

# Kluwer Competition Law Blog

## Main Developments in Competition Law and Policy 2022 – Sweden

Helene Andersson (Advokatfirman Delphi) · Monday, February 6th, 2023

With 2022 now in hindsight, it is time to take stock of what happened in the Swedish competition law arena during the first post-pandemic year. To sum up, after a relatively long period with little or no action in the competition field, the Swedish Competition Authority (the SCA) is once again picking up speed and becoming a more visible enforcer of the competition rules. During the past year, it has adopted its first decisions to impose fines on competition law offenders, adopted interim measures against suspected competition law infringements and investigated a possible obstruction of the investigation. In addition, it has also expressed the desire to receive new weapons against structural market inefficiencies.

Just as in many other parts of the EU, we are now witnessing a shift in the enforcement structure here in Sweden. In February 2022, the Swedish price comparison provider PriceRunner, backed by the Swiss litigation funder Nivalion, sued Google for SEK 22 billion (approx. EUR 2.1 billion) in a follow-on damages action. The case is the largest (competition law) damages case ever initiated before the Swedish courts. Enforcement of the competition rules is now resting on two pillars also in Sweden, one public and one private.

Below are some highlights from 2022.

### **The SCA Makes Use of its New Powers to Impose Fines on Competition Law Offenders**

For many years, Sweden was one of few EU Member States where the competition authority lacked the power to impose fines on competition law offenders. Instead, the SCA had to turn to the courts and ask them to impose fines. The scope of the SCA's powers has been hotly debated over the years. When Sweden was to transpose [EU Directive 2019/1](#) into Swedish legislation, the legislator eventually so it fit to extend the authority's powers also in this respect. Thus, since March 2021, the SCA no longer has to turn to the courts but can impose fines on companies engaging in restrictive practices or abusing their dominant position. In October 2022, the SCA availed itself of these powers for the first time, and less than two months later the next fining decision was adopted. Both cases concern small market players engaging in what appears to be rather flagrant infringements of the prohibition against restrictive practices.

### *Bid-rigging in the Taxi Sector*

On 20 October 2022, the SCA adopted an infringement [decision](#) against two local providers of taxi services, imposing fines totalling SEK 1,550,000 (approx. EUR 140,000) on them for engaging in a bid-rigging arrangement. According to the SCA, the two companies had coordinated their bids in the procurement of mobility services undertaken by a Swedish municipality. In its decision, the SCA declared that the infringement merited a higher fine due to its gravity, but that it had assessed the financial situation of the two companies and concluded that their continued existence would be jeopardised if the fines were set higher.

### *Market Sharing in the Sanitation Sector*

A little more than a month later, on 1 December 2022, the SCA adopted its second infringement [decision](#), this time against two companies active in the sanitation sector in the southern parts of Sweden. The two companies were found guilty of market sharing, having entered into a written agreement in March 2014 where they agreed not to compete with each other and to join forces against other competitors in the market. The cooperation saw its end in 2019 following a dispute between the two parties. One of them, Saneringscompaniet i Malmö, decided to file a leniency application prompting the SCA to carry out a dawn raid and launch a cartel investigation in May 2021.

18 months later, the SCA adopted an infringement decision and imposed a fine of SEK 1,219,000 (approx. EUR 112,000) against Sopkärlstvätt i Malmö. While the fine is low, it is worth noting that it corresponds to no less than ten per cent of the company's annual turnover, thereby hitting the ceiling stipulated in the Swedish Competition Act. As Saneringscompaniet had filed for leniency and cooperated with the SCA during the investigation, it was granted immunity from fines.

### **Interim Decision against Nasdaq**

In a [decision](#) of 3 June 2022, and pending the outcome of its investigation into the underlying competition case, the SCA imposed a temporary ban on Nasdaq Stockholm from offering shares listed on a rival marketplace. Three weeks earlier, Nasdaq's rival Nordic Growth Market (NGM) had filed a complaint with the SCA, requesting it to ban Nasdaq from listing financial instruments that had their primary listing on NGM's SME growth market. The complaint was filed after Nasdaq had announced its plan to offer trading in shares in 15 companies that had their primary listing on NGM's SME growth market, without asking for the issuers' consent.

For several different reasons, the SCA found it likely that the measures planned by Nasdaq would cause the entire trade in these shares to move from NGM to Nasdaq's market First North Sweden MTF and that such move was likely to take place shortly after the shares were listed on First North Sweden MTF. As the shares in these companies accounted for approximately half of the trade on NGM's SME growth market, this would result in a substantial loss of revenue for NGM. Finding that such a measure was likely to constitute an abuse of Nasdaq's dominant position, the SCA issued an interim injunction ordering Nasdaq to refrain from listing the shares unless the issuers had expressly consented thereto.

The investigation against Nasdaq was closed on 10 October 2022, after Nasdaq had announced that it would refrain from offering shares in undertakings listed on NGM's SME growth market without the issuers' explicit consent.

This is the SCA's third interim decision in as many years, which follows several years without any interim measures being issued. The recent row of cases suggests that the SCA identifies a particular need for interim measures on platform markets and nascent markets, given the risk of such markets tipping towards an incumbent and creating effects that are not easily reversed.

However, while interim measures may be necessary to avoid the irreversible effects of abusive market behaviour, the SCA should use this tool cautiously and endeavour to carry out a thorough assessment of the companies' market position and the effects of their actions before deciding to issue interim injunctions. In Nasdaq, it took the SCA three weeks to determine that not only did Nasdaq hold a dominant position, but there was also a prima facie case of abuse.

### **Investigation into Possible Obstruction**

Since March 2021 and following the transposition of [EU Directive 2019/1](#) into Swedish law, the SCA may impose fines of up to one per cent of a company's annual turnover if it obstructs the SCA's investigation. In March 2022, the SCA opened its first investigation into a suspected obstruction. The investigation, which was launched following a dawn raid carried out against a number of companies suspected of market sharing in the food sector, showed that the company in question had not tried to hinder the SCA's investigation. It was therefore [closed](#) on 31 May 2022. While the SCA thus found that there was no ground for intervening in the present case, the launch of the investigation sends a clear signal that the SCA will not ignore any attempts by targeted companies to obstruct its investigations.

### **The SCA is Seeking New Powers**

In October 2022, the SCA announced its need for more powers. According to the SCA, there is a need to introduce tools against more structural problems in highly concentrated markets where competition is distorted not by agreements between individual companies or unilateral actions by dominant firms, but rather by certain practices applied by all undertakings in the market. The SCA suggests that it should be granted the power to order companies to adopt the measures necessary to eliminate any competition concerns and does also suggest that companies in highly concentrated markets should be required to notify mergers also where the turnover thresholds in the Swedish Competition Act are not met. It remains to be seen whether the SCA's concerns will lead to further action from the legislator.

### **Damages Actions Now a Force to be Reckoned with Also in Sweden**

Already when Sweden introduced competition rules modelled on their EU equivalents in anticipation of Sweden's membership in the EU, the Swedish legislator introduced a right to antitrust damages. However, while the possibility to seek damages dates back to the 90s, the right

to compensation has been perceived as a right in theory rather than in practice. The recent damages action against Google brought by the Swedish price comparison service PriceRunner may be a game changer.

On 7 February 2022, PriceRunner brought an action against Google before the Swedish Patent and Market Court, claiming that it had suffered damages of SEK 22 billion (approx. EUR 2.1 billion) due to Google's alleged abuse of dominance. In June 2017, the European Commission imposed a EUR 2.42 billion fine on Google in the [Google shopping case](#). The case is now [pending](#) before the Court of Justice of the European Union. The Patent and Market Court has decided not to stay proceedings in anticipation of the Court of Justice's ruling and is now hearing issues on the production of evidence and limitation periods. However, no hearings on substantial matters are expected to take place before the Court of Justice has delivered its ruling.

### **Reflections on the Year that has Passed**

In order to effectively deter cartels and abuse of dominance, antitrust enforcement must be frequent and highly visible. Since 2016, the SCA has lost almost all of the cases pursued before the Patent and Market Court of Appeal, which is the court of last instance in competition cases. Perhaps for this reason, the SCA has not been very visible in recent years, bringing a few new cases before the courts. From an enforcement perspective, it is therefore welcome that the SCA now appears to be picking up speed and becoming a more visible enforcer of the competition rules in Sweden. It shall be interesting to see if the SCA continues at this pace also during 2023.

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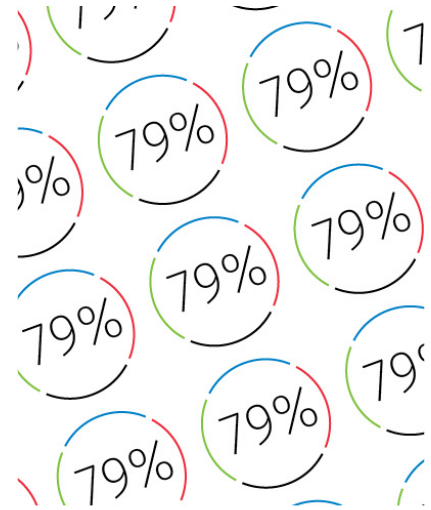
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