SWEDEN

2013 ANTITRUST YEAR IN REVIEW

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LEGISLATIVE DEVELOPMENTS

As of July 2013, a new law on the application of State aid rules in Sweden entered into force.[1] State aid rules, which are set out in Articles 107-108 of the Treaty on the Functioning of the European Union, prohibit advantages in any form whatsoever conferred on a selective basis to undertakings by national public authorities where competition is distorted or may be distorted and the intervention is likely to affect trade between Member States. The new Swedish Act governs the obligations of both providers and beneficiaries of State aid and primarily codifies the case law of the Court of Justice of the European Union. However, it also introduces provisions on, among other things, the means of recovery of unlawful aid in Sweden.

MERGERS

In December 2012, Assa Abloy ("Assa"), an international safety products and door opening solutions company, announced their acquisition of a wholesale company of locks, alarms and security services, Prokey. The transaction was not subject to mandatory notification as only one out of two thresholds for notification was met. Nor was it voluntarily notified by the parties. However, in January 2013, the Swedish Competition Authority (the "SCA") used its power to order the notification of a concentration where there are particular grounds.[2] The SCA found that this was called for due to Assa's very strong market position in manufacturing as well as at the wholesale level (through its subsidiary, Copiax) for safety products. Following an in-depth review of the matter, the SCA found that the combination of Prokey and Copiax would lead to a monopoly position for Assa in the wholesale market of supply of safety products to locksmiths. This was considered to lead to higher prices, reduced offering and poorer service as well as foreclosure of Assa's competitors at the manufacturing level. The parties argued the failing firm defence with reference to Prokey's economic situation, but it was not accepted by the SCA, which commenced proceedings against the parties to prohibit the merger subject to a default fine of SEK 100 million (approximately USD 15.4 million). Following an unsuccessful attempt to get the case dismissed on procedural grounds, the merger was subsequently abandoned.

The SCA did however clear another merger taking into account e.g. the poor financial situation of the acquired business.[3] In this first of its kind decision, the SCA based its approval on a relevant counter factual different from the present competitive situation, namely one where the acquired business would in any event have disappeared from the market. This three to two merger concerned insurance company KPA's acquisition of the municipal pension business of rival SPP. Comparing the pre- and post-merger scenario, the SCA initially found that the concentration risked significantly impeding competition by strengthening KPA's already dominant position (77%) and removing the competitive pressure exerted by SPP in a market with high barriers to entry. However, following an in-depth review the SCA found that the competitive conditions were highly likely to change in such a way

1 Sw. "Lag (2013:388) om tillämpning av Europeiska unionens statsstödsregler".
2 If the first of the two turnover thresholds are met, but not the second, the parties may voluntarily notify the transaction. In these circumstances, the SCA may also, where it finds that there are particular grounds, order the parties to notify. It is mandatory to comply with such order.
3 SCA Decision dnr 276/2013 of September 4, 2013.

that the situation at the time of the concentration was not relevant for assessing its effects. The acquired business was found to objectively lack the ability to keep running and be highly likely to close down. Furthermore, there was no other realistic buyer of the business. Against this background, the SCA found that the concentration would not lead to a significant impediment to competition and cleared the merger in the second phase review.

The pharmacy market, which was deregulated in 2009, also saw consolidation with no less than two mergers, ApoPharm's acquisition of Vårdapoteket[4] and Oriola-KD's acquisition of Medstop[5]. The market was thus reduced from eight larger players to six, with incumbent Apoteket AB remaining the largest one. Interestingly, the two acquisitions were filed only a few days apart, thereby raising the question of how the SCA will handle parallel acquisitions in the same market. The SCA opted to appraise the concentration first notified (Vårdapoteket) disregarding the subsequent notification (Medstop), i.e. as if Oriola-KD and Medstop were two independent competitors. The SCA thereby used the same approach as the European Commission – "first come, first served". Both transactions were ultimately cleared with no conditions in the first phase review.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In one of few cartel cases brought to court in 2013, the SCA filed a summons application to impose an administrative fine of about SEK 30 million (approximately USD 4.6 million) on three health care companies for alleged coordination in the context of a public procurement of services within clinical physiology and clinical neurophysiology. Aleris is the company which faces the risk of the largest fine of almost SEK 27 million (approximately USD 4 million), while Capio and HjärtKärlgruppen are each facing fines of under SEK 2 million (approximately USD 300,000). The SCA claims that the companies shared information on areas where they planned to submit tenders and also agreed to share the volumes of the contracts notwithstanding the winning tender, a course of conduct which is allegedly confirmed by bilateral cooperation agreements between the companies. The Stockholm City Court's ruling is still awaited.

During the year, the first two court judgments concerning the new rules introduced in 2010 which limit the ability of public bodies to conduct business in a manner that limits competition – the prohibition of anti-competitive sales activities by public undertakings - were handed down. The first case involved the refusal of Räddningstjänsten i Dala Mitt to grant access to training grounds for fire fighters to a private operator. According to the SCA, this refusal distorted competition, but the court found that this was not shown to the requisite standard and rejected the claim.[6] The case has been appealed to the Market Court which has granted leave to appeal. The second case involved municipal bus company Skelleftebuss, which was found to have gone beyond its municipal duties when, in addition to providing public transport, also offered contract bus services to private customers in competition with private actors. The court prohibited Skelleftebuss from pursuing the activities.[7] Another handful of cases concerning the prohibition of anti-competitive sales activities by public entities are currently pending.

4 SCA Decision dnr 234/2013 of May 17, 2013.
5 SCA Decision dnr 246/2013 of May 22, 2013.
6 Stockholm City Court Case T 7924-11, January 30, 2013.
7 Stockholm City Court Case T 8160-11, July 12, 2013.

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ABUSES OF A DOMINANT POSITION

The SCA also sued the Swedish state-owned company in charge of running Arlanda airport, Swedavia, for SEK 340,000 (approximately USD 52,300) for abuse of dominance.[8] The disputed conduct consisted of charging SEK 25 for allowing taxi drivers to pick up customers which had pre-ordered taxis outside the customs clearance area using a badge provided by Swedavia's contractor, EuroPark. The two companies were considered to have a joint dominant position in the market for the provision of a cueing and pick up system at Arlanda airport and, considering that the badge itself cost SEK 0.85, the price charged was found to be excessive. Interestingly, the suit follows the SCA's initial dismissal of a complaint of the very conduct now fined. The complainant therefore took recourse to the Market Court, where they initiated a successful civil claim.[9] The Market Court ordered that the conduct must cease. The SCA subsequently opted to sue Swedavia to impose an administrative fine for the nine-month period up until the conduct ceased. According to the SCA the Market Court's ruling did not preclude imposing the fine since it was not of a criminal type. The subsequent administrative fine therefore did not breach the right not to be punished twice for the same offence ("ne bis in idem"). Rejecting Swedavia's claim that the case should be dismissed on this ground, the Stockholm City Court confirmed the SCA's point of view.

The high profile case against the Swedish telecom incumbent TeliaSonera for abuse of a dominant position by way of margin squeeze was also decided in the second and final instance court, the Market Court. In 2010 the Stockholm City Court imposed a record fine of SEK 144 million (approximately USD 22 million) on the company for margin squeeze in the ADSL broadband market during 2000-2003.[10] On appeal, the Market Court found, in contrast to the Stockholm City Court, that the abuse had occurred during limited periods during 2000-2003 and only towards specific competitors. According to the Market Court, dial-up connection to Internet exerted a competitive constraint on the ADSL broadband market during a part of the period, under which TeliaSonera was not dominant. Furthermore, interestingly, in contrast to EU case law, the Market Court did not accept the application of the LRAIC-method (long run average incremental costs) when assessing the alleged margin squeeze. Accordingly, the court found that the fine was to be reduced to SEK 35 million (approximately USD 5.4 million). Follow-on damage claims are also pending before the Stockholm City Court.

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8 Summon application dnr 378/20013 of June 18, 2013.
9 Market Court Case A 2/10, MD 2011:2, February 2, 2011.
10 Market Court Case A 8/11, MD 2013:5, April 12, 2013.