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The Standard and the Burden of Proof in Competition Law Cases – Note by Sweden

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1. Introduction

1. This written submission begins by giving a brief background to the system for court review in the Swedish competition regime. It then highlights certain challenges faced by the Swedish Competition Authority (SCA) and other claimants in competition law cases and explores the question of standard of proof in Sweden. The contribution outlines the use of presumptions in Swedish and EU competition law, before finally explaining some actions taken by the authority in response to challenges faced.

2. Court review in the Swedish competition regime

2. Prior to 2018, Sweden's competition regime followed a predominantly judicial model, which meant that decisions to prohibit mergers and to issue competition fines were made by the courts upon an action brought by the SCA.[1] In 2018, the authority was granted decision-making powers to prohibit mergers, and in 2021 the same reform was introduced in matters relating to competition fines.

3. In both of these types of matters, decisions by the competition authority can be appealed to the Patent and Market Court and subsequently to the Patent and Market Court of Appeal for a merits review.[2]

4. In the vast majority of cases, the appellate court is the final instance for the hearing of competition cases. There is an additional mechanism whereby the appellate court may allow a further appeal to the Supreme Court in matters, other than merger decisions, where it is important to obtain guidance as to the application of the law. Such further appeal is also dependent on the Supreme Court granting leave to appeal. So far, this possibility has not been utilised in any cases regarding substantive competition law issues.

5. The courts may also refer questions on the interpretation of EU law for preliminary ruling by the Court of Justice of the EU. The last time a request for a preliminary ruling was made in a competition case in Sweden was in 2009.[3]

6. Pursuant to EU Regulation 1/2003, the burden of proof for establishing an infringement in competition cases rests on the SCA or the party alleging the infringement.[4] Since at least the court reform of 2016 described further below, the standard of proof has

[1] The SCA could decide on a "fine order" if the authority considered that the material circumstances concerning the infringement were clear and if the company consented to the order.

[2] A merits review by the appellate court requires leave to appeal.

[3] Case C-52/09, Konkurrensverket v TeliaSonera Sverige AB.

[4] Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. According to the same article, the burden of proof for establishing that the conditions are fulfilled to claim the benefit of an exemption under Article 101(3) of the Treaty on the Functioning of the European Union is borne by the undertaking.

been set by the courts at the level of "demonstrated" or "shown" in cases relating to competition fines.[5]

2.1. Court specialisation and economic expertise

7. As has been noted in previous OECD roundtables, having a degree of specialisation in competition law within the court system has a number of advantages, since it can "lead to greater efficiency, enhanced uniformity and better quality decisions".[6] The current Swedish courts for competition law cases were established during a reform of the court system in 2016. Prior to this, a specialised Market Court heard competition cases on appeal. This was replaced by a system of dedicated courts within the general court system that deal exclusively with competition, IP and marketing law cases. The government found that these areas are among the most complex and extensive cases brought to court, and that there are connections between them in terms of law and principles. Cases across these legal areas were fragmented over different courts, hampering quality and effectiveness in the view of the government.

8. It can nevertheless be noted that in many jurisdictions, the number of competition cases brought in front of the courts each year tends to be relatively low, particularly in the context of smaller jurisdictions. This may thus limit the opportunities for courts to examine and adjudicate specifically on competition cases. In some jurisdictions, there is an extensive body of private actions that complements public enforcement. However, the picture is uneven in the EU, where the majority of jurisdictions appear to have heard relatively few such cases.[7] Training opportunities, for example through EU technical support mechanisms or the OECD's regional centres for competition, may play a useful role in enhancing judges' expertise in competition law.

9. Competition cases decided by the first instance court and the appellate court in Sweden are, in most cases, heard by a panel comprising both judges and economic experts. In the view of the SCA, the involvement of economic experts as specially appointed members of the court can have a positive impact on the effective adjudication of competition law cases, since it acknowledges the complexity of the cases at hand. Competition cases often involve complex economic analyses, and it is increasingly common that economic consultants are called on by parties to provide evidence in court. It is therefore important that the courts are well-equipped to evaluate and weigh up the range of evidence presented.

[5] See further T. Andersson and M. Strand under assignment by the Swedish Competition Authority, Konkurrensverkets domstolsprocesser, Research Assignment Report 2021:4 and the cases referred to therein. For context, it can be noted that in older case law from the Market Court, the court concluded that the standard of proof should be set "relatively highly", but not at the level of beyond reasonable doubt. See MD 2005:7 *KKV./.* Norsk Hydro Olje AB m.fl. and MD 2009:11 NCC AB m.fl. ./. KKV

[6] The standard of review by courts in competition cases – Background Note, DAF/COMP/WP3(2019)1

[7] See JF Laborde, Cartel damages actions in Europe: How courts have assessed cartel overcharges (2021) 3 Concurrences, Art. N° 102086

3. Challenges faced in competition law cases

10. The SCA faced significant challenges in obtaining approval to the desired extent in cases that were tried on the merits by the appellate court in the years immediately following the creation of the patent and market courts in 2016. During the period of 2016 to 2021, eight cases brought by the competition authority were subject to a ruling by the appellate court, and almost all of these resulted in an outcome that went against the authority. Similarly, no private damages actions or injunctions were determined in the claimant's favour during the same time-frame. There was a high reversal rate between the first instance court and the appellate court.

11. There are varying reasons for the failure of the authority to obtain approval for its cases in the appellate court.[8] In certain cases relating to alleged anticompetitive agreements, the appeal court disagreed with the SCA's claim that the agreements had an anticompetitive object, and that they could therefore be regarded by their very nature as being harmful to competition according to EU law. In certain cases, the appellate court also reversed the first instance court's assessment in this respect.

12. The outcome of some cases rested on the SCA being found not to have shown that certain legal requisites were met, and in certain cases, the appellate court evaluated the available evidence in a different way to the authority. In general, it can be inferred from the cases that the evidentiary standard required to meet the standard of proof is high in competition law cases in Sweden.

13. In light of its experiences, the SCA undertook to evaluate how it could develop its work to take account of the legal framework that has been established by the Swedish courts. In 2021 the SCA gave independent researchers the task of undertaking an impartial review of the competition authority's litigation work during the period 2016 – 2021 in order to identify areas for improvement. A reference group of lawyers, academics and former judges was attached to the project.

14. The researchers drew a range of conclusions regarding the court review of competition law cases in Sweden, and also offered recommendations to the authority about how it could adapt to the framework established by the court.[9] Among other things, the researchers reflected on the level of the standard of proof in Swedish competition cases. The standard of proof is a national competence for the Member States of the EU. However, the Court of Justice of the EU has held that national rules governing the assessment of evidence and the standard of proof must not render the implementation of EU competition rules impossible or excessively difficult and, in particular, must not jeopardise the effective application of EU competition law.[10] The researchers therefore suggested that there could be reason to request a preliminary ruling from the Court of Justice of the EU on whether the standard of proof in an individual case has been set at a level that is in conflict with the principle of effectiveness of European law. This step has not yet been taken in any competition cases since the publication of the report.

[8] T. Andersson and M. Strand under assignment by the Swedish Competition Authority, Konkurrensverkets domstolsprocesser, Research Assignment Report 2021:4.

[9] Ibid.

[10] See, for example, Case C-74/14, Eturas UAB and Others v Lietuvos Respublikos konkurencijos taryba.

4. The use of presumptions

15. As the SCA has previously submitted to the OECD Competition Committee,[11] safe harbours and legal presumptions provide means for more efficient supervision of competition rules. The efficiency gains in enforcement from relying on safe harbours and legal presumptions have to be weighed against the importance of legal certainty and possible risks of over-enforcement and under-enforcement. Legal presumptions must therefore be based on robust theory and experience in order to reduce such risks.

16. The EU and Swedish competition rules include a number of presumptions regarding the competitive effects of agreements between undertakings, both horizontal and vertical. Some types of agreements are considered so-called hardcore restrictions, and are thereby presumed to be harmful for competition and consumers, although the presumption can be rebutted if the conduct at hand has overall positive effects for competition and consumers.

17. On the other hand, the EU courts have held that object restrictions are to be interpreted restrictively.[12] As noted above, the question of certain conduct's anticompetitive object has been one key factor in the appellate court coming to different conclusions to the SCA and the first instance court in particular cases. It is also worth noting that some cases that the SCA investigates involve types of conduct for which there is not always clear-cut case law, which may limit the applicability of presumptions in certain circumstances.

18. The question of legal presumptions is also relevant in the context of the analysis of abuse of dominance in the EU. The European Commission, with input and support from the national competition authorities of the EU, has recently published a set of draft guidelines relating to the question of exclusionary abuses of dominance.[13] The draft guidelines state that certain types of conduct are generally recognised as having a high potential to produce exclusionary effects and are, accordingly, subject to a presumption concerning their capability of producing exclusionary effects. The Commission considers that the case-law has developed tools which can be broadly described and conceptualised, for the purpose of the Guidelines, as "presumptions", even if the Court of Justice of the EU has not always explicitly used the term.

19. The draft has, at time of writing, recently been subject to a public consultation. The European Competition Network, which comprises the European Commission and the national competition authorities, including the SCA, has issued a statement in which it agrees with the draft guidelines' interpretation of the EU Courts' case law as regards the existence of legal presumptions in relation to certain types of conduct that have a high potential to produce exclusionary effects or are by their very nature capable of doing so.[14]

[11] Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note by Sweden, DAF/COMP/WD(2017)57

[12] See, for example, Case C-67/13 P, Groupement des cartes bancaires (CB) v European Commission

[13] European Commission, Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings

[14] Joint statement by the European Competition Network ("ECN") on the European Commission's initiative to adopt Guidelines on abusive exclusionary conduct by dominant undertakings.

20. It is also the view of the European Competition Network that the draft Guidelines have the potential to enhance legal certainty and foster a coherent enforcement of Article 102 TFEU in the area of exclusionary conduct by dominant undertakings.

5. Actions by the competition authority

21. The SCA continuously invests significant efforts into the development of its enforcement methods. Recommendations from the independent researchers about how methods can be adapted to the standards of review established by the Swedish courts have been taken into account as part of this work.

22. The SCA has, for example, continued to develop its case prioritisation methods to ensure that its resources are focused on the right cases. Internal time limits were introduced in 2021 in order to contribute to more efficient case handling, clearer prioritisation and delineation of investigations. It is furthermore important to ensure that the resource-intensity of different investigative methods are taken into account, as well as their capability to contribute relevant evidence, so that they are employed in the right circumstances. Further internal checks and balances have been introduced to strengthen the quality control of cases, including the introduction of a function separate from the case team for scrutinising draft decisions. This is in addition to existing quality control mechanisms, for example scrutiny provided by members of the legal department and chief economist's team that are not part of the case team.

23. The SCA is also of the view that the granting of decision-making powers for competition fines to the SCA in 2021 allows for more efficient proceedings, since it increases the incentives to cooperate with the authority's investigations. Instead of waiting to present the relevant facts in the court process, the SCA expects parties to cooperate early during the investigation, and at the latest when they get a draft decision. Court proceedings also have the potential to be more efficient, since appeals do not have to cover the entire decision, but rather can concentrate on the issues that are disputed.

24. In weighing up the need for effective enforcement, legal certainty, and effective judicial review, competition authorities can also consider the possibility – where appropriate – of accepting commitments as an efficient way to promote effective competition. The SCA encourages companies to offer commitments at an early stage in its investigations, and has accepted commitments in several cases in recent years.[15] Where there is a need to address problems quickly before they result in irreparable damage to competition, interim measures can be an appropriate tool.

25. Since being granted decision-making powers in 2021, the SCA has adopted four decisions with fines in antitrust cases. One case is pending review by the courts, and of the other three, only one has been subject to court review in the first instance, which upheld the SCA's decision. The authority has also adopted three interim decisions in recent years.[16] One of these was challenged in court, but was upheld. While these developments represent positive outcomes from the perspective of the competition authority, is too early to draw far-reaching conclusions about trends.

[15] See case 709/2019 (Carlsberg Sverige AB), case 248/2020 (Spendrups Bryggeriaktiebolag), case 111/2020 (Finnair Oyj) and case 602/2022 (Online search services for housing).

[16] Case 366/2022 (Nasdaq Stockholm Aktiebolag), case 348/2021 (Svensk Mäklarstatistik) and case 572/2019 (Im with bruce AB).

6. The role of the courts in clarifying questions of law

26. The formulation of court judgments is a crucial factor for contributing to effective enforcement and legal certainty, including in issues relating to standards of proof. It is particularly important for precedent-setting courts to offer clear guidance for lower courts and parties about the legal framework. This may be particularly useful in a context where there is an historically high reversal rate between decisions of the first instance court and appellate court, such as has been the case in Sweden.

27. Where questions of law are unclear, mechanisms for appeal to higher courts can be appropriate. For example, as noted above, in Sweden there are opportunities for the courts to allow an appeal to the Supreme Court or to refer questions on the interpretation of EU law to the Court of Justice of the EU.

7. Conclusions

28. There is a high evidentiary standard to meet the standard of proof for competition cases in Sweden. It is incumbent on the competition authority to adapt to the standards set by the courts and develop its internal workings accordingly.

29. Given the increasing complexity of competition cases, it is in general beneficial for judges to be empowered to develop a good level of understanding of competition law principles. Having economic experts sitting as specially appointed members of the court can also enhance the effectiveness of the hearing of economic evidence. By providing clear judgments, precedent-setting courts can offer guidance to lower courts, competition authorities and parties about the legal framework and issues of standards of proof, particularly where case law is lacking.

30. Presumptions can contribute to more efficient investigations and court proceedings, but must be based on robust theory and experience to ensure legal certainty and mitigate against the risk of over-enforcement. For example, according to draft guidelines from the European Commission, EU case law has developed tools which can be broadly described and conceptualised as “presumptions” regarding certain types of abuse of dominance conduct and their capability of producing exclusionary effects.

31. Within the EU, the standard of proof must not be set at such a level so as to render the implementation of EU competition rules impossible or excessively difficult and, in particular, must not jeopardise the effective application of EU competition law. Whether the standard of proof in an individual case is in line with the principle of effectiveness of EU law is a question that could, in theory, be referred for interpretation by the Court of Justice of the EU, but this has not been explored in the Swedish context.