THE DOMINANCE AND MONOPOLIES REVIEW

Seventh Edition

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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SEVENTH EDITION

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This article was first published in July 2019
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-036-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALLEN & GLEDHILL LLP

ANJARWALLA & KHANNA

ANJIE LAW FIRM

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PREFACE

Each of the past few years' editions of *The Dominance and Monopolies Review* has observed rapid development in abuse of dominance rules. If anything, the past year has seen more developments than ever before, including loud calls for an overhaul of antitrust rules to address perceived challenges raised by the digital economy.

Professor Carl Shapiro argues 'we need to reinvigorate antitrust enforcement in the United States'. US presidential hopeful Elizabeth Warren claims 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'. Nobel Prize economist 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'.

Against this background, governments have commissioned several thoughtful reports on whether competition law should be reformed. These include, in the UK, a report entitled Competition in Digital Markets, by a committee chaired by Professor Jason Furman; in the EU, a report entitled Competition Policy in the Era of Digitisation, written by Professors Heike Schweitzer, Jacques Crémer and Yves-Alexandre de Montjoye; and in Germany, a report entitled Modernising the Law on Abuse of Market Power, by Schweitzer and others. In parallel, greater regulation of the digital sector is already underway through, for example, the General Data Protection Regulation in Europe (which has triggered calls in the US to adopt a comparable framework); an EU platform-to-business regulation; and digital services taxes in France and the UK.

But even as these reports and regulations discuss and formulate new rules, the case law and decisional practice on abuse of dominance has continued to evolve as well. For example, in the EU, the courts reached notable decisions in *MEO*, *Servier* and *Slovak Telekom*, while the Commission continued its active enforcement in cases such as *Google Android*, *Qualcomm* and *Google AdSense for Search*. In the US, the Supreme Court reached its long-awaited decision in *American Express*, while the Californian District Court found that Qualcomm had violated antitrust laws in the landmark judgment of *FTC v. Qualcomm*. In Germany, the Federal Cartel Office identified a novel abuse concerning Facebook's terms and conditions relating to its use of user data. And in China, Brazil, Japan, the UK and other countries, authorities and courts reached several notable decisions – and continue to pursue investigations – in the pharmaceutical sector.

The seventh edition of *The Dominance and Monopolies Review* provides a welcome overview for busy practitioners and businesses who need an accessible and easily understandable summary of global abuse of dominance rules. As with previous years, each chapter – authored by a specialist local expert – 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 themes in 2018 enforcement.

Scrutiny of digital platforms

Digital platforms continue to come under intense antitrust scrutiny. As discussed in the EU chapter, in the *Android* case, the Commission fined Google a record-breaking €4.34 billion for imposing allegedly illegal restrictions on Android device manufacturers. Finding Android dominant in a market that excludes Apple, the Commission claims that Google's pre-installation of its search and browser apps prevents users accessing rival services and forecloses competition. The Commission kept up its focus on Google by also fining it €1.49 billion in a separate case relating to alleged exclusivity clauses in contracts with third-party websites (*AdSense for Search*).

Perhaps even more strikingly, in Germany, the Federal Cartel Office found that Facebook's terms and conditions relating to its collection of user data constitute an exploitative abuse of dominance. Specifically, the Federal Cartel Office – relying on German law principles that a breach of fundamental rights can constitute an abuse of dominance – held that Facebook committed an abuse by combining data from different sources (such as WhatsApp, Instagram and Facebook) without satisfactory user consent. Contrary to some reports, the case was therefore not about the amount of data Facebook collected. Rather, it concerned whether it was lawful for Facebook to combine users' Facebook profiles with data from, for example, WhatsApp without effective user consent.

Interestingly, Commissioner Margrethe Vestager has stated that the *Facebook* decision could not 'serve as a template' for EU action because the case 'sits in the zone between competition law and privacy'. That reflects case law from the European Court of Justice in *Asnef* that 'issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection'. Likewise, in its *Facebook/WhatsApp* decision, the Commission stated that 'privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules'.

Several of the Policy Reports mentioned above recommend stricter regulation of online platforms, and establishing a set of 'pro-competition' *ex ante* rules (in line with calls made by economics professor Jean Tirole for 'participative antitrust'). This may have some benefits over a reliance only on *ex post* enforcement. If designed in cooperation with stakeholders, such *ex ante* rules may enhance consumer welfare better than enforcement in individual cases. But there is a concern about proliferation of unharmonised initiatives in various jurisdictions: online platforms are typically active internationally. They must comply with rules in all countries where they are active, and have to take into account the combined effect of practice codes, platform regulation and reinforced competition enforcement. If they face a combination of policies to make it easier to find intra-platform dominance, impose stricter rules for unilateral conduct, reintroduce form-based abuse principles (or reverse the burden of proof, requiring defendants to prove absence of anticompetitive effects), eliminate a requirement to show consumer harm, show greater tolerance of over-enforcement and 'false positives' – all examples of policy recommendations – the cumulative effect may be stifling.

This concern is even more pressing when combined with procedural proposals to speed up proceedings and make appeals more difficult. While it makes sense to accelerate proceedings and – where appropriate – use interim measures more widely and wisely, this should not be at the expense of due process and the rule of law.

On the other side of the Atlantic, in terms of digital platforms, the past year was notable for the US Supreme Court's decision in *Ohio v. American Express*. As discussed in the US chapter, that case will have significant implications for future monopolisation cases in multi-sided markets. The Supreme Court held that 'anti-steering provisions' in American Express's contracts – which prohibit merchants from encouraging customers to use credit cards other than American Express by, for example, stating that the merchant prefers Visa or Mastercard – do not violate antitrust laws. Importantly, the Court held that competitive effects on both sides of the market need to be considered (merchants and cardholders) when assessing overall effects on competition: identifying a price rise on one side of the market is insufficient to prove anticompetitive effects – one needs to consider the overall effect on the platform as a whole. In this respect, the decision is consistent with the European Court of Justice's *Cartes Bancaires* decision, which finds that it is always necessary to take into consideration interactions between 'the two facets of a two-sided system'.

Focus on pharmaceutical sector

There is a continued focus on the pharmaceutical sector, through a variety of different cases covering both exploitative and exclusionary abuses. In the UK, for example, the Competition Appeal Tribunal (CAT) quashed the Competition and Market Authority's (CMA) landmark 2016 decision to fine Pfizer and Flynn £90 million for charging excessive prices for phenytoin sodium tablets (an anti-epileptic drug), discussed in the UK chapter. The CMA had considered that overnight price increases of 2,600 per cent after the drug was de-branded were excessive and broke competition rules. The CAT found that the CMA applied the wrong legal test for identifying excessive prices. It failed to identify the appropriate economic value of the drug. It also wrongly ignored the price of comparable products, such as the price for phenytoin sodium capsules. Unsurprisingly, the CMA has expressed disappointment with the judgment and is appealing it before the Court of Appeal. The CMA has other excessive pricing cases in the pharmaceutical industry in the pipeline and the direction of those cases may turn on the outcome of the appeal proceedings. Given the increase in exploitative abuses in Europe – with cases at the EU Commission, Germany, France and Italy – there is keen interest in the appeal, and the EU Commission has applied to intervene.

There is enforcement activity in pharmaceuticals outside the sphere of excessive pricing. In its *Remicade* case, the CMA issued a notable no grounds for action decision after issuing a statement of objections, finding that Merck's volume-based discount scheme was not likely to limit competition from biosimilar products. In *Servier*, by contrast, the EU General Court upheld much of the Commission's findings that pay-for-delay agreements between Servier and generic manufacturers relating to its blockbuster drug perindopril constituted restrictions by object contrary to Article 101 of the Treaty on the Functioning of the European Union (TFEU). The judgment is noteworthy for abuse of dominance, however, for three main reasons:

a The judgment – coming in at 1,968 detailed paragraphs – illustrates how the General Court is increasingly subjecting Commission decisions to extremely detailed and thorough judicial review.

b The Court annulled the Article 102 of the TFEU part of the Commission's decision due to errors in the market definition – one of the very few cases where the Commission has not prevailed on market definition at the court level.

c When assessing the anticompetitive effects of the conduct, the Court held it would be 'paradoxical' to permit the Commission to limit its assessment to likely future effects in a situation where the alleged abusive conduct has been implemented and its actual effects can be observed. In this respect, the judgment is consistent with Mr Justice Roth's observation in *Streetmap* that he would 'find it difficult in practical terms to

reconcile a finding that conduct had no anticompetitive effect at all with a conclusion that it was nonetheless reasonably likely to have such an effect'.

Standard-essential patents

The third theme of 2018's enforcement is the continued global focus on the licensing of standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms, especially around Qualcomm's licensing practices. In 2015, China's National Development and Reform Commission fined Qualcomm US$975 million for failing to license its SEPs according to its FRAND promise. In December 2016, the Korean Fair Trade Commission followed suit, fining Qualcomm US$854 million. In January 2018, the EU Commission fined Qualcomm €997 million for making significant payments to Apple on the condition that Apple would not buy baseband chipsets from rivals. And most recently, Judge Koh issued her decision in the *FTC v. Qualcomm* (discussed in the US chapter) finding that Qualcomm violated antitrust laws.

In the US case, the FTC alleged that Qualcomm would only supply its modem chips to mobile phone manufacturers that agreed to a Qualcomm patent licence requiring the customer to pay royalties to Qualcomm even when using modem chips bought from Qualcomm's rivals. The FTC claimed this 'no licence, no chips' policy imposed an anticompetitive tax on competing chips. In her opinion, Judge Koh reached several notable findings:

a The 'no licence, no chips' policy is anticompetitive.

b Qualcomm's provision of incentive funds to manufacturers such as Apple constituted *de facto* exclusive deals that were also anticompetitive.

c Qualcomm's refusal to license its SEPs to other chip suppliers violates its FRAND commitments and is anticompetitive, too. The Court also found that Qualcomm's refusal to license is tantamount to an anticompetitive refusal to deal because it was the termination of a prior, voluntary and profitable course of dealing.

d Qualcomm's royalties for its SEPs are unreasonably high. In particular, Qualcomm's contributions to the standards do not justify its high rates and its SEPs do not drive handset value (and so taking a percentage of handset value is inappropriate).

Overall, the combined effect of these practices was to cause the exit of, or to foreclose, rival chip manufacturers, raise prices for chips, and to slow innovation. The judgment was scant comfort for the many competitors that have, in the meantime, left the modem market, but is important as a benchmark for licensing of SEPs for 5G and the internet of things. The proceedings were remarkable in that they led to an unusual juxtaposition between the US Department of Justice Antitrust Division (led by Makan Delrahim, a former lobbyist for Qualcomm who is recused from any case involving Qualcomm but who has clocked up a high number of speeches in favour of the SEP owners' position) and the US Federal Trade Commission, which was deadlocked and thus allowed the legal proceedings to continue to judgment.

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

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June 2019

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 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.

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).

II YEAR IN REVIEW

i Judgments from the Swedish courts

Last year,[4] one judgment regarding abuse of a dominant position was delivered by the court of last instance (i.e., the Patent and Market Court of Appeal (PMCA)) and one by the Patent and Market Court (PMC), which is the court of first instance. Hearings in *Nasdaq*[5] took place in the PMCA between 5 March and 11 April 2019, and the final judgment is still to be delivered.

Swedish Match North Europe AB v. SCA[6]

The *Swedish Match* case stems from October 2012, when Swedish Match introduced a new system for shelf labels in its coolers for wet tobacco (snus). Swedish Match owned most of the snus coolers placed in the retailers' stores but had agreed to let competing suppliers use parts of the shelf space to sell their competing brands. The new shelf label system forced the competitors to either follow a detailed shelf label template, or have their labels replaced by generic grey and white labels. According to Swedish Match, the system was introduced to make the increasingly disparate and gaudy labelling tidier and more uniform, but the SCA, relying on internal documents from Swedish Match, found that the purpose was to reduce the visibility of the price and restrict competition from low price competitors.

The PMC imposed fines amounting to 38 million Swedish kronor. On appeal, the PMCA upheld the finding that the shelf label system had the capacity to restrict competition but found that the system was objectively justified.

The conduct's capability to restrict competition, which was one of the core questions in the case, was assessed rather briefly by the PMCA. The PMCA merely stated that the restricted marketing possibilities 'may' have effects on competition and that the shelf system was 'thus' capable of restricting competition. This part of the judgment is clearly questionable from an EU law perspective. In *Post Danmark II*, the Court of Justice of the European Union (CJEU) stated (in the context of rebates) that the anticompetitive effects of a conduct must be 'likely' or 'probable' in order for the conduct to fall within the scope of Article 102 TFEU.[7]

The shelf system was, however, somewhat surprisingly deemed to be objectively justified. Traditionally, it has been quite difficult for dominant companies to show that an exclusionary conduct is objectively necessary, but the PMCA found that Swedish Match, as owner of the coolers, was entitled to require that the coolers were not used in a way that could constitute an infringement of the Tobacco Act.

Svenska Förpacknings- och Tidningsinsamlingen AB v. SCA[8]

On 21 January 2019, the PMC upheld an order issued by the SCA against Svenska Förpacknings- och Tidningsinsamlingen AB (FTI) to recall a termination of an agreement with its competitor, TMResponsibilities (TMR).

4 1 April 2018 to 31 March 2019.

5 Case PMT 1443-18, *SCA v Nasdaq AB et al.*

6 Case PMT 1988-17, *Swedish Match North Europe AB v. SCA*.

7 Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, 6 October 2015, ECLI:EU:C:2015:651, Paragraphs 63–74.

8 Case PMÄ 2741-18, *FTI AB v. SCA*.

Swedish rules on producer responsibility require producers to ensure that their packaging materials are collected and recycled. FTI and TMR offer producers the services needed to comply with this responsibility. In 2012, FTI agreed to give TMR access to its nationwide collection system for household packaging. When FTI terminated the agreement without stating reason in 2016, the SCA found that the termination constituted an abuse of a dominant position and ordered FTI to recall the termination.

The Court stated that the *Bronner*[9] criteria are not strictly applicable when the refusal to supply concerns existing customers but noted that the criteria should still be relatively strict. In the absence of an anticompetitive strategy or a particularly improper behaviour, it would not be sufficient to show that the customer is no longer able to compete with the dominant. It would normally be necessary to show that the termination is capable of eliminating all effective competition in the relevant market. The PMC concluded that there were no actual or potential alternatives to FTI's infrastructure and that the termination constituted an abuse of a dominant position.

FTI's contention that the termination was objectively justified was rejected by the Court. FTI argued that the lack of control over the packages collected by TMR negatively affected its ability to apply high environmental standards, establish consumer confidence and protect its trademark; however, the Court concluded that it was not for the dominant company to decide general standards for customer information or general recycling goals. The Court also noted that there were no indications of disloyal or improper behaviour from TMR's side.

The judgment has been appealed.

ii SCA cases

Last year,[10] the SCA did not adopt any infringement decisions regarding abuse of a dominant position. One investigation of suspected loyalty rebates and exclusivity arrangements in the coffins industry was closed without the finding of an abuse.[11]

Currently,[12] the SCA has two active investigations; one against SJ regarding online advertisement and sale of train tickets[13] and one against the city of Gothenburg regarding private app providers' access to public car parks.[14]

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.[15]

9 Case C-7/97, *Oscar Bronner GmbH & Co. KG et al v. European Commission*, EU:C:1998:569.

10 1 April 2018 to 31 March 2019.

11 Decision on 24 May 2018 in Case 318/2017.

12 31 March 2019.

13 Cases 230/2018 and 380/2018, opened in April 2018.

14 Cases 304/2018 and 327/2018, opened in May 2018.

15 See, for instance, the Market Court's judgment in MD 2013:5, *TeliaSonera v. SCA*, 12 April 2013, p. 38; and the PMC's judgments in Case PMT 16822-14, *SCA v. Swedish Match North Europe*, 8 February 2017,

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.[16]

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.[17] 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.[18] 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.[19] Market definitions in previous cases may provide guidance, but are not precedential.[20]

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)[21] refer to the judgment of the 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.*[22]

The term 'dominant position' includes both single and collective dominance.[23]

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.[24]

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p. 134; Case PMT 7000-15, *SCA v. Nasdaq AB et al*, 15 January 2018, p. 22; and Case PMÄ 2741-18, *FTI AB v. SCA*, 21 January 2019, p. 16. See also the SCA's decision in Case 583/2016, *FTI*, 2 February 2018, p. 12. Even the preparatory works refer to the said notice, see Government Bill 2007/08:135, p. 71.

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

17 See, for instance, MD 2013:5, *TeliaSonera v. SCA*, 12 April 2013, p. 38; and the PMC's 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.

18 Judgment from the PMC, PMT 7000-15, *SCA v. Nasdaq AB et al*, 15 January 2018, p. 23.

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

20 See 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.

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

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

23 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 Arlanda Airport, had a collective dominant position.

24 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

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 regarding abuse of a dominant position, the PMC has refrained from relying on a market share presumption, despite high market shares.[25]

The courts have also referred to the European Commission's guidance paper on exclusionary abuses for further guidance on the term 'dominant position'.[26]

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.*[27]

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.[28] 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.[29]

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presumption that is almost impossible to rebut; in particular, if the competitors are relatively small.

25 Case PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, p. 144, and Case PMT 7000-15, *SCA v. Nasdaq AB et al*, 15 January 2018, p. 85.

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

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

28 The prioritisation policy, which was updated on 21 May 2018, is available at the SCA's website, www.konkurrensverket.se/globalassets/english/about-us/english_prioritisation_policy_for_enforcement.pdf

29 The PMC's judgment in Case PMT 7000-15, *SCA v. Nasdaq AB et al*, 15 January 2018.

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.[30] The SCA has used evidence of anticompetitive intent to argue that conduct does not constitute competition on the merits,[31] and that a dominant company has considered it likely that the conduct is capable of having anticompetitive effects.[32] The PMC has taken evidence of anticompetitive intent into account in its assessment of a conduct's effects on competition.[33]

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.[34] 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.[35]

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 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.[36]

30 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 the conduct was based on an anticompetitive strategy.

31 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.

32 ibid, p. 385 with further references.

33 See the PMC's judgment in Case PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, p. 183.

34 See footnote 28.

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

36 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.

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.[37] Such cases are more likely to occur in private litigation.[38]

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.

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 PMC may do so at the SCA's request.[39]

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.[40] 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.[41] 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).[42] Besides circumstances referable to the infringement, particular account shall

37 See footnote 28.

38 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.

39 Chapter 3, Article 5 of the Competition Act.

40 Chapter 3, Article 8 of the Competition Act.

41 ibid.

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

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.[43]

The SCA has published a memorandum describing its method of setting administrative fines.[44] 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.[45] The highest fine ever imposed by final judgment in a Swedish case concerning abuse of dominance is 35 million Swedish kronor.[46]

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.[47] According to the preparatory works, fine orders should not be used in cases with legal questions of precedential interest.[48]

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.

iv Orders imposing obligations

A company that abuses its dominant position may be ordered by the SCA to terminate the abuse.[49] 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.[50] 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.[51] 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.[52]

A final or interim order to terminate an abuse may be imposed under threat of a fine for default.[53]

43 Chapter 3, Article 11 of the Competition Act.

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

45 Chapter 3, Article 6 of the Competition Act.

46 MD 2013:5, *TeliaSonera AB v. SCA*, 12 April 2013.

47 Chapter 3, Articles 16–19 of the Competition Act.

48 Government Bill 2007/08:135, p. 261.

49 Chapter 3, Article 1 of the Competition Act.

50 Government Bill 1992/93:56, p. 90.

51 Chapter 3, Article 3 of the Competition Act.

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

53 Chapter 6, Article 1 of the Competition Act.

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.[54] As long as the decision applies, the SCA may not issue orders imposing obligations regarding the conduct covered by the decision.[55]

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.[56]

vii Nullity

An agreement that infringes the prohibition against abuse of a dominant position is considered null and void.[57] This means that the agreement, or at least the infringing provisions thereof, cannot be enforced by a court.

viii Damages

An intentional or negligent abuse of a dominant position may lead to liability to pay damages.[58]

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.

54 Chapter 3, Article 4 of the Competition Act.

55 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).

56 Chapter 3, Article 2 of the Competition Act.

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

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

ii SCA investigations

SCA investigations are governed by the Competition Act and the Administrative Act.[59] Subject to certain limitations set out in the Public Access to Information and Secrecy Act,[60] 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.[61] 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.[62] Unlike the Commission, the SCA is, however, not entitled to impose sanctions for the submission of incorrect, incomplete or misleading information.

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.[63] 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.

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.[64]

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.[65]

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59 The Administrative Act (1986:223).

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

61 See footnote 28.

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

63 Chapter 3, Article 5 of the Competition Act.

64 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/.

65 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.

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.[66] Fine orders may, under certain circumstances, be set aside.[67]

As of 1 September 2016, the competent court in competition law cases is the PMC, a division of Stockholm District Court that is specialised in competition, patent and market law.[68]

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.[69] To date, this opportunity has only been used in cases concerning procedural rights.

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 these types of cases.[70]

66 Chapter 3, Article 2 of the Competition Act.

67 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.

68 Chapter 8, Article 1 of the Competition Act.

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

70 Following the entry into force of the new court system, the PMC has delivered three judgments regarding abuse of a dominant position: *Swedish Match* (PMT 16822-14), 8 February 2017, *Nasdaq* (PMT 7000-15), 15 January 2018 and *FTI* (PMÄ 2741-18), 21 January 2019. In these cases, the proceedings in PMC lasted between one year (*FTI*) and two years and eight months (*Nasdaq*). The PMCA has delivered only one judgment regarding abuse of a dominant position. In *Swedish Match* (PMT 1988-17), in which a final judgment was delivered on 29 June 2018, the proceedings in PMCA lasted approximately one and a half years.

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,[71] which implements the EU Directive on Competition Damages into Swedish law.[72] 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.[73]

Collective actions are available and governed by the Swedish Group Proceedings Act,[74] which is based on an opt-in system.

Last year,[75] no judgments were handed down in cases regarding claims for damages based on abuse of a dominant position. One stand-alone case, which was rejected by the PMC in February 2018, has been appealed and is still pending.[76]

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.[77] Following the entry into force of the new court system on 1 September 2016, only one case on abuse of dominance has been finally decided. As described above, the SCA's action against Swedish Match was ultimately rejected. Even outside the scope of Article 102, it is notable that the PMCA has sided with the defendants in all competition law cases it has heard. The final judgments in *Nasdaq* and *FTI* are therefore followed with great interest. Considering the complexity, time and extensive resources required to investigate cases regarding abuse of a dominant position, the outcome of these cases is likely to influence the SCA's future priorities

71 The Competition Damages Act (2016:964).

72 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.

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

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

75 1 April 2018 to 31 March 2019.

76 Judgment by the PMC in Case PMT 16599-15, *Net at Once Sweden AB v. Göteborg Energi Gothnet AB*, 2 February 2018. The case stems from 2009, when the city of Gothenburg procured data communication services. Gothnet, which owned fibre connections to many 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 PMC rejected the claim. The Court concluded that the relevant wholesale market was broader than the fibre covered by the specific procurement, and Gothnet did not have a dominant position in this broader market.

77 The new court system is described in Section VI.

in this field. The high standards of proof in cases regarding administrative fines may make the SCA more inclined to focus its efforts on bringing ongoing infringements to an end, as it did in *FTI*, rather than bringing action with request for fines for historical infringements.

Appendix 1

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ISBN 978-1-83862-036-3