an associate at Hannes Snellman Attorneys Ltd.

2 The Swedish Competition Act (2008:579).

3 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

Following a period of a high level of enforcement activity, the SCA has, since the inception of a new competition court system in September 2016, so far lost all cases that reached the PMCA, including high-profile cases of bid rigging and abuse of dominance. As a result, the SCA has indicated that it will prioritise more carefully which cases it investigates and pursues in court. However, it now remains to be seen whether the SCA will increase its enforcement upon the expansion of its investigative and adjucative powers.

II CARTELS

Chapter 2 of the Competition Act holds the substantive provisions relevant for cartels and other anticompetitive agreements. Chapter 2, Sections 1 and 2 are modelled on Article 101(1) and 101(3) of the Treaty on the Functioning of the European Union (TFEU). Section 1 prohibits the 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 submit a complete application within a specified period. If the company with the marker fails to submit the outstanding information, another company cannot jump the queue for immunity. 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 director disqualification.

i Significant cases

Dairy procurement – leniency cut-off point

In December 2020, the SCA sued Arla Foods, Scandinavia's largest dairy company, and requested a fine of 1.1 million kronor for Arla having formed a bid rigging cartel with a competitor (which later filed for bankruptcy) during a dairy framework agreement procurement by several municipalities. The SCA's investigation was initiated through a complaint by one of the procuring municipalities. When the SCA ordered Arla Foods to provide information during the investigation, Arla responded by submitting a leniency application. However, the SCA claimed that Arla's application did not meet the conditions for leniency. Specifically, although there is no formal cut-off point for leniency applications in Sweden, the SCA claimed that the investigation had developed so far that the information supplied by Arla no longer provided the necessary added value. Although the SCA reduced the requested fine on the basis of Arla's cooperation, Arla, for its part, claimed that in fact the leniency application met the conditions for leniency. The PMC delivered its judgment in October 2021, in which it found that Arla had not meet the conditions for leniency as the SCA had sufficient information for initiating an investigation prior to the leniency application. The PMC ruled in favour of the SCA and fined Arla 1.1 million kronor.[4]

4 PMC, judgment of 8 October 2021 in case No. PMT 20357-20.

Insurance services – reviewability of dawn raids

In April and June 2017, the SCA conducted a dawn raid against several insurance companies (Söderberg & Partners et al.) for suspected bid rigging in the procurement of insurance services. This was done after a prior decision by the PMC allowing the raid. During the raid, the SCA 'mirrored' several hard drives and, with the consent of the companies, took these and reviewed them at the premises of the SCA. However, when the SCA copied certain documents from the hard drives and included them in the case file, one company appealed against the copying of the documents, arguing that they were outside the scope of the PMC's dawn raid decision. After both the PMC and the PMCA had rejected the appeal, the Supreme Court heard the case.[5] The Court stated that if a company contests the SCA's right to review or copy certain material on the grounds that the measure is outwith the scope of the original dawn raid decision, the SCA must refer the dispute to the Swedish Enforcement Agency and request its assistance to review or copy the contested material. In this case, the SCA had not requested such assistance, which the Supreme Court found to be a violation of the company's right to a fair trial under the European Convention on Human Rights. The Court stated, however, that the appropriate remedy for such a violation was economic compensation, rather than the creation of a new right of review before the PMC. The decisions of the lower courts were thus affirmed. Although the SCA found that there had been some exchange of information between the companies, it did not have sufficient evidence to indicate whether the information had anticompetitive effects and it closed the investigation in March 2021 without measures.

Lighting products – price fixing

The SCA imposed a fine on Markslöjd, a supplier of lightning products, for anticompetitive price control of a retailer. The SCA claimed that Markslöjd had restricted the retailer's ability to determine its sale prices by refusing to deliver products sold to customers below certain prices. Markslöjd had a supply agreement with the retailer and during 2018 requested that the retailer raise its prices to end customers, and obstructed deliveries to the supplier of products that were to be sold under a certain price. The retailer had submitted an application for leniency prior to the SCA investigation. The SCA granted the retailer's application for leniency for the vertical anticompetitive behaviour. This showed that the SCA is open to granting leniency, in cases of not only horizontal anticompetitive behaviour but also vertical anticompetitive behaviour.

The SCA found that the severity of the vertical price control called for a fine amounting to 4 per cent of Markslöjd's total turnover. However, as the price control was only imposed for a short time, the SCA lowered the fine. Markslöjd accepted the fine of 1.78 million kronor and the SCA issued its final decision in December 2020.[6]

5 Supreme Court, decision of 30 November 2018 in case No. Ö 5652-17.

6 SCA, decision of 16 December 2020 in case No. 59/2019.

ii Trends, developments and strategies

On average, the SCA conducts a handful of dawn raids per year and it receives approximately five leniency applications per year, of which approximately half are summary applications.[7] Sectors that have been investigated more recently include construction, electronic equipment, insurance and retail.

In December 2018, the SCA conducted a questionnaire survey of the level of corruption in the construction industry.[8] Among the responding firms, 49 per cent believed that there were cartels in the industry and 29 per cent of those believed that cartels operated on a regular basis.

During 2021, the SCA conducted dawn raids and opened an investigation into alleged price fixing of polymerase chain reaction tests (PCR tests) for covid-19. In a statement, the SCA expressed that PCR testing for covid-19 is an important public interest and the need for serious test providers and affordable tests warranted prioritisation of the investigation.

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 of companies suspected of having colluded at the bidding stage.

In the past, the SCA has been successful in obtaining large fines in cartel cases against companies in, inter alia, the asphalt and petrol businesses. However, since the reorganisation of the competition court system in 2016, the SCA has so far lost all cases that have reached the PMCA. As a result, the SCA has indicated that it that it will prioritise more carefully the cases it investigates and pursues in court. For instance, in November 2019, the SCA concluded an investigation of information exchange of production volumes in the asphalt sector, by accepting commitments from three competitors rather taking the case to court. Indeed, the SCA has become more active in using alternative enforcement methods such as communication in media.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Chapter 2, Section 1 of the Competition Act prohibits the 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 Chapter 2, Section 7 of the Competition Act sets out the prohibition against abuse of a dominant position. The provisions are modelled on Articles 101 and 102 of the TFEU.

i Significant cases

Access to waste collection infrastructure

In February 2018, the SCA imposed an injunction on FTI, a waste management company, ordering it to withdraw a contract termination with its competitor, TMR. FTI allows packaging producers to fulfil their legal obligation by offering a service to collect and recycle packaging waste emanating from their products in exchange for a weight-based fee. FTI's

7 During the period 2010–2014.

8 Report series 2018:10.

waste collection is primarily based on a nationwide infrastructure of public waste containers. Since 2012, FTI had granted access to this infrastructure to TMR, which offered its services in competition with FTI. In 2016, FTI terminated the access contract with TMR. Having investigated the case, the SCA found that the infrastructure of public waste containers constituted an essential facility and that FTI had abused its dominant position by refusing to deal with TMR. The PMC upheld the injunction. However, in February 2020, the PMCA overturned the PMC's ruling on appeal.[9] Although the PMCA agreed that FTI held a dominant position on the relevant market, it held that the SCA had not proved that it was impossible, or unreasonably difficult, for TMR to establish its own nationwide infrastructure of public waste containers. As such, the PMCA concluded that supply of services from FTI was not indispensable to TMR's business activities. Considering this, the court held that FTI's termination of its prior course of voluntary dealing with TMR did not constitute an unlawful refusal to deal.

Stock exchange services – foreclosure of competitor

The SCA sued the operator of the Stockholm stock exchange, Nasdaq, for abuse of dominance and requested fines of 28 million kronor. The case revolved around a data centre provided by Verizon. Nasdaq leased one area in the data centre and offered its customers, such as high-frequency traders, the opportunity to rent space in the same area. The co-location with Nasdaq gave the customers a fast connection to Nasdaq's trading systems. The events were triggered when Burgundy, a Nasdaq competitor, publicly announced that it had entered into a deal with Verizon and intended to move into the same data centre as Nasdaq. In effect, Burgundy would become part of Nasdaq's co-location service without having to set up its own service. Nasdaq responded by putting pressure on Verizon, threatening to move to another data centre if Burgundy was allowed into the centre. The SCA did not argue that access to the data centre was essential. Instead, it relied on the concept of a 'naked restriction', claiming that Nasdaq's reaction to Burgundy's announcement had no other purpose than to restrict competition. The PMC, however, held that this was a normal exercise of contractual rights and competition on the merits and consequently rejected the SCA's claim. On appeal, the PMCA[10] upheld the PMC's judgment. According to the PMCA, the investigation showed that the additional costs for Burgundy connected with having to establish itself in another data centre did not raise any barriers to entry or expansion for Burgundy.

Tobacco coolers labelling system

The SCA sued Swedish Match, a major supplier of snus (a moist tobacco product), for abuse of dominance. The SCA claimed that Swedish Match had foreclosed its competitors by implementing a uniform system for shelf labels in snus coolers that it had lent to retail stores. Although Swedish Match permitted sales of other suppliers in those coolers, the SCA argued that the labelling system restricted competitors from marketing their products in terms of price and brand, especially since the marketing of tobacco products in general is subject to significant legal restrictions. Swedish Match, on the other hand, had argued, inter alia, that its intention was to ensure that the labelling system complied with the strict marketing regulations relating to tobacco products. The PMC found that Swedish Match had abused

9 PMCA, decision of 28 February 2020 in case No. PMÖÄ 1519-19.

10 PMCA, judgment of 28 June 2019 in case No. PMT 1443-18.

its dominant position, and the Court imposed fines of 38 million kronor. However, the PMCA reversed and ruled in favour of Swedish Match. In its judgment from June 2018,[11] the PMCA held that the labelling system was in fact capable of foreclosing competition by way of restricting competitors' marketing options. However, the Court further held that exclusionary behaviour of this kind by a dominant undertaking is objectively justified – a concept rarely accepted by the EU courts – when the purpose is to ensure compliance with tobacco marketing regulations.

Accesses to aviation infrastructure

The SCA opened an investigation into abuse of dominance by AFAB, which supplies on-land aviation infrastructure at Arlanda airport. The investigation also dealt with suspicions of anticompetitive cooperation between AFAB and its parent companies. The SCA had received information that AFAB, or its parent companies in the aviation fuel sector, had actively limited access to aviation infrastructure at Arlanda Airport. During its investigation, the SCA did not find evidence to support anticompetitive cooperation between AFAB and its parent companies. Regarding the abuse of dominance, the SCA found that limitation of access to aviation infrastructure is principally governed by the Swedish Ground Handling at Airports Act and that the Swedish Transportation Agency is the government authority responsible for investigating breaches of the Act. Thus, the SCA closed the investigation without taking measures.[12]

ii Trends, developments and strategies

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

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.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

E-commerce and the sharing economy

In 2017, the SCA analysed the Swedish e-commerce and sharing economy sectors,[13] and concluded that the emergence of these industries has resulted in increased price transparency and price competition, which is beneficial for consumers. Swedish e-commerce companies

11 PMCA, judgment of 29 June 2018 in case No. PMT 1988-17.

12 SCA, decision of 22 September 2021 in case No. 726/2020.

13 Report series 2017:2.

are facing increased foreign competition, as this sector has grown significantly over the past few years. The technical development of a digital payment infrastructure 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, although e-commerce constitutes a competitive restraint on the physical stores. The SCA also stressed that the increased digitalisation and technical improvement of the e-economy has resulted in new challenges for competition authorities to tackle, for instance that the higher degree of price transparency may facilitate price collusion. 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, usually in exchange for user data, to expand more rapidly. A large number of users and collection of user data can give a platform significant market power through, for instance, indirect network effects, which its competitors may not be able to replicate. 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. However, the SCA already has the discretion to order a party to notify a concentration if particular grounds are at hand.[14]

New legislation on unfair trading practices in the agricultural and food supply chain

In November 2021, Sweden's new act on unfair trading practices in the food supply chain (the UTP Act)[15] entered into force. The UTP Act implements the EU directive on unfair trading practices in the agricultural and food supply chain, and the SCA is the Swedish authority responsible for its enforcement. The UTP Act applies to Swedish suppliers and retailers in the agricultural and food industry with a yearly turnover exceeding €2 million. Pursuant to the UTP Act, unlawful trading practices mainly concern the terms of payment and delivery of agricultural and food products. According to the UTP Act, the payment of delivery of such products shall not be made later than 30 days from the delivery, and unilateral changes to terms of delivery contracts are also prohibited under the UTP Act (i.e., hard restrictions). Trading practices including the return of unsold food and agricultural products without payment and terms whereby the supplier must pay for advertising and personal costs of the retailer are prohibited unless the terms have been clearly agreed by the supplier and the retailer (i.e., soft restrictions).

The SCA is mandated to conduct on-site inspections, hold hearings and demand information from companies to investigate breaches of the UTP Act. The SCA can issue an injunction to a company in breach of the UTP Act, and breaches of the Act can result in a fine for non-compliance amounting to at most 1 per cent of the company's annual turnover.

14 Chapter 4, Section 7 of the Competition Act.

15 Act (2021:579) on Prohibition of Unfair Trading Practices in the Food Supply Chain.

ii Trends, developments and strategies

The SCA may commence a market investigation either on its own initiative or following a complaint. 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 to avoid an additional investigation.

iii Outlook

Much like the European Commission (the Commission), one of the SCA's priorities concerns the development of the e-economy and the sharing economy, and how the growth of these sectors will affect the competition authorities' enforcement function, as well as the risk of anticompetitive conduct. 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, procedural rules on the application of Articles 107–109 of the TFEU were adopted in 2013.[16] In addition, the Local Government Act[17] 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.

The Swedish Transparency Act[18] 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 common in Swedish courts. In particular, the cases have concerned the sale of facilities from municipalities to private operators below market price. Sweden has also been under review by the Commission multiple times, as only the Commission can approve targeted state aid.

Sale of a property

The Supreme Administrative Court has on two occasions heard cases on state aid concerning the sale of public property. In the first case,[19] the municipality of Karlskrona decided to sell a property to the construction company NCC for 5 million kronor, despite a higher bid from another interested buyer. The Court stated in its judgment that the municipality had failed to conduct an independent valuation of the property and had not considered the higher bid. The Court therefore concluded that the agreement entailed individually targeted support to NCC and that the contract with NCC was in conflict with the Local Government Act.

16 Act (2013:388) on the Application of the European Union's State Aid Rules.

17 The Local Government Act (1991:900).

18 The Swedish Transparency Act (2005:590).

19 Supreme Administrative Court 2010 ref 119.

However, in the second case,[20] the Supreme Administrative Court concluded that that there was no question of illegal state aid. Here, 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 this support.

The Commission approving Swedish state aid

In 2020, to address the covid-19 economic slowdown, the Commission approved large Swedish state aid grants, including, for example, a guarantee scheme on new loans granted by commercial banks to support mainly small and medium-sized enterprises; a rent rebate scheme in support of hotels, restaurants and retail tenants; a compensation scheme related to the loss of revenue for the cancellation of cultural events; a capitalisation of the airline SAS; and an aid scheme for travel agencies and tour operators. The airline company Ryanair appealed the Commission's decision to approve the SAS capitalisation to the General Court of the European Union. In April 2021, the General Court delivered its judgment deeming the Swedish and Danish efforts to capitalise SAS to be compatible with the EU state aid regulations.[21]

ii Trends, developments and strategies

The majority of previous state aid cases in Sweden have been related to municipalities selling property at significantly lower prices than market value. There has, however, been a decrease in the number of these 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

In previous years, the SCA reviewed 70 to 80 mergers per year, of which three to four went to Phase II (4–5 per cent). In 2021, there was a steady influx of cases regarding merger reviews, with three cases going to Phase II review and two cases resulting in remedies.

20 Supreme Administrative Court 2010 ref 119 II.

21 CJEU, judgments of 14 April 2021 in Cases T-378/20 and T-379/20.

A concentration meets the applicable merger 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 each of at least two of the 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 the concentration to be notified if the SCA finds particular grounds for doing so. These grounds may be met when an undertaking already holds a strong market position and acquires a smaller or newly established undertaking. In these circumstances, the acquirer may also submit a voluntary notification. In general, the SCA encourages undertakings to make voluntary notifications of mergers.

i Significant cases

Alcoholic beverages

In December 2020, the SCA opened a Phase II review of the merger announced between two of the Nordics' leading alcoholic beverage companies, Finnish-based Altia and Norwegian-based Arcus. The merger was also notified to the competition authorities in Finland and Norway. After its initial investigation, the SCA considered that it could not rule out the risk that the concentration, within certain spirits categories, would significantly impede effective competition by reducing the competitive pressure between Altia and Arcus. The SCA announced its final decision in April 2021,[22] clearing the merger with conditions suggested by the parties. As the SCA had found that the merger would result in competition concerns on the markets for aquavit, cognac and vodka, the conditions involved the divestment of brands on the markets concerned.

Retail food supply

In July 2021,[23] the SCA opened a Phase II review of Dagab Inköp och Logistik AB's acquisition of Bergendahls Food AB and Axfood Investering och Utveckling AB's acquisition of shares in City Gross Sverige AB. As the transactions were related, they were reviewed together. The parties were active in the market for retail and wholesale distribution of food in Sweden, Axfood being one of the largest grocery retailers and Dagab one of the largest grocery wholesalers. The investigation showed that the transaction would not result in competition concerns on the horizontal market for retail sales of foods but the market power created in the upstream market for wholesale food could result in increased prices for retailers.

The SCA announced its final decision in September 2021, clearing the transaction with conditions suggested by the parties. As the SCA had found that the merger would result in vertical competition concerns on the wholesale food market, the conditions involved behavioural remedies ensuring that downstream competitors would continue to have the same, or more favourable, terms as those pre-merger in their supply agreements with the wholesaler. The conditions also involved the wholesaler negotiating supply agreements with new customers in the e-commerce sector on fair, reasonable and non-discriminatory terms.

22 SCA, decision of 15 April in case No. 637/2020.

23 SCA, decision of 12 July in case No. 361/2021.

Logistics services

In August 2021, the SCA opened a Phase II review of Tempcon's acquisition of Lincargo AB. The parties were active on the market for providing climate-controlled logistics services in Sweden. The view of the parties was that the relevant market for the transaction was the broad market for logistics services. The SCA, however, viewed the relevant market as being climate-controlled logistics services. The investigation showed that the parties would not have a combined market share exceeding 25 per cent, nor had the parties been particularly close competitors prior to the transaction. Furthermore, the SCA did not find that the transaction would raise the barriers to entry for new competitors in the market, and it cleared the transaction unconditionally.[24]

ii Trends, developments and strategies

Over the past couple of years, the number of merger notifications has remained high in Sweden. However, most were cleared in Phase I. Indeed, in cases where there is an absence of vertical links or horizontal overlaps, the SCA often clears a transaction well ahead of its Phase I deadline of 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 do so, even if the turnover thresholds are not exceeded. In these circumstances, the acquirer may also decide to submit a notification voluntarily. The SCA has issued guidance that 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 mechanism particular to Swedish merger control.

In 2015, the SCA introduced further guidance for notifications and the assessment of concentrations. 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. One argument for the reform was to increase conformity with the merger control procedure of the Commission and in other Member States. However, the reform did not receive a uniformly positive response and it has been argued that the safeguards surrounding the SCA's decision-making process are not as well developed as, for example, the Commission's. It still remains to be seen how the reform will be implemented in practice.

VII CONCLUSIONS

As stated above, the SCA has so far lost all cases that have reached the PMCA since the inception of the new competition court system in 2016. As a result, the SCA has indicated that it will consider more carefully which cases it investigates and pursues in court. It remains to be seen whether the SCA will increase its enforcement activities in line with previous levels upon the imminent expansion of its investigative and adjudicative powers.

24 SCA, decision of 14 October in case No. 440/2021.

Appendix 1

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