THE DOMINANCE AND MONOPOLIES REVIEW

ELEVENTH EDITION

Editors
Maurits Dolmans, Henry Mostyn and Patrick Todd

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VINGE

Chapter 18

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 of:

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

Over the past few years, the SCA's enforcement activities in the field of abuse of a dominant position have been remarkably low. Last year[4] there were nevertheless some signs of increased activity. No infringement decisions were adopted, but the SCA did issue an interim order. The order was issued against the Swedish stock exchange operator, Nasdaq, temporarily

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

2 The Swedish Competition Act (2008:579).

3 The former Competition Act (1993:20).

4 1 April 2022 to 1 August 2023.

banning Nasdaq from offering shares for trade in undertakings listed on the Nordic Growth Market Nordic SME without providing the issuers the opportunity to oppose the listing. The case was initiated by a complaint from Nordic Growth Market (NGM), a marketplace for growth companies, following Nasdaq's announcement that it planned to list shares in 15 undertakings already listed on NGM's Nordic SME. The SCA preliminary concluded that Nasdaq has a dominant position on the market for listing and trading of shares in emerging markets for small and medium-sized companies in Sweden and that the conduct constituted an abuse. The conduct would, according to the SCA, be likely to cause the entire trade in these shares to be moved to Nasdaq's marketplace First North Sweden MTF and thus lead NGM to lose volumes and competitiveness. Notably, the SCA also found that the conduct had an exploitative element. It considered that Nasdaq used its strong position at the direct cost of issuers that had consciously and for various reasons chosen to be listed on a stock exchange other than Nasdaq's growth market. The interim order was not appealed by Nasdaq. Following Nasdaq's announcement that it would refrain from such listing for two years, or at least until it has been clarified whether the ongoing evaluation of MifID II will require any legislative amendments in Sweden, the SCA closed the investigation without taking a final position on whether the conduct constituted an abuse of a dominant position.[5]

Another investigation was closed during the year without the finding an infringement. The case concerned an alleged refusal by the state-owned railway logistics company to supply shunting services to a competitor. The SCA identified competition concerns but decided to close the investigation with reference to a new initiative by the Swedish Transport Administration that aims to remedy the said concerns.[6]

According to public records at the time of writing, the SCA has four ongoing investigations: one concerning the imposition of unfair trading terms to a downstream competitor in the market for digital books; one concerning suspected exclusionary and exploitative conduct in the finance sector; one concerning excessive pricing in district heating; and one concerning exclusive agreements in the sector for insurance medical advice.[7]

Notably, the SCA has on several occasions repeated its wish for supplementary regulation to remedy structural competition problems in highly concentrated markets without the finding of a competition law infringement, including a duty for undertakings in such markets to notify mergers that fall below the turnover thresholds.

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.[8]

5 Decisions dated 3 June and 10 October in case 366/2022.

6 Decision dated 27 March 2023 in case 363/2021.

7 Cases 817/2022 (digital books), 668/2022 (finance sector), 805/2022, 89/2023 (district heating) and case 91/2023 (insurance medical advice).

8 See, for instance, the 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*

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.[9]

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.[10] 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.[11] 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.[12] Market definitions in previous cases may provide guidance, but are not precedential.[13]

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[14] 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.*[15]

The term dominant position includes both single and collective dominance.[16]

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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.

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

10 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*).

11 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*).

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

13 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.

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

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

16 Like Article 102 of the 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.

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.[17]

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 cases, *Swedish Match*[18] and *Nasdaq*,[19] 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.[20]

The courts have also referred to the European Commission's guidance paper on exclusionary abuses for further guidance on the term dominant position.[21]

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*

17 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.

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

19 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.

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

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

> *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.*[22]

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.[23] It may also be noted that the PMC has 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.[24]

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.[25] The SCA has used evidence of anticompetitive intent to argue that conduct does not constitute competition on the merits,[26] and that a dominant company has considered it likely that the conduct is capable of having anticompetitive effects.[27] The PMC has taken evidence of anticompetitive intent into account in its assessment of a conduct's effects on competition.[28]

ii Exclusionary abuses

Although the prohibition covers both exclusionary and exploitative abuses, the SCA's enforcement has traditionally focused 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. Therefore,

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

23 The prioritisation policy, which was updated on 12 February 2020, is available on the SCA's website, https://www.konkurrensverket.se/globalassets/dokument/engelska-dokument/english_prioritisation_policy_for_enforcement.pdf.

24 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.

25 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.

26 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.

27 ibid., p. 385 with further references.

28 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.

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.[29]

iii 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. These cases are more likely to occur in private litigation.[30]

iv Exploitative abuses

Exploitative abuses are covered by the prohibition. Cases regarding pure exploitative conduct have, however, traditionally been rare in public enforcement.[31] From 2016 to 2020, the SCA's prioritisation policy did not even mention exploitative abuse, and the SCA did not initiate any investigations or legal proceedings regarding pure exploitative conduct. According to the latest version of the prioritisation policy, adopted on 12 February 2020, the SCA may nevertheless 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. During the past year, the SCA has stated that it considers itself to have an important role during times of crises ensuring that undertakings do not take advantage of the crisis to exploit their customers. In February 2023, it published a brief analysis, 'Significant price increases. Competition in times of crisis' (2023:4), in which it, inter alia, describes the circumstances in which it finds it appropriate for the SCA to intervene against dominant companies' excessive

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

30 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.

31 The most recent example of a case in which the SCA has intervened against a pure exploitative conduct 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.

pricing. The authority has also demonstrated an increased willingness to take on cases regarding exploitative abuse. In July, it opened an investigation concerning excessive prices by two district heating companies. Two of the other cases that are currently investigated by the authority include exploitative elements.

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.

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.[32] 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.[33] 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.[34] 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).[35] 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.[36]

The SCA has published guidelines describing its method of setting administrative fines.[37] The purpose of the guidelines is to provide greater clarity on how the SCA interprets and applies the provisions on administrative fines in the Competition Act. The guidelines do 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.[38] The highest fine ever imposed by final judgment in a Swedish case concerning abuse of dominance is 35 million Swedish kronor.[39]

32 Chapter 3, Article 5 of the Competition Act.
33 Chapter 3, Article 8 of the Competition Act.
34 ibid.
35 Chapter 3, Articles 9–10 of the Competition Act.
36 Chapter 3, Article 11 of the Competition Act.
37 Policy statement 2021:1, published 2 July 2021. Available on the SCA's website.
38 Chapter 3, Article 6 of the Competition Act.
39 MD 2013:5, *TeliaSonera AB v. SCA*, 12 April 2013.

iii Orders imposing obligations

A company that abuses its dominant position may be ordered by the SCA to terminate the abuse.[40] 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.[41] 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.[42] 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.[43] The SCA appears to be increasingly willing to use interim measures during in its investigations of suspected abuse of dominance. Over the last years, the SCA has adopted three interim decisions, of which all relate to suspected abuse of dominance in platform markets.

A final or interim order to terminate an abuse may be imposed under threat of a fine for default.[44]

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).[45] Such decisions have precedential value in competition damages cases, which means that the infringement as such may not be reassessed.[46]

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.[47] As long as the decision applies, the SCA may not issue orders imposing obligations regarding the conduct covered by the decision.[48]

40 Chapter 3, Article 1 of the Competition Act.

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

42 Chapter 3, Article 3 of the Competition Act.

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

44 Chapter 6, Article 1 of the Competition Act.

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

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

47 Chapter 3, Article 4 of the Competition Act.

48 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 diaries other 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).

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.[49]

vii Nullity

An agreement that infringes the prohibition against abuse of a dominant position is considered null and void.[50] 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.[51]

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 (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.[52] Subject to certain limitations set out in the Public Access to Information and Secrecy Act,[53] 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.[54] 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.[55] As of

49 Chapter 3, Article 2 of the Competition Act.

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

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

52 The Administrative Act (2017:900).

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

54 See footnote 32.

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

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).[56] 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.[57]

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.[58] The Competition Act contains no corresponding provisions to communicate draft orders to impose 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.[59]

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.[60]

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 2021 when the SCA gained decision-making powers in respect of fines.

56 Chapter 5, Article 21 of the Competition Act.

57 Chapter 5, Article 23 of the Competition Act.

58 Chapter 3, Article 5 of the Competition Act.

59 The oral hearing is described on the SCA's website (Swedish only), https://www.konkurrensverket.se/konkurrens/tillsyn-arenden-och-beslut/kvalitetssakring-av-beslut/.

60 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.

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.[61]

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.[62] Judgments and decisions by the PMC may be appealed to the PMCA, which is a division of the 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.[63] This opportunity has mainly been used in cases concerning procedural issues.

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.[64] 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,[65] which implements the EU Directive on Competition Damages into Swedish law.[66] 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

61 Chapter 3, Article 2 of the Competition Act.

62 Chapter 8, Article 1 of the Competition Act.

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

64 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.

65 The Competition Damages Act (2016:964).

66 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.

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.[67]

Collective actions are available and governed by the Swedish Group Proceedings Act,[68] which is based on an opt-in system.

Swedish case law on damages for competition law infringements is very limited. 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,[69] no judgments regarding damages for abuse of a dominant position were delivered. One stand-alone action was rejected by the Patent and Market Court for being incomplete.[70] Currently, there is one high-profile case pending before the PMC. The Swedish price comparison firm PriceRunner's filed an action against Google in 2022 as a follow-on action on the Commission's 2017 infringement decision in *Google Shopping*.[71] Google's request to stay the proceedings until the appeal of the Commission's decision has been finally decided was dismissed by the court, which considered that there were many procedural issues that could be dealt with while waiting for the final decision from the European Court of Justice. At the end of May, Google was ordered to disclose, inter alia, confidential information from the Commission's infringement decision and data on traffic volumes. The order has been appealed.

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

VIII FUTURE DEVELOPMENTS

The SCA's interventions against abuse of dominance continues to be low, but there are signs of increased enforcement activity. Notably, apart from opening investigations into suspected exclusionary abuses, the SCA has demonstrated an increased interest in and willingness to take on exploitative cases. Particularly during times of crisis and inflation, the SCA considers it important to ensure undertakings do not take advantage of the crisis to exploit their customers. Another key aspect for the future is whether the SCA's repeated call for supplementary regulation will be heard. The SCA has on several occasions stated that it would like to see a new and flexible tool which enables the authority to remedy structural competitive concerns through future-oriented actions, without establishing an infringement of the competition rules. The arguments presented in favour of supplementary rules have not yet been convincing, but the Swedish government has stated that it will look into the matter.

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

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

69 1 April 2020 to 31 March 2021.

70 *PEAS Institut v. Region Östergötland* PMT 17391-22.

71 COMP/AT.79340, upheld by the General Court in case T-612/17, *Google and Alphabet v. Commission*, EU:T:2021:763.