THE DOMINANCE AND MONOPOLIES REVIEW

SIXTH EDITION

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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PREFACE

In last year's edition of *The Dominance and Monopolies Review*, we noted that abuse of dominance rules appeared to be entering a phase of more rapid development. For once, our predictions were not far off the mark. 2017 saw authorities reach decisions imposing record fines based on novel theories of harm applied to rapidly changing markets; overlapping parallel investigations have become the norm, rather than the exception; and 'hipster antitrust' – a call to replace the consumer welfare standard with a broader public interest test – has emerged as a serious challenge to contemporary economic orthodoxy. Carl Shapiro recently went so far to claim that 'antitrust is sexy again'.[1]

The sixth edition of *The Dominance and Monopolies Review* seeks to navigate these choppy waters. As with previous years, each chapter summarises the abuse of dominance rules in a jurisdiction, provides a review of the regime's enforcement activity in the past year, and offers a prediction regarding future developments. From the thoughtful contributions of the specialist chapter authors, we identify four trends.

First, we observe growing clamour on both sides of the Atlantic for more competition enforcement. In May 2017, Senator Elizabeth Warren stated: 'It's time for us to do what Teddy Roosevelt did – and pick up the antitrust stick again. Sure, that stick has collected some dust, but the laws are still on the books.' In September, *The Economist* argued that 'the world needs a healthy dose of competition to keep today's giants on their toes and to give others in their shadow a chance to grow'. And *The New York Times* has associated declining competition with rising inequality: 'with competition in tatters, the rip of inequality widens'.

These statements are sometimes accompanied by a plea to abandon consumer welfare as the lodestar of antitrust in favour of a broader, multi-factored public interest test – and even a 'fairness' test.[2] The underlying concern is that large corporations wield too much influence, collect too much data and undermine traditional industries by siphoning off the large majority of profits. The response, it is argued, should be to break up these companies, which would, according to Scott Galloway, 'oxygenate' the economy and 'prune [the] firms [that have] become invasive, cause premature death and won't let other firms emerge'.[3]

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1 Carl Shapiro, 'Antitrust in a Time of Populism', 24 October 2017, available at https://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf.

2 M Dolmans and W Lin, 'Fairness and Competition Law, a Fairness Paradox', *Concurrences* No. 4-2017 4, 2017, available at https://www.concurrences.com/fr/revue/issues/no-4-2017/articles/fairness-and-competition-law-a-fairness-paradox-85119.

3 Scott Galloway, 'The Case for Breaking Up Amazon, Apple, Facebook and Google,' 8 February 2018, available at http://www.stern.nyu.edu/experience-stern/faculty-research/case-breaking-amazon-apple-facebook-and-google.

We are concerned that many of these calls seek to address broader societal problems – such as widening wage inequality, declining democratic institutions, and rising global populism and intolerance – rather than a problem in the competitive process.[4] We do not think that a reduction of competition is the cause or effect of these societal issues. Attempting to use antitrust to address problems not directly related to competition would backfire. Antitrust laws are ill-suited for remedying political problems in society, and introducing political objectives into antitrust risks politicising enforcement, reducing legal certainty, and undermining confidence in the foundations of antitrust.

Instead, enforcement should always focus on whether a dominant firm engages in conduct that departs from legitimate competition on the merits and that excludes equally efficient rivals. That is a fact-intensive inquiry that requires balancing procompetitive business justifications with exclusionary conduct. The analysis turns on the specific conduct at issue and its effects in the market,[5] not the size of a firm or its success or reach into other areas, or political issues.

In April 2018, Daniel Crane published a fascinating case study applying modern antitrust principles to the rise of fascism in 1930s Germany.[6] The study is especially germane given today's calls to broaden the consumer welfare standard to help arrest the decline in contemporary democracy. Crane argues that applying contemporary economically-orientated antitrust principles could have prevented the rise of *IG Farben* – the chemical cartel that supported the rise of Nazism and the perpetuation of its atrocities. He concludes: 'If the *Farben* story can be generalized—an important caveat since this is just the beginning of an inquiry—that would suggest that antitrust law need not be reformulated to safeguard political liberalism, that what is good for consumers is good for democracy.'

Secondly, the past year has seen authorities pursue an increasing number of excessive pricing cases. In the UK, the Competition and Markets Authority (CMA) fined Pfizer and Flynn £85 million for suddenly increasing the prices of an anti-epilepsy drug; the CMA has two other excessive cases against Actavis and Concordia in the pipeline. In China, the National Development and Reform Commission imposed fines on two companies for engaging in excessive pricing in the pharmaceutical sector. In Italy and in Spain, and at the European Commission, excessive pricing cases concerning Aspen's pricing of cancer drugs are ongoing.

Excessive pricing cases present the familiar paradox that it is not illegal to hold a monopoly; the natural consequence of a monopoly is to price above the competitive level; and finding a price above the competitive level to be illegal treats the monopoly as illegal. The excessive pricing cases observed during the past year traverse this paradox by following specific fact patterns in the pharmaceutical industry. In each case:

a the price rises were sudden and substantial;

b the products concerned were essential or had very high demand inelasticity;

4 M Dolmans, R Zimbron, J Turner, 'Pandora's box of online ills: technology solutions, regulation, or competition law?', *Concurrences* No. 3-2017 (colloquium, Pembroke College, Oxford, 22 May 2017), available at http://www.rpieurope.org/Events2017/Dolmans2.pdf.

5 Alexander Waksman, 'Bad Science, Abuse and Effects in Online Markets', *CPI*, 29 November 2017, available at https://www.competitionpolicyinternational.com/bad-science-abuse-and-effects-in-online-markets.

6 Daniel Crane, 'Antitrust and Democracy: A Case Study from German Fascism', Law and Economics Research Paper Series, University of Michigan, Paper No. 18-009, April 2018.

c the products had been in the market for a long time; and
d the price rise does not appear to be explained by cost or market changes.

It is not obvious that these findings could be transposed to other situations. Hence, in his opinion in *AKKA/LAA* (the *Latvian collecting society* case), Advocate General Wahl advised: 'there is simply no need to apply that provision [excessive pricing] in a free and competitive market: with no barriers to entry, high prices should normally attract new entrants. The market would accordingly self-correct.' Accordingly, in our view, excessive pricing cases will (and should) remain rare and exceptional, other than where there are long-term barriers to entry, as in patents that are essential for standards. We hope that the renewed appetite to bring such cases does not stretch the concept of an exploitative abuse to address policy issues beyond the scope of competition law.

Thirdly, the past year was notable for the European Court of Justice's long-awaited judgment in the *Intel* case. Intel had offered customers discounts if they exclusively installed its chipsets in categories of their computers. The European Commission found this to be abusive and imposed a €1 billion penalty. The EU General Court upheld the European Commission's decision, treating Intel's arrangements as akin to *per se* abusive. The Court of Justice has set that judgment aside, making clear that competition rules do not seek to protect less-efficient rivals or prevent them leaving the market. Instead, what matters is an 'exclusionary effect on competitors considered to be as efficient' as the dominant firm.

Advocate General Wahl in his *Orange Polska* opinion and the Court of Justice in its subsequent *MEO* judgment have reaffirmed the importance of establishing anticompetitive effects as a necessary element of an infringement of Article 102 TFEU, emphasising once more that only the exclusion of equally-efficient competitors is problematic. This mantra now appears to be firmly entrenched in the minds of the EU courts, and it will be interesting to see how the European Commission and national authorities react.

The European Commission, for example, appears to take the view that *Intel* largely imposes a procedural requirement, with Commissioner Vestager noting that 'in practical terms, our main conclusion is that you won't see fundamental change'. The European Commission has also argued that 'The benefit of ascertaining whether something is, in fact, true, is not necessarily worth the cost'.[7] However, an effects analysis can be conducted quickly and efficiently: in last year's *Ice Cream* case, for example, the UK CMA opened and closed an investigation in six months, and conducted an effects analysis in a 13-page decision. The European Commission, for its part, frequently conducts detailed economic analyses – under significant time pressures – when assessing mergers. Stricter standards ought to apply when analysing unilateral conduct, because rights of defence are fully engaged.

Fourthly, we could not let this editorial pass without commenting on the divergent global approach to investigating Google's conduct in search. Over the past few years, courts and authorities in the UK, Germany, Brazil, Canada, the US and Taiwan have held that Google's search designs are procompetitive. Last year, the Competition Commission of India joined the consensus by rejecting complaints against Google's search designs and ranking of search results (the CCI identified a narrow concern with the way that Google labels its Flights Commercial Unit, asking for Google to display an enhanced disclaimer). Similarly, in

7 European Commission submission to OECD, Roundtable on Safe Harbours and Legal Presumptions in Competition Law, 5 December 2017, ¶ 15.

December 2017, the Russian Federal Antimonopoly Service authority dismissed complaints against Google's search designs.

Against this background, the European Commission's decision to impose on Google a record-breaking fine of €2.42 billion looks increasingly like an outlier, and perhaps a politically inspired one. The European Commission considers that the different way that Google ranks and displays groups of ads for product offers compared to free results for comparison shopping services amounts to unlawful favouring.

Google has appealed the decision to the General Court in Luxembourg. In Google's view, the product ads at issue are enhanced ad formats that help users find relevant products and are more efficient for advertisers. Showing ads in clearly marked advertising space separate from free results is not favouring; it is how Google monetises the free search service it offers to users. In addition, Google has no obligation to supply rivals with access to its search results pages because it is not an essential facility. Google also points to a thriving product search space, where Amazon (not Google) is the leading player. Finally, while the Court of Justice has espoused the equally efficient competitor benchmark, nowhere does the European Commission's *Shopping* decision discuss whether supposedly marginalised comparison shopping services were equally efficient.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this sixth edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

Maurits Dolmans and Henry Mostyn
Cleary Gottlieb Steen & Hamilton LLP
London
May 2018

Chapter 24

SWEDEN

Marcus Glader and Trine Osen Bergqvist[1]

I INTRODUCTION

Chapter 2, Article 7 of the Swedish Competition Act[2] prohibits the abuse of a dominant position. The provision reads as follows: 'Any abuse by one or more undertakings of a dominant position on the market shall be prohibited.'

Such abuse may, in particular, consist in:

a directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions;

b limiting production, markets or technical development to the prejudice of consumers;

c applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

d making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial usage have no connection with the subject of such contracts.'

The Competition Act entered into force on 1 November 2008. The prohibition against the abuse of a dominant position has remained intact since it was introduced in the former Competition Act[3] in 1993. It corresponds to Article 102 of the TFEU, which applies in parallel to the Swedish provision if the dominant position covers a substantial part of the internal market and the abuse may affect trade between EU Member States.

The Competition Act is enforced by the Swedish Competition Authority (SCA). Neither the legislator nor the SCA has issued any formal guidance on the interpretation of the prohibition. In practice, the SCA and the Swedish courts interpret Swedish and EU case law.

II YEAR IN REVIEW

i Judgments from the Swedish courts

Last year,[4] no judgments regarding abuse of a dominant position were delivered by the court of last instance (i.e., the Patent and Market Court of Appeal). The Patent and Market Court, which is the court of first instance, delivered two judgments. These cases are briefly described below.

1 Marcus Glader is a partner and Trine Osen Bergqvist is a specialist at Vinge.

2 The Swedish Competition Act (2008:579).

3 The former Competition Act (1993:20).

4 1 January 2017 to 31 March 2018.

Swedish Competition Authority v. Swedish Match North Europe AB [5]

On 8 February 2017, the Patent and Market Court upheld the SCA's finding that Swedish Match had abused its dominant position on the market for the sale of wet tobacco (*snus*) to retailers and imposed fines amounting to 38 million Swedish kronor.

The case concerned a new system for shelf labels that Swedish Match introduced in its *snus* coolers in October 2012. Swedish Match owned a majority of the *snus* coolers placed in the retailers' stores, but had agreed to let competing *snus* suppliers use parts of the shelf space in the coolers to sell their competing brands. According to the new shelf label system, the competitors were forced to either follow a detailed shelf label template, or have their labels replaced by generic grey/white labels. According to Swedish Match, the new system was introduced to make the increasingly disparate and gaudy labelling more tidy and uniform in its coolers. The system was implemented in about one-third of the market before it was discontinued in April 2013, after the SCA had initiated an investigation.

The Court noted that Swedish Match had more than 80 per cent of the *snus* market. However, as the market shares were declining, the Court found it necessary to consider all the relevant aspects of the market before concluding that Swedish Match had a dominant position.[6]

As regards the alleged abuse, considering that traditional marketing is significantly restricted by the Tobacco Act, shelf label marketing was deemed to be of particular competitive importance to the *snus* suppliers. In these circumstances, the Court considered the new shelf label requirements basically amounted to a marketing prohibition in the *snus* coolers, for which there were no effective countermeasures available for Swedish Match's competitors.

Although the shelf label system was discontinued by Swedish Match before it was fully implemented, the Court's assessment of the effects of the system was not limited to the stores in which the system had actually been implemented. The decisive question for the Court was what effects the system would have had, if it had been fully implemented. The Court concluded that the system was capable of restricting price and brand competition and increasing barriers to entry and expansion. It also found that the system was based on an apparently anticompetitive strategy, the primary purpose of which was to reduce price communication and limit Swedish Match's loss of market shares to low-price competitors.

The judgment has been appealed to the Patent and Market Court of Appeal. The case was heard from 8 May to 1 June 2018.

Swedish Competition Authority v. Nasdaq AB et al [7]

On 15 January 2018, the Patent and Market Court rejected the SCA's request to impose fines on four companies within the Nasdaq group for abuse of a dominant position.

Nasdaq is the operator of the Swedish, Norwegian and Finnish stock exchanges. Following the EU Markets in Financial Instruments Directive, which entered into force in 2007, the former national stock exchange monopolies in Europe were exposed to competition from multilateral trading platforms (MTFs). For a new MTF, achieving a critical mass of

5 Case PMT 16822-14, *Swedish Competition Authority v. Swedish Match North Europe AB*.

6 Swedish Match had a large number of 'must-have' products and was deemed to be an unavoidable trading partner for the retailers. This, together with the restricted marketing possibilities for tobacco products, led the Court to conclude that the barriers to entry and expansion were relatively high. The retailers' buyer power was not sufficient to conclude that Swedish Match did not have a dominant position on the market.

7 Case PMT 7000-15, *Swedish Competition Authority v. Nasdaq AB et al*.

liquidity is crucial. One category of customers that may contribute to increased liquidity is high-frequency traders. For these traders, physical proximity to the matching engine of the marketplace is often important to reduce risk caused by time lag in the execution of transactions. It is therefore common that marketplaces offer their customers the opportunity to co-locate with the market place (i.e., placing the trading equipment in the same data centre facility as the matching engine of the marketplace).

Shortly after a new entrant, Burgundy, was established in the Nordics, it wanted to move its matching engine to the same location where Nasdaq already had its matching engine along with the trading equipment of a large number of customers. When Nasdaq was informed in October 2010 that Burgundy had finalised negotiations with data centre supplier Verizon concerning the rental of a neighbouring space, Nasdaq contacted Verizon and expressed its dissatisfaction. Nasdaq informed Verizon that, if Burgundy moved in, Nasdaq would move its matching engine from the data centre. Eventually, Verizon decided to withdraw from the negotiations with Burgundy.

In May 2015, the SCA initiated legal proceedings and requested that four different companies in the Nasdaq group pay fines totalling 29 million Swedish kronor. The SCA claimed that Nasdaq's use of coercive methods to exclude Burgundy from the data centre, which made it harder for Burgundy to compete with Nasdaq, was abusive. The SCA argued that the conduct constituted a 'naked restriction', which harmed both Burgundy and customers without improving Nasdaq's own offering. It was therefore not necessary to demonstrate negative effects on competition. In any case, the conduct led to both actual and potential negative effects on competition. The SCA submitted that if Burgundy had been allowed to lease space for its matching engine in the same data centre, the co-located traders would also have been able to get fast and cheap connections to Burgundy. This could have contributed to increased liquidity for Burgundy and increased competitiveness in relation to Nasdaq.

The Patent and Market Court upheld the SCA's finding that Nasdaq had a dominant position in the EU and EEA-wide market for services relating to the trade of Swedish, Danish and Finnish equities, but it did not agree that Nasdaq's conduct constituted an abuse. The Court noted that the SCA did not argue that the relevant data centre was an essential facility, or that the data centre agreements between Nasdaq and Verizon were anticompetitive as such. As regards the questioned conduct, the Court noted that the interference in a contractual relationship between a competitor and a third party may, in principle, constitute an abuse. However, the Court found no support in the case law that such conduct constitutes a 'naked restriction', for which it is not necessary to demonstrate anticompetitive effects. With reference to the CJEU's judgment in *Intel*,[8] the Court questioned the concept of 'naked restrictions' under Article 102.

The effects of the conduct were analysed in relation to two different counterfactuals, both of which were found to be implausible. In the first scenario, where customers would cross-connect their trading equipment to Burgundy through Nasdaq's co-location service, the Court reviewed Nasdaq's agreements with Verizon and the co-location customers, and concluded that Nasdaq would have been entitled to refuse such cross-connections. In the second scenario, where customers would connect to Burgundy through a network provider present in the data centre, the Court found insufficient proof that Burgundy had such

8 Case C-413/14 P *Intel v. European Commission*, EU:C:2017:632.

intentions. Against this background, the Court concluded that Nasdaq's conduct constituted competition on the merits. Rather than abusing power derived from its dominant position, Nasdaq had acted in accordance with its contractual rights.

The judgment has been appealed to the Patent and Market Court of Appeal.

ii SCA cases

Last year[9], the SCA closed six investigations concerning abuse of a dominant position, only one of which led to a finding of infringement. Currently, as of 21 May 2018, the SCA has two active investigations.

Decisions during the past year

Sector	Conduct	Case opened*	Decision
Dairy products†	Restrictions of the right to deliver organic milk to other dairies than the dominant dairy; violation of previous commitment decision	September 2015	May 2017: previous commitment decision revoked;‡ investigation closed§
Online advertisement of cars¶	Tying or bundling of services related to online advertisement of cars	September 2015	June 2017: investigation closed with reference to self-correcting measures
Charity lotteries#	Exclusivity arrangements in agreements between a charity lottery and its beneficiaries	April 2013	November 2017: investigation closed
Locks**	Loyalty rebates and margin squeeze	August 2013	November 2017: investigation closed
Waste management††	Termination of agreement with competitor concerning recycling stations	September 2016	February 2018: finding of infringement; order to revoke termination of agreement
Fuel‡‡	Application of discriminating terms	December 2017	March 2018: investigation closed

* 'Case opened' refers to the date on which the authority opened its investigation (where known) or announced that it had opened an investigation
† Case 630/2015 and 210/2017
‡ Case 210/2017
§ Case 630/2015
¶ Case 601/2015
# Case 263/2013
** Case 494/2013
†† Case 583/2016
‡‡ Case 657/2017

Currently active investigations

As of 21 May 2018, there are two active investigations: *Coffins*,[10] which involves royalty rebates, was opened in May 2017; and *Train tickets*,[11] which involves the online advertisement of train tickets, was opened in April 2018.

9 1 January 2017 to 31 March 2018.

10 Case 318/2017.

11 Case 230/208.

III MARKET DEFINITION AND MARKET POWER

i Market definition

Neither the legislator nor the SCA have adopted guidelines on how to define the relevant market. In its decisions and judgments, the SCA and the courts regularly refer to EU case law and the Commission's notice on the definition of the relevant market.[12]

The purpose of the market definition in abuse cases is to assess whether the undertaking in question has the possibility to prevent effective competition from being maintained on the market by giving it the power to behave to an appreciable extent independently of its competitors.[13]

The SSNIP test has been accepted by the courts as an established method for defining the relevant market.[14] A SSNIP test may, however, be misleading in cases regarding abuse of dominance if the test is based on a price that is already above the competitive level (the 'cellophane fallacy'), or if the market is characterised by strong network effects.[15] In practice, the assessment is based on a number of circumstances, including not only quantitative evidence of substitution, but also qualitative aspects such as the qualities of the products and their intended use.[16] Market definitions in previous cases may provide guidance, but are not precedential.[17]

ii Market power

The term 'dominant position' is interpreted the same way as it is in Article 102 TFEU. As regards a definition of the term, the preparatory works to the previous Competition Act (preparatory works)[18] refer to the judgment of the Court of Justice of the European Union (CJEU) in United Brands, in which a dominant position was defined as:

> *a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.*[19]

12 See, for instance, the Market Court's judgment in MD 2013:5, *TeliaSonera v. Swedish Competition Authority*, 12 April 2013, page 38; and the Patent and Market Court's judgments in case PMT 16822-14, *Swedish Competition Authority v. Swedish Match North Europe*, 8 February 2017, page 134, and case PMT 7000-15, *Swedish Competition Authority v. Nasdaq AB et al*, 15 January 2018, page 22. See also the SCA's decision in case 583/2016, *FTI*, 2 February 2018, page 12. Even the preparatory works refer to the said notice, see Government Bill 2007/08:135, page 71.

13 Judgment from the Market Court, MD 2013:5, *TeliaSonera v. the Swedish Competition Authority*, 12 April 2013, page 38.

14 See, for instance, MD 2013:5, *TeliaSonera v. Swedish Competition Authority*, 12 April 2013, page 38; and the Patent and Market Court's cases PMT 16822-14, *Swedish Competition Authority v. Swedish Match North Europe AB*, 8 February 2017, page 135, and PMT 7000-15, *Swedish Competition Authority v. Nasdaq AB et al*, 15 January 2018, page 22.

15 Judgment from the Patent and Market Court, PMT 7000-15, *Swedish Competition Authority v. Nasdaq AB et al*, 15 January 2018, page 23.

16 See, for instance, MD 2013:5, *TeliaSonera v. Swedish Competition Authority*, 12 April 2013, page 38.

17 See the Patent and Market Court's judgment in case PMT 7000-15, *Swedish Competition Authority v. Nasdaq AB et al*, page 26, which referenced to OECD, Market Definition, DAF/COMP(2012)19, page 87.

18 Government Bill 1992/93:56, page 85.

19 Case C-27/76 *United Brands Company et al v. Commission of the European Communities*, ECLI:EU:C:1978:22, pages 65–66.

The term 'dominant position' includes both single and collective dominance.[20]

The assessment of dominance is based on a number of circumstances that are not individually decisive. A company's market shares are a natural starting point for the analysis. Market shares above certain thresholds may lead to presumptions of dominance.[21]

Despite the existence of market share presumptions, the assessment of dominance is usually based on a full assessment of all the relevant facts in the case, including, in particular:

a barriers to entry and expansion;
b advantages (financial, technological, regulatory, historical, etc.);
c vertical integration;
d presence in neighbouring markets;
e whether the company is an unavoidable trading partner; and
f whether customers have counterweighing buyer power.

In the two last cases regarding abuse of a dominant position, the Patent and Market Court refrained from relying on a market share presumption, despite high market shares.[22]

The courts have also referred to the European Commission's guidance paper on exclusionary abuses for further guidance on the term 'dominant position'.[23]

IV ABUSE

i Overview

The prohibition against the abuse of a dominant position does not define the term 'abuse'; the type of abuses mentioned in the prohibition are only examples, and do not constitute an exhaustive list. For a definition of abuse, both the SCA and the Swedish courts regularly refer to the CJEU's judgment in *Hoffman-La Roche*, in which an abuse was defined as:

> *an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of markets where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.*[24]

20 Like Article 102 TFEU, the prohibition covers abuse by 'one or more undertakings'. In MD 2011:28, *Uppsala Taxi 100 000 AB v. Europark Svenska AB et al*, 23 November 2011, the Market Court considered that Europark and Swediavia, by virtue of their agreement concerning the taxi allocation system at Airlanda airport, had a collective dominant position.

21 According to the preparatory works to the former Competition Act (Government Bill 1992/93:56, pages 85–86), market shares above 40 per cent constitute a clear sign of dominance; market shares above 50 per cent lead to a presumption of dominance; and market shares above 65 per cent lead to a presumption that is almost impossible to rebut, in particular if the competitors are relatively small.

22 Case PMT 16822-14, *Swedish Competition Authority v. Swedish Match North Europe AB*, 8 February 2017, page 144, and case PMT 7000-15, *Swedish Competition Authority v. Nasdaq AB et al*, 15 January 2018, page 85.

23 See, for instance, the Patent and Market Court's judgment in case PMT 16822-14, *Swedish Competition Authority v. Swedish Match North Europe AB*, 8 February 2017, page 140.

24 Case C-85/76, *Hoffman-La Roche & Co AG v Commission*, ECLI:EU:C:1979:36, page 91.

The prohibition covers both exclusionary and exploitative abuses.

Over the past decade, the enforcement of the prohibition has gradually shifted from being rather legalistic to being more effect-based. In 2016, the SCA adopted a new prioritisation policy for its enforcement, which states that the most important factor for prioritising cases is the potential harm to competition and consumers.[25] It may also be noted that the Patent and Market Court in a recent judgment questioned the existence of 'naked restrictions', that is, unilateral restrictions that are so harmful to competition that there is no need to show anticompetitive effects to establish an abuse.[26]

Evidence of an anticompetitive strategy is not sufficient *per se* to establish an abuse, but in practice it seems to play a rather important role.[27] The SCA has used evidence of anticompetitive intent to argue that conduct does not constitute competition on the merits,[28] and that a dominant company has considered it likely that the conduct is capable of having anticompetitive effects.[29] The Patent and Market Court has taken evidence of anticompetitive intent into account in its assessment of a conduct's effects on competition.[30]

ii Exclusionary abuses

Although the prohibition covers both exclusionary and exploitative abuses, the SCA's enforcement focuses on exclusionary abuses. The SCA's enforcement policy states that the SCA prioritises unilateral conduct that is capable of excluding effective competition. When deciding whether conduct is sufficiently harmful to warrant an investigation, particular consideration is given to the share of the market affected by the conduct and, in cases where the foreclosure concerns an input, to what extent the input is essential to enable effective competition. When it comes to price-based conduct, the SCA considers whether the pricing is capable of foreclosing as efficient competitors.[31] Thus, although as-efficient competitor tests are not strictly necessary to establish an abuse, the SCA regularly performs such tests in cases regarding price-based abuse to decide whether an intervention is warranted.[32]

iii Exploitative abuses

Exploitative abuses are covered by the prohibition. Cases regarding pure exploitative conduct are, however, rare, in particular in public enforcement. Following the adoption of the SCA's

25 The prioritisation policy is available at the SCA's website, http://www.konkurrensverket.se/globalassets/english/about-us/english_prioritisation_policy_for_enforcement.pdf

26 The Patent and Market Court's judgment in case PMT 7000-15, *Swedish Competition Authority v. Nasdaq AB et al*, 15 January 2018.

27 In case PMT 16822-14, *Swedish Competition Authority v. Swedish Match North Europe AB*, 8 February 2017, several pages of the Patent and Market Court's judgment are devoted to the question of whether the conduct was based on an anticompetitive strategy.

28 See the SCA's summons application in case 815/2014, *Swedish Competition Authority v. Swedish Match North Europe AB*, 9 December 2014, page 383 with further references.

29 Ibid, page 385 with further references.

30 See the Patent and Market Court's judgment in case PMT 16822-14, *Swedish Competition Authority v. Swedish Match North Europe AB*, 8 February 2017, page 183.

31 http://www.konkurrensverket.se/globalassets/english/about-us/english_prioritisation_policy_for_enforcement.pdf

32 See, for instance, the SCA's decision in case 494/2013, *Assa AB et al*, 22 November 2017.

new prioritisation policy in 2016, which does not even mention exploitative abuse, the SCA has not initiated any investigations or legal proceedings regarding pure exploitative conduct. Cases regarding exploitative abuse are more likely to occur in private litigation.[33]

iv Discrimination

Like Article 102 TFEU, the Swedish provision prohibits the application of 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. The prohibition applies not only to discriminatory prices, but also to other discriminatory terms. It covers discrimination of a dominant company's competitors (first-line discrimination) as well as discrimination of its customers (second-line discrimination). The latter form of discrimination (sometimes referred to as 'pure discrimination) is less likely to lead to foreclosure of effective competition, and thus less likely to be prioritised by the SCA.[34] Such cases are more likely to occur in private litigation.[35]

V REMEDIES AND SANCTIONS

i Overview

The main remedies and sanctions against abuse of a dominant position are:

a administrative fines;
b fine orders;
c orders imposing obligations (under threat of a fine for default);
d commitment decisions;
e nullity; and
f damages.

33 The most recent example of a case regarding pure exploitative abuse is a case from 2011 concerning a 'sign fee' imposed by the airport operator Swedavia for pre-ordered taxis at Arlanda airport. The fee was imposed on taxis that picked up customers in the arrival hall with a sign with the customer's name on it. When the complaint was rejected by the SCA on priority grounds, the complainant brought successful private actions to the Market Court. In a judgment delivered on 23 November 2001, MD 2011:28, the Market Court found that there was no 'necessary connection' between the fee and the pre-ordered taxi traffic. Without considering whether the fee was excessive, the Court found that the fee was 'unfair' and thus abusive. Following the judgment, the SCA submitted a summons application with a request for fines. In its judgment delivered on 9 June 2016 in case T 9131-13, the request was dismissed by Stockholm City Court. The Court agreed that the fee was anticompetitive, but found that it was objectively justified by capacity issues at the airport. The SCA chose not to appeal the judgment.

34 http://www.konkurrensverket.se/globalassets/english/about-us/english_prioritisation_policy_for_enforcement.pdf

35 See, for instance, MD 2011:2, *Stockholm Transfer Taxi in Stockholm AB v. Swedavia AB*, 2 February 2011, concerning the alleged discriminatory allocation of taxi lanes at Arlanda airport. When the complaint was rejected by the SCA on priority grounds, the complainant brought private actions in the Market Court. Considering that the taxi space outside Arlanda was limited, the Market Court agreed that Swedavia was obliged to ensure that the allocation of taxi lanes was neutral from a competition perspective, but it did not agree that the allocation was discriminatory. The Court found that the allocation was based on customer demand and that it did not lead to a competitive disadvantage for the complainant. Accordingly, the conduct did not constitute an abuse.

ii Administrative fines

An undertaking that intentionally or negligently infringes the prohibition against abuse of a dominant position may be ordered to pay administrative fines. The SCA does not have the authority to impose fines itself, but the Patent and Market Court may do so at the SCA's request.[36]

When determining the amount of the administrative fines, account shall be taken of the gravity and duration of the infringement, and possible aggravating or mitigating circumstances.[37] The gravity is based primarily on the nature of the infringement, the size and significance of the market, and the infringement's actual or potential impact on competition.[38] The amount may be increased if there are aggravating circumstances (if the company has persuaded other companies to participate, or has played a leading role in the infringement) and reduced if there are mitigating circumstances (if the company's participation has been limited).[39] Besides circumstances referable to the infringement, particular account shall be taken of the undertaking's financial status, whether the undertaking has previously infringed any of the competition prohibitions and whether it has quickly discontinued the infringement.[40]

The SCA has published a memorandum describing its method of setting administrative fines.[41] The purpose of the memorandum is to provide greater clarity on how the SCA interprets and applies the provisions on administrative fines in the Competition Act. The memorandum does not pre-empt the interpretations made by the courts.

The fines may not amount to more than 10 per cent of the undertaking's total annual turnover.[42] The highest fine ever imposed by final judgment in a Swedish case concerning abuse of dominance is 35 million Swedish kronor.[43]

iii Fine order

Instead of bringing legal proceedings requesting administrative fines, the SCA may in some cases issue a fine order with the same effect as a legally binding judgment. Such orders may only be issued if the undertaking consents thereto and the SCA considers that the material circumstances regarding the infringement are clear.[44] According to the preparatory works, fine orders should not be used in cases with legal questions of precedential interest.[45]

The opportunity for the SCA to issue fine orders has only been used in a limited number of cases. To date, the SCA has not issued any fine orders in cases regarding abuse of a dominant position.

36 Chapter 3, Article 5 of the Competition Act.

37 Chapter 3, Article 8 of the Competition Act.

38 Ibid.

39 Chapter 3, Articles 9–10 of the Competition Act.

40 Chapter 3, Article 11 of the Competition Act.

41 The memorandum is published at the SCA's website, http://www.konkurrensverket.se/globalassets/english/competition/method-of-setting-administrative-fines.pdf

42 Chapter 3, Article 6 of the Competition Act.

43 MD 2013:5, *TeliaSonera AB v. Swedish Competition Authority*, 12 April 2013.

44 Chapter 3 Articles 16–19 of the Competition Act.

45 Government Bill 2007/08:135, page 261.

iv Orders imposing obligations

A company that abuses its dominant position may be ordered by the SCA to terminate the abuse.[46] According to the preparatory works, such orders may not be more far-reaching than what is necessary to eliminate the anticompetitive effects of the infringement.[47] The SCA may impose behavioural obligations, such as the obligation to end an agreement or stop a certain conduct, but it may not impose structural obligations.

If there are 'particular grounds', the SCA may issue an interim order for the period until a final decision is adopted.[48] According to the preparatory works, interim measures should be taken in cases where the infringement is 'more serious' and may lead to 'significant negative effects' if the company is not ordered to terminate the conduct immediately. Account shall also be taken of the effects on the company addressed by the order.[49]

A final or interim order to terminate an abuse may be imposed under threat of a fine for default.[50]

v Commitment decision

If the undertaking investigated offers commitments, the SCA may adopt a commitment decision stating that there are no longer grounds for action.[51] As long as the decision applies, the SCA may not issue orders imposing obligations regarding the conduct covered by the decision.[52]

vi Special right to legal action

If the SCA decides not to investigate a complaint, or to end an investigation without issuing an order, undertakings affected by the conduct are entitled to institute private proceedings before the Patent and Market Court, and to request that the Court orders the company to end the abuse.[53]

vii Nullity

An agreement that infringes the prohibition against abuse of a dominant position is null and void.[54] This means that the agreement cannot be enforced by a court.

46 Chapter 3, Article 1 of the Competition Act.

47 Government Bill 1992/93:56, page 90.

48 Chapter 3, Article 3 of the Competition Act.

49 Government Bill 1997/98:130, page 62.

50 Chapter 6, Article 1 of the Competition Act.

51 Chapter 3, Article 4 of the Competition Act.

52 See, for instance, the SCA's decisions dated 3 May 2017 in case 630/2015 and 210/2017, *Arla Foods amba*. In February 2016, Arla introduced restrictions in the right for members of the Arla group to supply organic milk to other diaries than Arla. The SCA initiated an investigation regarding abuse of a dominant position (case 630/2015). Considering that the members' right to supply milk to competing dairies was subject to a commitment decision from 2010, which was unlimited in time, the SCA found that it was not entitled to issue an order against the restrictions introduced in 2016. The new restrictions were, however, deemed to constitute a violation of the said commitment decision. For the SCA to be able to intervene against the new restrictions, the SCA revoked the commitment decision (case 210/2017).

53 Chapter 3, Article 2 of the Competition Act.

54 This does not follow directly from the Competition Act, but is stated in the preparatory works, Government Bill 2003/04:80, page 54.

viii Damages

An intentional or negligent abuse of a dominant position may lead to liability to pay damages.[55]

VI PROCEDURE

i Overview

The Swedish procedural rules differ significantly from the EU's procedural rules and from those of other EU Member States. In particular, the decision-making powers of the SCA are less extensive than those of the European Commission and most other European competition authorities. As regards decisions to impose administrative fines, a pure judicial model applies, meaning that the first instance decision (both on substance and fines) is taken by the court. The SCA may take decisions requiring that an infringement be brought to an end, but if such orders are appealed, the courts are entitled to make a full review of the case.

ii SCA investigations

SCA investigations are governed by the Competition Act and the Administrative Act.[56] Subject to certain limitations set out in the Public Access to Information and Secrecy Act,[57] a party to an investigation has extensive rights of access to files.

Most SCA investigations regarding abuse of a dominant position start with a tip-off or a complaint from a customer, supplier or competitor. *Ex officio* investigations occur, but are quite rare. The SCA does not investigate all tips and complaints that it receives: the process of selecting cases for investigation is described in the SCA's Prioritisation Policy for Enforcement.[58] If the SCA decides not to open an investigation, the case is closed with no further explanation other than a short reference to the Authority's prioritisation policy. If the SCA decides to open an investigation, the case is allocated to the Market Abuse Unit, a specialised unit that handles cases regarding abuse of dominance, vertical restraints and competition neutrality.

The SCA has extensive investigative powers. It may order parties and third parties to provide information and documents, conduct interrogations and, upon prior authorisation from the Patent and Market Court, conduct unannounced inspections at the premises of companies.[59]

Before the SCA institutes proceedings with request for fines, the party must be given the opportunity to comment on the SCA's draft summons application.[60] The Competition Act contains no corresponding provision regarding orders to impose obligations, but the SCA has nonetheless developed a practice of communicating draft orders before adopting a final decision.

55 The liability to pay damages for competition law infringements is described further under Section VII.

56 The Administrative Act (1986:223).

57 The Public Access to Information and Secrecy Act (2009:400).

58 http://www.konkurrensverket.se/globalassets/english/about-us/english_prioritisation_policy_for_enforcement.pdf.

59 Chapter 5, Articles 1 and 3 of the Competition Act.

60 Chapter 3, Article 5 of the Competition Act.

A party that receives a draft summons application or a draft order may request an oral hearing of the case. The main purpose of the oral hearing is to complete the party's written submissions with oral comments and ensure that the SCA's decision is well-supported.[61]

When the investigation is completed, the main findings and a proposed decision are presented to the Director General, who makes the final decision on whether to intervene or close the case.

The SCA does not have the opportunity to give negative clearance. Thus, when the SCA decides to close a case, the closing decision normally states that the SCA has not taken a final stand on whether the conduct constitutes an infringement.

The duration of the SCA's investigations varies from case to case, depending on the complexity of the case and whether the investigation leads to the finding of an infringement. Investigations regarding abuse of dominance tend to take longer than investigations of other competition infringements. In cases that lead to the finding of an abuse, the investigation may take several years.[62]

iii Early resolutions and settlement procedures

The SCA does not have the possibility to make settlement agreements. If a party consents thereto, the SCA may issue a fine order with the same effect as a legally binding judgment, but the SCA is not entitled to grant reductions in the fines in return for such consent.

iv Appeals and judicial review

The right to appeal decisions adopted by the SCA is governed by Chapter 7, Article 1 of the Competition Act. Orders by the SCA to impose obligations may be appealed. Decisions not to investigate a case may not be appealed, but undertakings affected by the conduct may institute private proceedings and request that the court issues an order to end the conduct.[63] Fine orders may under certain circumstances be set aside.[64]

As of 1 September 2016, the competent court in competition law cases is the Patent and Market Court, a division of Stockholm District Court that is specialised in competition, patent and market law.[65]

Judgments and decisions by the Patent and Market Court may be appealed to the Patent and Market Court of Appeal, which is a division of Svea Court of Appeal. Leave to appeal is required. Decisions and judgments by the Patent and Market Court of Appeal in competition cases may normally not be appealed. The Patent and Market Court of Appeal may, however, allow the judgment to be appealed to the Supreme Court if the Supreme Court's review is important from a precedential perspective.[66]

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61 The oral hearing is described on the SCA's website (Swedish only), http://www.konkurrensverket.se/omossmeny/om-oss/sa-arbetar-vi/beslut-och-kvalitetssakring/muntligt-forfarande.

62 From recent investigations leading to the finding of an abuse, it may be noted that the SCA's investigation of FTI, Swedish Match and Nasdaq took approximately one-and-a-half years, two-and-a-half years and four-and-a-half years, respectively.

63 Chapter 3, Article 2 of the Competition Act.

64 According to Chapter 3, Article 19 of the Competition Act, a fine order for which consent has been given shall upon appeal be set aside under the preconditions in Chapter 59, Section 6, First Paragraph of the Code of Judicial Procedure.

65 Chapter 8, Article 1 of the Competition Act.

66 Chapter 1, Article 3 of the Act on Patent and Market Courts (2016:188).

The courts' review is not limited to a legal review: both the Patent and Market Court and the Patent and Market Court of Appeal make a full review of the case.

The number of judgments delivered by the Patent and Market Courts in cases regarding abuse of a dominant position is too limited to make any general conclusions regarding the length of the court proceedings in these types of cases.[67]

VII PRIVATE ENFORCEMENT

A company that intentionally or negligently abuses a dominant position may be held liable to pay damages for the harm caused. The right to claim damages is governed by the Competition Damages Act,[68] which implements the EU Directive on Competition Damages into Swedish law.[69] When the Competition Damages Act entered into force on 27 December 2016, it replaced the previous provisions on competition damages in the Competition Act.

The liability covers compensation for actual loss, loss of profit and interest. The claimant has to demonstrate the existence of an abuse, the extent of the harm, and the existence of a causal link between the abuse and the harm. As opposed to cartels, abuse of a dominant position is not presumed to cause harm. Following the entry into force of the Competition Damages Act, final infringement decisions of the SCA or Swedish courts constitute full proof that an infringement has actually occurred.[70]

Collective actions are available and governed by the Swedish Group Proceedings Act,[71] which is based on an opt-in system.

Last year, three judgments were handed down in cases regarding claims for damages based on abuse of a dominant position: two judgments from Svea Court of Appeal and one judgment from the Patent and Market Court.

The two judgments from Svea Court of Appeal concerned claims for damages against Telia concerning margin squeeze on the broadband market. Whereas Stockholm District Court found in favour of the claimants and awarded damages of 65 million Swedish kronor to Yarps and 240 million Swedish kronor to Tele2, both claims were ultimately rejected by Svea Court of Appeal. In *Yarps*, the Court concluded that Telia's pricing policy did not constitute an abuse, despite the fact that an abuse had already been established by the Market Court.[72]

67 Following the entry into force of the new court system, the Patent and Market Court has delivered two judgments regarding abuse of a dominant position: *Swedish Match* (PMT 16822-14), 8 February 2017, and *Nasdaq* (PMT 7000-15), 15 January 2018. Both judgments have been appealed to the Patent and Market Court of Appeal, and the cases are still pending.

68 The Competition Damages Act (2016:964).

69 Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

70 The Competition Damages Act applies to infringements conducted and harm that arose after the Act entered into force on 27 December 2016.

71 The Swedish Group Proceedings Act (2002:599).

72 Judgment by Svea Court of Appeal in case T 2673-16, *Yarps Network Services AB v. Telia Company AB*, 21 February 2017. In the Market Court's case, MD 2013:5, *TeliaSonera v. Swedish Competition Authority*, 12 April 2013, the Market Court found that Telia's margin squeeze constituted an abuse of a dominant position and ordered Telia to pay fines. As the harm was caused prior to the entry into force of the Competition Damages Act, the new provisions regarding the probative value of infringement decisions of the SCA and Swedish courts were not applicable.

In *Tele2*, the Court upheld the finding of an abuse, but somewhat surprisingly concluded that the conduct, which involved the application of negative margins over several months, had not caused the harm for which Tele2 claimed compensation.[73] Upon finding that the conduct did not cause the total harm for which Tele2 claimed compensation, the Court rejected the claim without making use of the possibility to estimate a reasonable amount. Both judgments were appealed to the Supreme Court, which decided not to grant leave to appeal.

The judgment from the Patent and Market Court concerned a claim for damages against the data and telecommunication provider Gothnet. When the City of Gothenburg procured data communication services in 2009, Gothnet, which owned fibre connections to a large number of the addresses specified in the procurement, charged its competitor, Net at Once, a wholesale access price that was higher than the price Gothnet offered in the tender. Net at Once argued that Gothnet had abused its dominant position by way of discrimination, margin squeeze or unfair trading conditions. The Patent and Market Court rejected the claim. The Court concluded that the relevant wholesale market was broader than the fibre connections covered by the specific procurement, and Gothnet did not have a dominant position on this broader market.[74] The judgment has been appealed.

Apart from these cases, we are not aware of any ongoing cases regarding competition damages caused by abuse of a dominant position.

There are no general prohibitions against third-party funding of private litigation.

VIII FUTURE DEVELOPMENTS

A key aspect for the future will be how abuse cases are assessed by the new courts in Sweden.[75] Following the entry into force of the new court system on 1 September 2016, no final judgments on abuse of dominance have been delivered. However, it may be noted that so far, the Patent and Market Court of Appeal has sided with the defendant in all competition law cases it has heard.[76] The outcomes in the *Swedish Match* and *Nasdaq* cases are thus being followed with great interest. Considering the complexity of these types of cases, and the time and resources required, it is fair to assume that the outcome of these cases will influence the SCA's future priorities and possibly private enforcement in this field.

73 Judgment by Svea Court of Appeal in case T 5365-16, *Tele2 Sverige AB v. Swedish Competition Authority*, 21 December 2017.

74 Judgment by the Patent and Market Court in case PMT 16599-15, *Net at Once Sweden AB v. Göteborg Energi Gothnet AB*, 2 February 2018.

75 The new court system is described in Section VI.

76 The Patent and Market Court of Appeal has decided on four cases; three cases regarding anticompetitive agreements and one merger case.

Appendix 1

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