# THE DOMINANCE AND MONOPOLIES REVIEW

NINTH EDITION

**Editors**
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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# PREFACE

Even before covid-19 disrupted the world as we knew it, competition law was at a crossroads, facing far-reaching and sometimes contradictory calls for reform – including with respect to monopolisation and abuse of dominance. This is driven in large part by developments in the digital sector, as well as an increasing awareness of the urgency of the climate crisis, environmental degradation and loss of biodiversity.

Some, such as President Macron and Chancellor Merkel, have argued that there is too much competition from abroad, and advocate for more permissive enforcement to facilitate 'European champions' to emerge: 'We need to adapt the EU competition law: [It is] too focused on consumer rights and not enough on EU champions' rights.'

Others maintain that there is too little competition, enforcement has been too permissive, and the rules should be tightened. Senator Elizabeth Warren, for example, has argued that 'competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere.' Similarly, Professor Joseph Stiglitz contends that 'current antitrust laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace'.

A third set of commentators believes that competition policy is misdirected, that the historic focus of competition law has been too narrow, and that the consumer welfare standard should be expanded to take account of social, industrial, environmental and other considerations (sometimes referred to as 'hipster antitrust').

And a fourth critique, voiced by Maurice Stucke and Ariel Ezrachi, maintains that many of today's problems result from too much 'toxic' competition overall, driven by ideologues, lobbyists and privatisation, and that we need to promote a kind of 'noble competition', where rivals mutually strive for excellence.

To address these challenges, a dizzying array of reports has emerged, commissioned by governments in the US, EU, UK, Germany, France, Australia and elsewhere. And from those reports, a constellation of ideas has emerged to overhaul competition law, including: reorienting the goals of antitrust policy away from the consumer welfare standard towards a broader societal welfare test; reversing the burden of proof in merger control; per se bans on certain categories of conduct in the digital sector (including prophylactic controls on vertical integration); lowering the standard of judicial review to give competition authorities more leeway; injecting political oversight into competition law enforcement; loosening the standard to impose duties to share data with rivals; introducing market study regimes; allowing authorities to impose remedies without formally establishing an infringement; and establishing mandatory codes of conduct for digital platforms.

Where does this all leave busy practitioners and businesses that are trying to navigate the complex and constantly evolving rules concerning abuse of dominance? Helpfully, this ninth edition of *The Dominance and Monopolies Review* seeks to provide some respite, providing an accessible and easily understandable summary of global abuse of dominance rules. As with previous years, each chapter – authored by specialist local experts – summarises the abuse of dominance rules in a jurisdiction, provides a review of the regime's enforcement activity in the past year, and sets out a prediction for future developments. From those thoughtful contributions, we identify three main trends to watch out for over the next year.

**Sustainability and abuse of dominance**

The past year has seen sustainability become a new and important focus for competition regulators. The Dutch competition authority started the trend by setting 'sustainability' as a key priority and proposing a more permissible review for certain environmental agreements. The Hellenic Competition Commission followed, advocating for far-reaching policy changes to promote sustainability goals across all areas of competition policy. The European Parliament has called on the European Commission to 'urgently take the concrete action needed in order to fight and contain the threat of climate and environmental catastrophe before it is too late'. As Commissioner Vestager has noted, 'everyone is called upon to make our contribution to the necessary change – including enforcers'. The European Commission initiated a consultation, and the Organisation for Economic Co-operation and Development held several events to discuss the integration of climate and environmental goals in competition policy. Chinese competition law already provides an explicit exemption for 'agreements between undertakings which they can prove to be concluded for . . . serving public interests in energy conservation, environmental protection and disaster relief'.

At core, the cause of the climate crisis is a market failure: the cost of pollution of air, water and land, and the damage wrought by greenhouse gas emissions to the climate today and in the future are generally not included in the price of goods and services. Because the market price of a polluting product excludes the social cost, production is higher than the social optimum, taking into account that consumption of natural resources now exceeds what the regenerative capacity of the Earth can sustain.

To address this market failure, the discussion around including environmental goals in competition law has, so far, mostly focused on state aid, horizontal cooperation and merger control. For example, it has been argued that the consumer welfare analysis in merger control could include whether the merger could be expected to raise or lower the environmental price that consumers pay, which is not reflected in the market price in monetary terms or in quality (which could take account of non-market externalities such as emissions). Likewise, horizontal guidelines could be revised to allow cooperation in pursuit of environmental goals, where individual producers are willing to invest in greening production, but may be held back by the fear that they will be undercut by those who do not invest, or by cheaper imports.

There is no inherent reason, however, why sustainability could not be incorporated into an abuse of dominance assessment, too. This could be done in a number of ways.

First, pricing analysis (for example, for loyalty rebates, predatory pricing, margin squeeze) could take into account the actual costs incurred by the dominant company and by society, including not only the total costs of production, but also the environmental cost. A company may be able to price lower than its rivals because it is employing polluting or greenhouse gas emitting technology, at great societal cost, which is not reflected in its traditional variable and fixed costs.

Second, a dominant provider with an incumbent polluting technology might commit an abuse by excluding rival, greener technologies by means other than competition on the merits. Such conduct should already violate dominance rules. In this case, however, 'competition on the merits' should be defined so as to exclude competition that relies on avoidable pollution or greenhouse gas emissions. Also, the assessment should take into account that consumer harm would be even higher from the abuse because of the exclusion of a greener technology. The theory would be not dissimilar to that pursued by the European Commission in its *Car Emissions* cartel investigation, albeit that case concerns horizontal collusion to restrict competition on innovation for emission cleaning systems.

Third, there may be *sui generis* abuses that involve unsustainable business practices that also restrict competition. For example, a dominant producer might employ cheap and polluting means of production, and thereby price cheaper than its rivals. A dominant raw materials producer might make misleading representations to an environmental agency to secure a licence to extract minerals. And a dominant chemical producer could illegally dump products in rivers, thereby gaining an advantage over rivals that dispose of waster safely. All these might conceivably be an abuse of dominance because they distort competition, via means other than competition on the merits. The fact that they may also infringe other laws is no bar to bringing an abuse of dominance claim, just as a dominant factory owner burning down a rival's factory can be both arson and an abuse of dominance. Rivals should have a cause of action, especially where environmental rules are inadequate or insufficiently enforced.

Fourth, there may be situations where conduct that might otherwise be abusive could be excused because of sustainability-based objective justification, just as Article 101(3) of the Treaty on the Functioning of the European Union is being considered to exempt otherwise anticompetitive agreements that promote sustainability. For example, a dominant e-commerce platform might prioritise in its ranking green products (including green technologies sold by its downstream subsidiary) over polluting products (sold by its rivals). Provided that greenwashing is avoided, a regulator might consider that even if such conduct has the potential to restrict competition, it should be objectively justified because of the overall benefits it creates for society.

**Regulation versus antitrust enforcement**

Over the past year, regulators and legislators have moved from consultation to action, as they have set out competing proposals for regulation to address perceived competition problems caused by concentration in digital markets. In broad terms, the concerns with digital markets are that certain market characteristics (such as network effects and tipping, lack of switching, and lock-in effects) lead to high concentration, insurmountable entry barriers and exploitation of market power, especially (but not only) when combined with abusive conduct.

The German 10th Amendment to the Act against Restraints of Competition introduced new rules to tackle companies with 'cross-market significance'. The UK is setting up a digital markets unit to create an enforceable code of conduct for companies with 'strategic market status'. And perhaps most significantly, the EU, with its draft Digital Markets Act (DMA), is formulating *ex ante* dos and don'ts for large 'gatekeeper' platforms.

It is perhaps understandable that regulators and legislators seek to go down the route of regulation, rather than pursuing individual cases. Regulatory rules can potentially reach quicker outcomes than antitrust cases, which can be long and complex. As Commissioner

Vestager has explained as the motivation of the DMA: 'We need regulation to come in before we have illegal behaviour and to be able to say these are the rules of the game and this is what you must do.'

At the same time, regulation can also come with risks to competition and society. This is because ill-crafted or insufficiently flexible regulation can impede innovation, snuffing out pro-competitive conduct before it takes place or raising barriers to entry. As the UK Competition and Markets Authority (CMA) has explained, 'Greater regulation is – on average – associated with less competition. For instance, countries with lower levels of product market regulation tend to have more competitive markets and enjoy higher rates of productivity and economic growth.'

Accordingly, it is particularly important that new rules of the road allow companies the opportunity to justify their behaviour, on the grounds of consumer benefits or that alternatives would lead to harm. For example, the CMA recognises that 'conduct which may in some circumstances be harmful, in others may be permissible or desirable as it produces sufficient countervailing benefits', and it has advised that conduct should be exempted under its new code of conduct if it 'is necessary, or objectively justified, based on the efficiency, innovation, or other competition benefits it brings'. Likewise, the new German rules allow a company to justify its practices.

It is therefore troubling that the draft DMA does not contain any analogous provision. As currently framed, the prohibited behaviours and obligations are extremely broad. They touch on almost all aspects of competition and have far-reaching consequences for consumers in Europe. But the draft DMA includes no safeguards to protect against unintended adverse consequences, even to protect users from privacy violations or exposure to fraudulent activity, or preventing other harmful behaviour. It is difficult to see the benefit of this approach. It is positively harmful.

A proportionality safeguard would be a simple way to improve the draft regulation, without impeding any of its objectives. Including a proportionality safeguard would also be consistent with general principles of EU law. Under Article 16 of the Charter of Fundamental Rights (which is a binding source of EU law under Article 6(1) of the Treaty on European Union), companies (even alleged gatekeeper platforms) have a right to conduct their own business. Interference with that right is only permitted if it is proportionate. By implication, it should therefore be open to companies to justify their practices, on the grounds of proportionality. A blanket refusal to engage with justifications at all is disproportionate to the aims of the DMA, and harmful.

Advocate General Pitruzzella rightly commented in March 2021 on the draft DMA that 'too much rigidity could hinder efficiency and introduce a disproportionate limitation on the freedom to conduct a business'. Rather, rebuttable presumptions together with justification defences strike the balance between 'the need for certainty' and 'the need to avoid false positives in antitrust enforcement and undue limitations of fundamental rights'.

**Mandatory arbitration as a mechanism to solve FRAND disputes**

A third theme of the past few years' dominance enforcement is the continued global focus on the licensing of standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms. Refusing a licence or seeking an injunction is considered an abuse of dominance, unless the SEP owner is a 'willing licensor' or the implementer is an 'unwilling licensee'. In August 2020 in the UK, the Supreme Court handed down an important judgment in *Unwired Planet*, finding that an English court can set the royalty rates and

terms of a FRAND licence on a worldwide basis, to determine whether a licensor or licensee is 'willing'. In Europe, the EU Commission's expert group wrote a 230-page report on the licensing and valuation of SEPs on FRAND terms.

A problem has emerged, however, that the current legal framework does not incentivise parties to reach a negotiated outcome as to the FRAND rate. This is because for both implementers and SEP holders, the best alternative to a negotiated agreement (the BATNA) is to litigate: for SEP holders, the BATNA is usually to seek an injunction and offer a high royalty, thus threatening a high penalty while limiting risk by appearing to follow the sequence requirements of the European Court of Justice's *Huawei/ZTE* judgment. Implementers, on the other hand, may have an incentive to challenge the validity or infringement of the patents at issue. So the BATNA of an implementer may therefore be to seek judgment for invalidity or non-infringement, thus threatening long delays, while limiting risk by also appearing to follow the sequence of the *Huawei/ZTE* case.

As a result, parties are not incentivised to reach settlements as to the FRAND rate. In our view, the best way to address this problem is to ensure that the BATNA is no longer a positive outcome, but a possible negative one for each party. This could be achieved by ensuring that, absent agreement within a reasonable time period, a third party sets the rate for the parties (for example, by standard-setting organisations requiring arbitration or rate setting as a fallback for the FRAND undertaking). Parties tend to be much more willing to negotiate and ready to reach agreement on a balanced solution if the fallback is someone else deciding the rate.

For this reason, a refusal to agree to rate setting should be seen as rebuttable presumption of being an 'unwilling' licensor (and an abuse of dominance) for the purpose of the question of whether an injunction is available on an SEP. Conversely, an offer to have an independent third party set the rate and key terms should be seen as a rebuttable presumption of being a 'willing' licensor or licensee. The advantage of such mandatory arbitration as a fallback is that it encourages a reasonable outcome. Both parties have an incentive to agree on a rate to avoid an arbitrator setting a rate for them. And even if they cannot agree on a rate, the rate will be set. Abuse of dominance can thus be avoided. Arbitration in this respect is better than litigation because it is faster, more flexible, reduces forum shopping and results in awards that are enforceable worldwide. Arbitration also allows the parties to address IP rights implicating multiple national jurisdictions in a single proceeding. We believe that this solution could solve the endless FRAND disputes and end abusive hold-up and hold-out.

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 ninth edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

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June 2021

**Chapter 22**

# 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.'

The 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 the 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 Treaty on the Functioning of the European Union (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

Last year,[4] the SCA's enforcement activities against abuse of dominance were remarkably low. No infringement decisions were adopted and no judgments regarding abuse of dominance were delivered by the Swedish courts. One investigation regarding suspected predatory pricing in the insurance industry was closed without finding an infringement.[5] According to

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

2 The Swedish Competition Act (2008:579).

3 The former Competition Act (1993:20).

4 1 April 2020 to 31 March 2021.

5 Decision dated 18 November 2020 in Case 446/2019.

public records at the time of writing, the SCA has one ongoing investigation in the market for aviation fuel.[6] There were no pending court cases at this time.

During the year, the SCA conducted a sector inquiry on the digital platform markets in Sweden. The purpose was to acquire greater knowledge of the competitive conditions on such markets. Five selected markets were analysed, along with the SCA's previous competition cases concerning digital markets. Studies were made of 16 different digital platforms, including CDON, Tradera, Storytel, Foodora, Apple, Google and Facebook. The results were published in February 2021.[7] The inquiry shows that digital platform markets can be very complex. There are significant differences both between platforms within the same markets and between different platform markets. It is therefore difficult to draw any general conclusions. However, in line with what other international expert panels and competition agencies have already found, the SCA considers that a number of different competition concerns can arise on digital platform markets. The SCA's case experience shows that it is often possible to address such issues under the current competition law framework. However, according to the SCA, the current rules have several built-in limitations. In respect of the prohibition of abuse of a dominant position, the SCA notes that it can be difficult to calculate market shares in platform markets and it questions whether the traditional method for assessing dominance provides an accurate picture of competition on such markets. Due to limitations in the existing competition rules, the SCA considers that there is a need for a flexible supplementary legal framework at a Swedish level to effectively remedy competition concerns on platform markets. The legislative proposal that has been made for regulating large digital platforms at an EU level[8] has the potential to remedy some competition concerns, although the SCA finds that the potential need for additional regulation should be investigated at a Swedish level. The SCA does not see the need for *ex ante* rules to promote competition on digital platforms at a Swedish level (i.e., over and above the proposed EU regulation), but it believes it would be beneficial if the supplementary framework would enable interventions that apply to whole markets rather than only to specific market players and make it possible to remedy structural market failures instead of prohibiting specific conduct.

## 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.[9]

6 Case 726/2020.

7 The report is available on the Swedish Competition Authority (SCA) website, www.konkurrensverket.se/en/Competition/--ovrigt--/market-study-of-digital-platforms/.

8 Draft Digital Markets Act, published on 15 December 2020.

9 See, for instance, the Patent and Market Court of Appeal (PMCA) judgments in PMÖÄ 1519-19, *Svenska Förpacknings- och Tidningsinsamlingen AB v. SCA*, 28 February 2020, p. 10; the Market Court's judgment in MD 2013:5, *TeliaSonera AB v. SCA*, 12 April 2013, p. 38; and the Patent and Market Court (PMC) judgments in Case PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, p. 134; Case PMT 7000-15, *SCA v. Nasdaq AB et al*, 15 January 2018, p. 22; and Case PMÄ 2741-18, *Svenska Förpacknings- och Tidningsinsamlingen AB v. SCA*, 21 January 2019, p. 16. Even the preparatory works refer to the said notice, see Government Bill 2007/08:135, p. 71.

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.[10]

The small but significant and non-transitory increase in price (SSNIP) test has been accepted by the courts as an established method for defining the relevant market.[11] 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.[12] 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.[13] Market definitions in previous cases may provide guidance, but are not precedential.[14]

### ii Market power

The term 'dominant position' is interpreted the same way as it is in Article 102 of the TFEU. As regards a definition of the term, the preparatory works to the previous Competition Act (preparatory works)[15] 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.*[16]

The term 'dominant position' includes both single and collective dominance.[17]

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.[18]

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10 Judgment from the Market Court, MD 2013:5, *TeliaSonera AB v. SCA*, 12 April 2013, p. 38.

11 See, for instance, MD 2013:5, *TeliaSonera AB v. SCA*, 12 April 2013, p. 38; and the PMC cases PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, p. 135 and PMT 7000-15, *SCA v. Nasdaq AB et al*, 15 January 2018, p. 22 (not changed by the PMCA in PMÖD PMT 1443-18, *SCA v. Nasdaq AB et al*).

12 Judgment from the PMC, PMT 7000-15, *SCA v. Nasdaq AB et al*, 15 January 2018, p. 23 (not changed by the PMCA in PMÖD PMT 1443-18, *SCA v. Nasdaq AB et al*).

13 See, for instance, MD 2013:5, *TeliaSonera AB v. SCA*, 12 April 2013, p. 38.

14 See, for instance, the PMC's judgment in Case PMT 7000-15, *SCA v. Nasdaq AB et al*, p. 26, which referenced OECD, Market Definition, DAF/COMP(2012)19, p. 87.

15 Government Bill 1992/93:56, p. 85.

16 Case C-27/76, *United Brands Company et al v. Commission of the European Communities*, EU:C:1978:22, pp. 65 and 66.

17 Like Article 102 of the Treaty on the Functioning of the European Union, 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 Arlanda Airport, had a collective dominant position.

18 According to the preparatory works to the former Competition Act (Government Bill 1992/93:56, pp. 85 and 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.

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 two recent cases, *Swedish Match*[19] and *Nasdaq*,[20] the Patent and Market Court (PMC) refrained from relying on a market share presumption, despite high market shares. However, following an appeal of the judgment in *Swedish Match*, the Patent and Market Court of Appeal (PMCA) stated that market shares of more than 70 per cent in volume and value provided a strong indication that Swedish Match had a dominant position, and that it would have to be exceptionally easy for new players to enter the market, or expand, for Swedish Match not to be deemed to have a dominant position.[21]

The courts have also referred to the European Commission's guidance paper on exclusionary abuses for further guidance on the term 'dominant position'.[22]

## 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.*[23]

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

19 Case PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, p. 144.

20 Case PMT 7000-15, *SCA v. Nasdaq AB et al*, 15 January 2018, p. 85. The judgment was upheld by the PMCA in PMÖD PMT 1443-18, *SCA v. Nasdaq AB et al*, but the PMCA did not assess whether Nasdaq had a dominant position.

21 Case PMT 1988-17, *Swedish Match North Europe AB v. SCA*, 29 June 2018, p. 7.

22 See, for instance, the PMC's judgment in Case PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, p. 140.

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

prioritising cases is the potential harm to competition and consumers.[24] It may also be noted that the PMC 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.[25]

Evidence of an anticompetitive strategy is not sufficient per se to establish an abuse, but in practice it has sometimes seemed to play a rather important role.[26] The SCA has used evidence of anticompetitive intent to argue that conduct does not constitute competition on the merits,[27] and that a dominant company has considered it likely that the conduct is capable of having anticompetitive effects.[28] The PMC has taken evidence of anticompetitive intent into account in its assessment of a conduct's effects on competition.[29]

### 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.[30] Therefore, 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.[31]

### iii Exploitative abuses

Exploitative abuses are covered by the prohibition. Cases regarding pure exploitative conduct are, however, rare, in particular in public enforcement. From 2016 to 2020, the SCA's prioritisation policy did not even mention exploitative abuse, and the SCA has not initiated any investigations or legal proceedings regarding pure exploitative conduct. In the latest version of the Prioritisation Policy, which was adopted on 12 February 2020, an amendment

24 The prioritisation policy, which was updated on 12 February 2020, is available at the SCA's website, www.konkurrensverket.se/globalassets/english/about-us/english_prioritisation_policy_for_enforcement.pdf.

25 The PMC's judgment in Case PMT 7000-15, *SCA v. Nasdaq AB et al*, 15 January 2018. The judgment was upheld by the PMCA in PMÖD PMT 1443-18, *SCA v. Nasdaq AB et al*, 28 June 2019.

26 In Case PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, several pages of the PMC's judgment are devoted to the question of whether Swedish Match's conduct was based on an anticompetitive strategy but with a different motivation. The judgment was set aside by the PMCA in Case PMT 1988-17, *Swedish Match North Europe AB v. SCA*, dated 29 June 2018 because the conduct was deemed objectively motivated. It was thus not necessary to determine whether the conduct was based on an anticompetitive strategy.

27 See the SCA's summons application in Case 815/2014, *SCA v. Swedish Match North Europe AB*, 9 December 2014, p. 383 with further references.

28 ibid., p. 385 with further references.

29 See the PMC's judgment in Case PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, p. 183. The judgment was set aside by the PMCA in Case PMT 1988-17, *Swedish Match North Europe AB v. SCA*, dated 29 June 2018, as the conduct was deemed to be objectively justified.

30 See footnote 24.

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

was made regarding exploitative abuse stating that the SCA may prioritise exploitative abuse if there are clear signs that a dominant firm is directly exploiting customers or consumers as a result of non-functioning competition.[32] However, the SCA has not initiated any in-depth investigations of exploitative conduct following the amendment. Cases regarding exploitative abuse occasionally occur in private litigation.[33]

### iv Discrimination

Like Article 102 of the 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] These 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* orders imposing obligations (under threat of a fine for default);
*c* infringement decisions;
*d* commitment decisions;
*e* nullity; and
*f* damages.

32 See footnote 24.

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 See footnote 24.

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.[36] Following a legislative amendment on 1 March 2021, the SCA has decision-making powers in cases regarding fines.

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] As well as 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 SCA has initiated a review of the memorandum to ensure that it reflects recent legislative changes and case law.

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 Orders imposing obligations

A company that abuses its dominant position may be ordered by the SCA to terminate the abuse.[44] 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.[45] The SCA has the power to impose behavioural obligations (e.g., order the undertaking investigated to end an agreement or stop a certain conduct) as well as structural obligations (e.g., order the undertaking to divest operations or trademarks).

If there are 'particular grounds', the SCA may issue an interim order for the period until a final decision is adopted.[46] According to the preparatory works, interim measures should be

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, 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. SCA, 12 April 2013.
44 Chapter 3, Article 1 of the Competition Act.
45 Government Bill 1992/93:56, p. 90.
46 Chapter 3, Article 3 of the Competition Act.

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.[47]

A final or interim order to terminate an abuse may be imposed under threat of a fine for default.[48]

### iv Infringement decision

As of 1 March 2021, the SCA has the power to adopt infringements decisions (i.e., decide that an undertaking has infringed a competition prohibition without taking any measures against the infringement).[49] Such decisions have precedential value in competition damages cases, which means that the infringement as such may not be reassessed.[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 PMC, 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 considered null and void.[54] This means that the agreement, or at least the infringing provisions thereof, cannot be enforced by a court.

47 Government Bill 1997/98:130, p. 62.

48 Chapter 6, Article 1 of the Competition Act.

49 Chapter 3, Article 1(a) of the Competition Act.

50 Chapter 5, Article 9 of the Competition Damages Act (2016: 964).

51 Chapter 3, Article 4 of the Competition Act.

52 See, for instance, the SCA's decisions dated 3 May 2017 in cases 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, p. 54.

### viii Damages

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

## VI PROCEDURE

### i Overview

Following the implementation of Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers (the ECN+ Directive), the SCA now has similar investigative and sanctioning powers as the European Commission and the national competition authorities of other Member States.

### 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 PMC, conduct unannounced inspections at the premises of companies.[59] As of 1 March 2021, it is entitled to impose administrative fines on undertakings that intentionally or negligently violate certain administrative decisions during the SCA's investigation (e.g., by submitting incorrect, incomplete or misleading information, failing to ensure that a representative appears for interrogation, breaking a seal or otherwise obstructing an inspection).[60] Such fines may only be imposed on the undertaking investigated, not on third parties, and may amount to a maximum of 1 per cent of the undertaking's turnover during the previous financial year.[61]

Before the SCA decides to impose fines for competition law infringements, the party must be given the opportunity to comment on the SCA's draft decision.[62] The Competition Act contains no corresponding provisions to communicate draft orders to impose

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

56 The Administrative Act (2017:900).

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

58 See footnote 24.

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

60 Chapter 5, Article 21 of the Competition Act.

61 Chapter 5, Article 23 of the Competition Act.

62 Chapter 3, Article 5 of the Competition Act.

obligations or draft infringement decisions. The SCA has nonetheless developed a practice of communicating draft orders before adopting a final decision and it appears likely that the SCA will communicate draft infringement decisions as well.

A party that receives a draft decision 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.[63]

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.[64]

### iii Early resolutions and settlement procedures

The SCA does not have the power to make settlement agreements. Its previous power to issue fine orders with the same effect as legally binding judgments was repealed on 1 March 2020 when the SCA gained decision-making powers in respect of fines.

### 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. Decisions to impose fines, orders to impose obligations and infringement decisions 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.[65]

As of 1 September 2016, the competent court in competition law cases is the PMC, a division of Stockholm District Court that specialises in competition, patent and market law.[66]

Judgments and decisions by the PMC may be appealed to the PMCA, which is a division of Svea Court of Appeal. Leave to appeal is required. Decisions and judgments by the PMCA in competition cases may normally not be appealed. The PMCA may, however, allow the judgment to be appealed to the Supreme Court if the Supreme Court's review is important from a precedential perspective.[67] To date, this opportunity has only been used in cases concerning procedural issues.

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

64 From recent investigations leading to the finding of an abuse, it may be noted that the SCA's investigations 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.

65 Chapter 3, Article 2 of the Competition Act.

66 Chapter 8, Article 1 of the Competition Act.

67 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 PMC and the PMCA make a full review of the case.

The number of judgments regarding abuse of a dominant position delivered by the courts following the introduction of the new court system is too limited to make any general conclusions regarding the length of the court proceedings. In the three cases in which final judgments have been handed down, the total proceedings lasted from two to four years.[68] Considering the complexity of this type of case, it is fair to assume that court proceedings will take at least two years and most often several years (appeals included).

## 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,[69] which implements the EU Directive on Competition Damages into Swedish law.[70] 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. In contrast 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.[71]

Collective actions are available and governed by the Swedish Group Proceedings Act,[72] which is based on an opt-in system.

To our knowledge, there are no Swedish court cases in which a claimant has been awarded damages for abuse of a dominant position.

Last year,[73] no judgments regarding damages for abuse of a dominant position were delivered.

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

68 Following the entry into force of the new court system, final judgments from the PMCA have been delivered in three cases: *Swedish Match* (PMT 1988-17), in which the court proceedings lasted for three and a half years, *Nasdaq* (PMT 1443-18), which took approximately four years, and *FTI* (PMÖÄ 1519-19), which took approximately two years. The proceedings in the PMC are somewhat lengthier than in the PMCA.

69 The Competition Damages Act (2016:964).

70 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.

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

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

73 1 April 2020 to 31 March 2021.

## VIII FUTURE DEVELOPMENTS

A key aspect for the future is whether the SCA will be able to turn the tide in relation to the negative enforcement trend in the field of abuse of dominance. Following court defeats in all three abuse of dominance cases in which the SCA has intervened over the past few years,[74] the SCA's enforcement activities have been remarkably low. There is currently only one ongoing investigation, but no pending court cases, on abuse of dominance. The PMCA's inclination to dismiss cases brought by the SCA, sometimes on questionable grounds, may have made the SCA less inclined to invest the extensive time and resources needed to investigate these types of cases. It remains to be seen whether the SCA's extended decision-making powers will improve the authority's enforcement. Another key aspect is, of course, whether the SCA's call for supplementary regulation to make it easier to intervene against competition concerns in digital markets will be heard.

74 Following the entry into force of the new court system on 1 September 2016, three cases on abuse of dominance have been finally decided. Two of the cases were upheld by the PMC, but all three were ultimately dismissed by the PMCA. From a third-party perspective, and without access to all the facts, it is difficult to judge the outcome of the cases. However, the fact that two out of three judgments from the lower court have been changed by the court of last instance is notable per se and raises important questions regarding predictability and legal certainty, the effectiveness of the enforcement and the competence of the courts. Even in other competition law cases, the PMCA has sided with the defendants in all competition law cases it has heard.

**Appendix 1**

# ABOUT THE AUTHORS


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Marcus Glader specialises in competition law and is a partner in Vinge's EU, competition and regulatory practice group. Marcus works with all types of EU and competition law matters, and focuses in particular on transactions, abuse of dominance issues and competition law litigation. Marcus has a wealth of international experience after several years in Brussels, including at the European Commission and a leading international firm, before managing Vinge's Brussels office. He is ranked among the top five competition law specialists in Sweden. Marcus holds a doctor of laws degree from Lund University, and is a guest lecturer at Lund University and Stockholm University.


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Trine Osen Bergqvist works as a senior expert in Vinge's EU, competition and regulatory practice group. Before joining Vinge in August 2017, she worked for many years at the Swedish Competition Authority, first as legal counsel in the Legal Department, and later as deputy head of the Market Abuse Unit, which investigates cases regarding abuse of a dominant position. She has many years of experience from working as a lawyer at Swedish and Norwegian law firms. Trine holds an LLM from the University of Bergen (1996) and a master's degree from Stockholm University. She also holds postgraduate diplomas in competition law and economics of competition law from King's College London. She is a member of the Swedish Bar and the Norwegian Bar and is a non-government adviser in the International Competition Network.


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