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Abuse of a dominant position – recent case law in Sweden

This past year has offered some interesting cases in Sweden regarding abuse of a dominant position. In the TeliaSonera-case (cf ECJ case C-52/9) the Stockholm District Court imposed the highest fines ever ordered in Sweden, SEK 144 million (approximately EUR 15 million), for abuse of a dominant position through a margin-squeeze. This case, which is now under appeal, was subject to a preliminary ruling by the ECJ in case C-52/9. The other two cases were final judgments from the Market Court, which issued injunctions under penalty of a fine. One case concerned unreasonable fees for taxi services at Arlanda, the major Swedish airport (Uppsala Taxi 100 000 AB v. EuroPark Svenska Aktiebolag and Swedavia AB, (publ), judgment of the Market Court, MD 2011:28, 23 November 2011) and the other case concerned loyalty rebates applied by Posten, the former postal incumbent (Bring CityMail Sweden AB v. Posten Meddelande AB, judgment of the Market Court, MD 2011:14; 8 June 2011). In the Posten-case, it is noteworthy that the Market Court stated that an equally efficient competitor analysis does not have to be conducted in all foreclosure situations. In these two cases the Competition Authority had decided not to take action following complaints which gave the applicants the right to bring action in the Market Court as first and last instance (cf the right to subsidiary right of action, Chapter 3, Section 2 of the Swedish Competition Act).

TeliaSonera v Konkurrensverket, Tele 2 AB, Stockholm District Court, Case no T 31862-04, 2 December 2011

The Stockholm District Court found in its judgment of 2 December 2011 that the former telecom incumbent, TeliaSonera, had abused its dominant position through a margin squeeze. TeliaSonera was fined SEK 144 million (approximately MEUR 15) which is by far the highest fine ever imposed in an abuse of dominance case in Sweden.

The Swedish Competition Authority (Competition Authority) brought an action in the Stockholm District Court in 2004, claiming that TeliaSonera should pay a fine of a total amount of SEK 144 million due to a violation of Chapter 2, Section 7 of the Swedish Competition Act and Article 102 TFEU respectively. The Competition Authority claimed that TeliaSonera had abused its dominant position by applying a pricing strategy resulting in squeezed margins between the wholesale price for its resale products for ADSL broadband and the resale price for its ADSL services to end-users. The price squeeze had occurred on the Swedish market during the period April 2000 through to January 2003.

The Stockholm District Court decided on 30 January 2009 to stay the proceedings and referred the case for a preliminary ruling under article 267 TFEU to the ECJ regarding the interpretation of the application of Article 102 TFEU and whether the pricing strategy undertaken by TeliaSonera should be regarded as an abuse of a dominant position. The ECJ answered the referred questions through a preliminary ruling on 17 February 2011, Konkurrensverket v. TeliaSonera Sverige AB, case C-52/9, ECR 2011 p. I-0000.

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The ECJ stated that in the absence of any objective justification, the fact that a vertically integrated undertaking, enjoying a dominant position on the wholesale market for ADSL input services, applies a pricing practice of such a kind that the spread between the prices applied on that market and those applied in the retail market for broadband connection services to end-users, was not sufficient to cover the specific costs which that undertaking must incur in order to gain access to that retail market, may constitute an abuse within the meaning of Article 102 TFEU.

The District Court found that TeliaSonera had abused its dominant position by a margin squeeze by offering wholesale and end-user services for broadband connections at prices where the margin between the wholesale price and the price to households was insufficient to cover TeliaSonera's own costs for offering broadband to households. According to the District Court, TeliaSonera had, in several cases, applied higher prices towards competitors than private customers.

TeliaSonera was not considered to have squeezed margins resulting in effects on the market at large, but only during a limited period of time and towards specific customers. The margin squeeze was considered to have limited the opportunities for TeliaSonera's competitors to expand their business on the market for broadband connection. It delayed their entry on the market and forced them to sell their services at a loss or with very low profit with the consequence that they were unable to engage in active marketing to win new customers.

The judgment has been appealed to the Market Court (final instance). There are also two damage claims regarding TeliaSonera's margin squeeze (T 10956-05, TeliaSonera AB v Tele2 AB and T 15382-06 TeliaSonera AB v Yaps Network AB) pending in the Stockholm District Court.

Uppsala Taxi 100 000 AB v EuroPark Svenska Aktiebolag and Swedavia AB, (publ), judgment of the Market Court, MD 2011:28, 23 November 2011
The Market Court prohibited in its judgment Swedavia AB, the governmental company owning and managing eleven airports in Sweden, and EuroPark Svenska AB, a company within the APCOA Parking AG-group – the largest parking company in Europe – under a penalty of a fine of SEK 2 million (approximately EUR 215 000) charging taxi companies, which are picking up customers that have pre-booked a taxi to Arlanda Airport, a special fee.

The taxi traffic at Arlanda Airport is managed through a computerized system modeled like a toll-system where every taxi arriving at the airport is equipped with a transponder corresponding with a computer. Through this system, each taxi is given a queue-number and the cars are called to drive down from the remote parking area to the arrival gate when a customer is waiting. EuroPark charges SEK 35 (approximately EUR 3.8) for this service. This fee was not, however, disputed in the case.

In 2011, Swedavia and EuroPark introduced a dual service-level system for pre-ordered taxis, which it had not interfered with prior to that. The first level meant that a customer who had pre-ordered a taxi pick-up at the arrival gate had to announce his/her arrival at a certain "pre-order desk". The driver was then called to come to the desk to pick up the customer. For this service EuroPark charged an additional 25 SEK (approximately EUR 2.7) to the remote-service. At the second service-level, the customer could be met by the driver with a name sign at the arrival gate. This service level had a price tag of an additional SEK 25. For the second service-level, which taxi companies have been providing to their customers free

of charge for a long time, the total additional cost was thus 50 SEK (cf the average taxi fee from Arlanda Airport to Stockholm City or Uppsala being approximately SEK 500 or EUR 54). Uppsala Taxi, operating between Arlanda Airport and the town of Uppsala north of Stockholm, and mainly by pre-bookings, brought an action against Swedavia and EuroPark claiming that the additional fees for the first and second service level respectively constituted abuse of Swedavia's and EuroPark's dominant positions through unfair contracting terms. Uppsala Taxi alternatively claimed that the fees constituted excessive pricing and/or bundling.

The Market Court found that Swedavia and EuroPark had a joint monopoly on the market for administering the taxi traffic at Arlanda Airport. The Market Court then concluded that the fee of SEK 25 for the second service-level, of which 99 percent was supposed to be used in an environmental fund, could not be justified by the additional costs for Swedavia and EuroPark to provide the service, thus it was found to constitute unfair contracting terms contrary to Chapter 2, Section 7 of the Swedish Competition Act and Article 102 TFEU. The fee for the first service level was however found to be motivated by the need to maintain order in the taxi queue system and the costs associated with this, thus no prohibition was issued in this respect.

Bring CityMail Sweden AB v Posten Meddelande AB, judgment of the Market Court, MD 2011:14; 8 June 2011
The Market Court ordered in its judgment of 8 June 2011 Posten Meddelande AB (Posten), under a penalty of a fine of SEK 100 million (approximately EUR 10.8 million) to cease applying certain loyalty discounts. The Market Court found that the discounts constituted an abuse of a dominant position.

Posten is the former national incumbent for postal services in Sweden. Bring CityMail (CityMail) is Posten's only competitor for postal services in Sweden. CityMail only distributes mail in the three metropolitan areas in Sweden (Stockholm, Malmö and Gothenburg) and on Gotland. Posten has an established network to distribute mail over the whole country.
In 2008, Posten introduced a sorting discount concerning bulk mail deliveries. In 2009 the discount included Economy Mail and Periodicals B as well. The discount applied by Posten meant that its customers could receive a discount of SEK 0.2 per item on bulk-mail deliveries covering more than 300 000 items, provided that the mail had been pre-sorted by the customer. Below the limit of 300 000 items no discount was granted.

CityMail brought an action against Posten claiming that the discounts applied by Posten had foreclosing effects on bulk mail deliveries totaling more than 300 000 items, but where less than 300 000 of the addressees are located in areas where both Posten and CityMail were active. In order for CityMail to be able to compete for such deliveries, it would have to offer a discount well over SEK 0.2 per item at a loss. If a customer planned a consignment of 300 000 items in the whole country, that did not exceed 300 000 items outside the area where CityMail also distributed mail, i.e the area where Posten had a monopoly, the customer would lose its discount if selecting CityMail as its distributor in Stockholm, Gothenburg, Malmö and Gotland.

According to CityMail, an unlawful foreclosing effect arose when CityMail had to compete with Posten for potential customer's shipments of consignments between 300 000 and 600 000 items. The foreclosing effect arose according to CityMail because Posten is the only distributor of mail in certain parts of the country in combination with the fact that the discount was retrospective.

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Posten claimed that the discount was a so-called functioning discount, which is permissible. Furthermore, according to Posten, no unlawful foreclosing effect could occur since the price CityMail had to offer to be able to compete for the shipments exceeded CityMail's long-term average marginal cost and thus provided a profit (the so-called equally efficient competitor analysis), and a very limited part of the market could potentially be foreclosed.

Posten claimed that the discount scheme could not be considered as an abuse of its dominant position since it did not impede competition. The discount was based on costs which were equivalent to the amount that Posten gained when the customer did some of the work by pre-sorting the mail.

It was undisputed that the relevant market was large shipments of mail in Sweden. The Market Court found no reason to make a different assessment. Furthermore it was undisputed that Posten had a dominant position.

The Market Court stated that it is obvious that a customer who intends to send e.g. 310 000 items to addressees located within and outside the competitive areas will be less inclined to use CityMail as its distributor unless CityMail compensates the customer for the loss of the discount. Thus it is clear that the discount in question would have a foreclosing effect. The Market Court dismissed the argument put forward by Posten that an "equally efficient competitor analysis" proposed in the Commission's Guidelines is required, stating that it follows both from case law and the Commission's Guidelines that such analysis does not have to be conducted in all foreclosure situations.

Thus, the Market Court found that the discount was contrary to Chapter 2, Section 7 of the Swedish Competition Act and Article 102 TFEU.

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