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Swedish competition law – update on case-law and legislation

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by Tommy Pettersson and Magnus Gustafsson, Mannheimer Swartling

The Swedish Competition Act ('the Act') was enacted in 1993, and its substantive rules are largely modeled on EC competition law. The Act is primarily enforced by the Swedish Competition Authority ('the SCA', *Konkurrensverket*), but also by the Stockholm district court and the Market Court (*Marknadsdomstolen*). This article provides an update on cases in the field of mergers, abuse of dominant positions and cartels as well as recent legislative reforms and proposals.

Case update

Mergers

Cinema. In 2004, the SCA received a notification from SF Bio AB, the dominant operator on the Swedish cinema market, of its intention to acquire Sandrews Metronome Sverige AB, the only other significant operator in the market. After massive intervention from third parties, the SCA, in a 'phase II' investigation, found that the concentration would be severely anti-competitive affecting the selection of films, ticket prices and the number of cinema theatres. SF Bio would post-merger be the only owner of cinema theatres in a large part of the country. The merger was also held to negatively affect competition on the markets for film production and distribution. Shortly after the SCA decided to bring the case to court seeking a prohibition decision, SF Bio announced its withdrawal from the deal. (Case No. 617 and 875/2004)

Natural gas. The Competition Authority has cleared a merger between Dong Naturgas A/S of Denmark and Nova Supply AB of Sweden. Dong is a supplier of natural gas in Denmark, Germany, the Netherlands and Sweden with some degree of production, whilst Nova Supply was a trader in imported natural gas and selling to wholesalers and end consumers in Sweden. The SCA described the market as characterised by a few operators that enter into long-term agreements, which makes market entry difficult. In a 'phase II' investigation, the SCA found that Dong's high market share of some 77% on the Swedish wholesale market in combination with its ownership of important infrastructure, access to natural gas and the limited potential competition, made Dong already dominant on the Swedish-Danish market, a position that would be strengthened through the acquisition of Nova Supply. Nevertheless, the SCA cleared the deal upon Dong's voluntarily undertaking to offer premature termination of supply agreements to Nova's customers. This, stated the SCA, would permit potential competitors to enter the market to the extent that the merger could no longer be deemed to create or strengthen a dominant position. (Case No. 556/2004)

Abuse of a dominant position

Price-squeeze in broadband services. The SCA has asked the Stockholm district court to impose fines of some €16m on TeliaSonera, the Swedish telecoms incumbent and the dominant operator in the DSL broadband market, for abuse of its dominant position. TeliaSonera controls the fixed landline (backbone) network reaching all households in Sweden, which is used by TeliaSonera when selling broadband services to consumers. The company also offers access to the landline to its competitors allowing them to compete downstream, a service for which the competitors are charged. In addition to this cost, broadband operators incur expenses e.g. for customer support and administration.

According to the SCA, TeliaSonera has set its access charges and prices to consumers on levels not sufficient to cover its own costs on the retail market. This price strategy, limiting the possibility for new operators to enter the broadband market, allegedly amounted to an abuse of TeliaSonera's dominant position on the wholesale market with a view to enhancing its position on the consumer market. (Case No. T 31862-04, Stockholm district court, pending)

Cartels

Petrol. In February the Market Court imposed fines totaling some €12m on five companies operating in the petrol market (Statoil, OKQ8, Shell, Preem and Hydro) for having infringed the Act by concerted practices on joint alteration of customer rebates.

The court found that representatives of the five companies had met regularly in early autumn of 1999. The purpose of the meetings was to exchange information on the parties' respective rebate

systems, including levels, categories of customers and period. Upon bringing the case to the Market Court, the SCA dropped its claim that the cartel had had severe effects in the market and chose to focus on the companies' object to restrict competition. Although the evidence found was limited, the Court concluded that all the representatives concerned must have been aware of the fact that the concerted practice was anti-competitive. This case is considered to be the biggest cartel case so far in Swedish public competition enforcement. (Case No. MD 2005:7)

Oil. The SCA has asked the Stockholm district court to impose fines of approximately €40m on two oil companies for having infringed the Act for cartel activity in bitumen sales. (Case No. T 31529-04, Stockholm district court, pending)

Ventilation. In March 2005 fines were imposed in relation to a cartel involving two companies operating on the market for ventilation systems. The infringement consisted in an agreement on prices in connection with procurements for installations of ventilation systems in the forest industry. One of the companies was granted full immunity, while the other was fined a mere €17,000. (Case No. T 11660-03, Stockholm district court)

Civil cases

Validity of 'follow-on' contracts. The main issue at stake in the Boliden Mineral/Fortum case was whether so-called follow-on contracts, i.e. contracts concluded with third parties by individual cartel members as a consequence of the cartel arrangement, should be deemed null and void under the counterpart in Swedish law to Art. 81(2) EC. A number of suppliers of electricity had cooperated and agreed on the terms of a standard form agreement concerning deliveries of electricity to their respective customers. The standard form agreement contained a price adjustment clause, which regulated the fraction to be passed on to customers in the event of an alteration in energy taxation. Subsequently one of the suppliers, Fortum, concluded an agreement including the price adjustment clause with Boliden (the customer). Following two energy tax increases, Boliden sought to escape payment of the fractions passed on to it under the agreement by claiming nullity under Art. 81(2).

In a briefly reasoned decision, the Supreme Court stated that "it does not seem possible to give a general answer since [the validity of the follow-on contract] will depend for instance on the

connection between the prohibited agreement [the horizontal one] and the follow-on agreement as well as the importance in each case of protecting the public interest of a functioning competition in the marketplace". In the view of the possibilities of imposing fines and damages and order infringers to cease violations, the Court concluded that only agreements or terms of agreement which are directly caught by the prohibition in Art. 81(1) can, in turn, be deemed null and void under Art. 81(2). At least, said the Court, this should be a 'starting point', and the circumstances of the case at hand did not justify a departure from that rule. Given that neither the horizontal agreement at issue nor the follow-on agreement between Boliden and Fortum infringed Art. 81(1), the latter could not be declared void under Art. 81(2). (Decision of the Supreme Court of December 23, 2004, Case No T-2280-02)

Legislation

Amendments to the Swedish Competition Act

Extension of parties entitled to damages. With effect from August 1, 2005, the parties entitled to claim damages for injury suffered as a result of an infringement of Arts. 81 and 82 (and their counterparts in Swedish law) is extended. Prior to the amendment, the category of potential plaintiffs was restricted to 'another undertaking or a contracting party'. This limitation has now been removed, meaning that basically anyone who can prove a relevant injury is entitled to compensation. The amendment also includes an extension of the limitation period after which damages can no longer be claimed. The previous period of five years has been replaced by a 10-year-period applicable from the time the damage occurred.

The principal aim behind the amendments is to enhance the reparative effect of the competition rules. Although antitrust damages cases in Swedish courts thus far are very rare, it is hoped that the recent enactment of a class action act will facilitate such proceedings. The extension of the category of parties entitled to damages is also said to increase the Act's preventive effect.

Extended fact-finding powers for the SCA. Likewise with effect from August 1, 2005, the SCA has been granted additional fact-finding powers. Subject to approval by the Stockholm district court, 'dawn-raids' may now be carried out in the private homes of board members and employees of the company in question. The purpose is to align Swedish law with EC competition law.

Effectiveness of the SCA's case-handling

The Swedish Government has appointed the President of the Swedish Administrative Court of Appeal, Sten Heckscher, to analyse to what extent it would be possible and feasible to rationalise various forms of proceedings governed by the Act. *Inter alia*, the assessment will focus on whether the SCA itself should be empowered to impose fines on companies for infringements (at present vested in the Stockholm district court at first instance), whether the Swedish merger control rules (still containing the 'old' dominance test) should be aligned with the recent changes in the EC rules, and whether at least some antitrust infringements should be criminalised. (The report is due on November 1, 2006.)

Authors:
Tommy Pettersson, Partner
Magnus Gustafsson, Associate
Mannheimer Swartling
Norrmalmstorg 4, Box 1711
111 87 Stockholm
Sweden
Tel: +46 8 505 765 00
Fax: +46 8 505 765 01
Email: tpe@msa.se / mag@msa.se
Website: www.mannheimerswartling.se