

Chapter [●]

Sweden

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1. Introduction

In 2017 almost 10% of all trade in Sweden is made online. According to the Swedish Retail and Wholesale Council, approximately 20% of all Swedish retail sales will be made online as soon as 2020.¹ A recent report of the Swedish Competition Authority shows that while online trade constitutes a relatively small part of the overall trade in Sweden, nevertheless the general growth of online trade in the EU puts additional competitive pressure on the Swedish companies.² Moreover, the European Commission's Digital Single Market strategy³ currently being implemented means that a package of new EU legislation in the area of online sales will directly affect the Swedish markets. It is likely that it will also have ripple effects on EU and Swedish competition law.

2. Positive Law

2.1. Swedish Competition Law in Overview

The Swedish Competition Act of 2008⁴ contains provisions prohibiting anti-competitive agreements and abuse of a dominant position which constitute copies of Articles 101 and 102 TFEU.⁵ According to the *travaux*

¹ Report of the Swedish Trade Council on the importance of trade (“Handelns betydelse. Då, nu och i framtiden”), 2017, pp. 29-30. The report can be accessed at handelsradet.se/ekonomiska-radet.

² Swedish Competition Authority's Report 2017:2 on competition and growth in the digital markets (“Konkurrens och tillväxt på digitala marknader”), March 2017, p. 148. The report can be accessed at www.konkurrensverket.se/globalassets/publikationer/rapporter/rapport_2017-2.pdf.

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A Digital Single Market Strategy for Europe”, COM(2015) 192 final.

⁴ Konkurrenslagen (2008:579).

⁵ The relevant provisions of the Swedish Competition Act prohibiting both horizontal and vertical anti-competitive cooperation between undertakings are the following:

Chapter 2, Article 1: “Agreements between undertakings shall be prohibited if they have as their object or effect, the prevention, restriction or distortion of competition in the market to an appreciable extent, if not otherwise regulated in this act.

This shall apply, in particular, to agreements which:

1. directly or indirectly fix purchase or selling prices or any other trading conditions;
2. limit or control production, markets, technical development, or investment;

préparatoires behind the preceding Competition Act,⁶ the fact that the substantive provisions of the Swedish Competition Act are in line with those of EU competition law means that the Commission's practice and jurisprudence of the Court of Justice of the European Union can serve as guidance when interpreting the Swedish Competition Act.⁷

The Swedish Supreme Court has, in a case concerning the existence of a dominant position,⁸ concluded that the substantive provisions of Swedish competition law are in line with the corresponding provisions of EU competition law to the extent that it in effect does not matter for the outcome whether Swedish or EU competition law is applied.

Public enforcement of Swedish competition law is assigned to the Swedish Competition Authority⁹ and its approximately 150 employees. In the majority of cases handled by the Swedish Competition Authority, the procedure is very similar to that of the Commission's DG Competition and to that of most other national competition authorities in the EU. The Swedish Competition Authority is entitled to take both final and interim injunction decisions on its own,¹⁰ ordering an on-going violation of Swedish or EU competition law to be terminated; such decisions can be combined with a penalty to be paid in case the antitrust offender does not comply with the injunction decision.¹¹ Moreover, the Swedish Competition Authority is entitled to take decisions making

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3. share markets or sources of supply;
 4. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
 5. make 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."

Chapter 2, Article 2: "The prohibition in Article 1 does not apply to agreements which

1. contribute to improving the production or distribution or to promoting technical or economic progress;
2. allow consumers a fair share of the resulting benefit;
3. only impose on the undertakings concerned restrictions which are indispensable to the attainment of the objective referred to in paragraph 1, and
4. do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the utilities in question."

Chapter 2, Article 6: "Any agreements or provisions included in agreements that are prohibited under Article 1 shall be void."

The relevant provision of the Swedish Competition Act prohibiting abuse of a dominant position is the following:

Chapter 2, Article 7: "Any abuse by one or more undertakings of a dominant position on the market shall be prohibited.

Such abuse may, in particular, consist in

1. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,
2. limiting production, markets or technical development to the prejudice of consumers,
3. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or
4. 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."

⁶ The Swedish Competition Act of 1993, Konkurrenslagen (1993:20).

⁷ See prop. 1992/93:56 p. 21.

⁸ Judgment of the Swedish Supreme Court in case T 2808-05 of 19 February 2008, *The Ystad Harbour Case*.

⁹ Konkurrensverket.

¹⁰ Chapter 3, Articles 1 and 3 of the Swedish Competition Act.

¹¹ Chapter 3, Article 1 and Chapter 6, Article 1 of the Swedish Competition Act.

voluntary commitments mandatory, under threat of penalty payments.¹² The Authority is also entitled to issue non-mandatory fine orders.¹³

A peculiarity of Swedish procedural competition law consists of the fact that the Swedish Competition Authority may not take any mandatory decision on its own to impose fines for breaches of Swedish or EU competition law. In these cases, the Swedish Competition Authority has to sue the undertakings involved before the Swedish Patent and Market Court at Stockholm District Court.¹⁴ It is thus the Swedish Patent and Market Court which may impose a fine, as a first instance court.

The judgments of the Swedish Patent and Market Court can only be appealed to the Swedish Patent and Market Court of Appeal at Svea Court of Appeal.¹⁵ The general rule is that a further appeal to the Swedish Supreme Court is not possible. The Swedish Act on Patent and Market Courts of 2016 does allow exceptions from this regulation, yet, only when the Patent and Market Court of Appeal deems such an appeal to be needed. According to the preparatory works behind the Act on Patent and Market Courts of 2016,¹⁶ an appeal to the Swedish Supreme Court could come into question only if there is a general need for a more overarching precedent where other areas of law come into play as well.¹⁷ There are no known judgments that have been appealed to the Swedish Supreme Court under this regulation yet.

A 2016 government-commissioned report proposed expanding the powers of the Swedish Competition Authority to also include the issuing of fines without a prior ruling of the Patent and Market Court. The idea is to align the Competition Authority's powers with those of the European Commission as well as make the enforcement of competition law more effective.¹⁸ A draft bill based on the report was submitted to the Swedish Council of Legislation (Lagrådet) for further scrutiny in August 2017.¹⁹ The bill is expected to be presented to the Parliament after the Swedish Council of Legislation leaves its remarks on the draft bill's compatibility with the current law. The draft bill is currently proposed to enter into force on the 1 of January 2018.

Another peculiarity of Swedish competition procedural law is that private injunction claims to cease any on-going infringement of Swedish or EU competition law may not be brought directly to court. First, a complaint has to be made to the Swedish Competition Authority. If the Swedish Competition Authority decides to investigate the matter, the Authority would take an injunction decision, which then could be appealed to the Swedish Market Court; in these proceedings, the complainant does not enjoy any standing as a party. If, however, the Swedish Competition Authority decides not to pursue the case, the complainant obtains a so called subsidiary right of action. The complainant can then directly lodge her case at the Swedish Patent and Market Court which may then, take an injunction decision.²⁰

2.2. Definition of the Relevant Market

Swedish competition law is highly influenced by EU competition law and should be interpreted in the light of the Treaties of the EU.²¹ Therefore, all competition cases of the CJEU, the regulations of the Council of the EU as well as the notices, guidelines and other documents of the European Commission are of relevance even in the Swedish jurisdiction. Thus, the main rules on market definition are to be found in the Commission's Notice on the

¹² Chapter 3, Article 4 and Chapter 6, Article 1 (2) of the Swedish Competition Act.

¹³ Chapter 3, Article 17 of the Swedish Competition Act; if the undertaking to which the fine order is addressed does not consent to the order within the time specified, the Swedish Competition Authority may initiate court proceedings concerning fines instead.

¹⁴ Patent- och marknadsdomstolen; see Chapter 7, Article 1 of the Swedish Competition Act. Patent- och marknadsdomstolen replaced the previous Marknadsdomstolen on the 1 September 2016.

¹⁵ Patent- och marknadsöverdomstolen, www.patentochmarknadsoverdomstolen.se.

¹⁶ Lag (2016:188) om patent- och marknadsdomstolar.

¹⁷ See prop. 2015/16:57, p. 165.

¹⁸ See Swedish Government Official Report SOU 2016:49 on expanding the decisive rights for the Swedish Competition Authority (En utökad beslutanderätt för Konkurrensverket).

¹⁹ Lagrådsremiss Ändringar i konkurrenslagen of the 17 of August 2017 is available at www.regeringen.se/4a3c7a/contentassets/82fc8f5e617247779ae5d20151f59ee4/andringar-i-konkurrenslagen-slutlig-webb.pdf.

²⁰ Chapter 3, Article 2 of the Swedish Competition Act.

²¹ See prop. 1992/93:56 p. 21.

relevant market.²² The Notice on the relevant market is followed by the Swedish Competition Authority and the Swedish Courts.²³ The relevant market is thus defined according to the EU competition law, according to which, both a relevant product and a relevant geographic market need to be defined. The Commission's Notice on the relevant market stipulates that:

“A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.”²⁴

“The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.”²⁵

Both product and geographical markets are tested by looking at the substitution of the product or the geographical area from the consumers' perspective. A hypothetical, *small but significant non-transitory increase in price* is used as a test to define the relevant market: the SSNIP test. If a 5 to 10% increase in price of a certain product would result in the consumers substituting the product with a different one, or if this would mean that the consumers choose a product from a different geographical area, the product market or, in the latter case, the geographical market, should be considered as belonging to the same relevant market. An additional requirement is that the substitution leads to a decrease of profitability for the undertaking in question. The SSNIP test is then applied in greater geographical areas and with different products, until the increase in price does not result in demand substitution. Substitution on the supply side is taken into consideration in cases where the suppliers are able to switch their production quickly and without significant additional costs as a response to small and permanent changes in the prices. Potential competition is not taken into account at this stage.²⁶

The report of the Swedish Competition Authority shows that Swedish companies are facing competition from other European countries online as a result of the growth of online trade in the EU. In practice, this means that the relevant geographic market will in the future more often include not only different parts of Sweden, but also other countries in the EU or EFTA.²⁷

2.3. Cases Dealing with Internet Related Markets

Swedish precedent on online sales platforms and other internet related markets is still fairly scarce. Guidance is currently mainly sought in the decisions of the Swedish Competition Authority. Relevant decisions are presented first in a chronological and then in a thematic order below.

The Reitan case of 2006²⁸

Reitan Servicehandel AB had obliged its franchisees *Pressbyrå* and *7-Eleven* convenience store chains to use a computer programme to price *Reitan*'s products, which constituted the major part of the franchise stores' inventory. The programme made it difficult for the franchisees to individually set prices on such products. Swedish Competition Authority also found that the franchisees in practice also followed the recommended prices provided in *Reitan*'s system. The investigation was closed after *Reitan* made certain voluntary commitments making it easier for the franchisees to deviate from the recommended prices.

²² Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C 372, p. 5.

²³ See, e.g., case NJA 2008 s 120 of the Swedish Supreme Court of 19 February, 2008.

²⁴ Notice on the relevant market, para. 7.

²⁵ Notice on the relevant market, para. 8.

²⁶ Notice on the relevant market, paras 14-24.

²⁷ Report of the Swedish Competition Authority on competition and growth in the digital markets, p. 148.

²⁸ Decision of the Swedish Competition Authority of 6 February 2006, file ref. 994/2004.

The *Make Up Store* decision of 2010²⁹

Similarly to the previous case, *Make Up Store* was put under investigation by the Swedish Competition Authority for the use of a certain cashier system. *Make Up Store* recommended its franchisees to use the same system, however, only *Make Up Store* could change the prices in the system. The investigation of *Make Up Store* was closed after the company offered voluntary commitments consisting of changing the cashier system so that the franchisees were enabled to set the prices themselves.

The *Booking.com* decision of 2015³⁰

An online travel agency *Booking.com* operated an online platform, on which consumers could search for, compare and book hotel rooms. Customers could make bookings directly on *Booking.com*, however, the hotels connected to the platform were not allowed to offer lower prices on any other platforms, including their own websites. The Swedish Competition Authority initially viewed this as anti-competitive conduct but the investigation was closed after *Booking.com* offered a set of voluntary commitments, including a commitment not to enter into or enforce obligations that require hotels to offer room prices on *Booking.com* that are equal to or lower than those offered on any other online travel agency.

The *Expedia* decision of 2015³¹

At the same time as the *Booking.com* case, the Swedish Competition Authority also investigated *Expedia*, one of *Booking.com*'s competitors. *Expedia* applied the same type of price parity clause as *Booking.com* towards the hotels that were connected to its platform. Also in this case a voluntary commitment by *Expedia* to discontinue the application of its narrow price parity clause in the agreements with the hotels was accepted by the Swedish Competition Authority and the investigation was closed.

The *Onlinepizza* decision of 2016³²

Onlinepizza, an online platform where consumers could order meals from restaurants connected to the platform, was investigated by the Swedish Competition Authority for possibly pressuring its clients not to cooperate with a competing online platform *Pizzahero*. *Pizzahero* claimed that *Onlinepizza* applied an exclusivity clause in its agreements with the restaurants. The Authority concluded that the clause was not exclusive neither formally nor in practice. Also in this case the investigated company decided to make a voluntary clarification of the non-exclusivity of the clause, which the Competition Authority accepted and closed the investigation.

The *Nasdaq OMX* case (ongoing)³³

The Swedish Competition Authority filed a law suit against *Nasdaq OMX AB* for an abuse of its dominant position towards its competitor *Burgundy*. The Swedish Competition Authority claimed that *Nasdaq* pressured its server provider *Verizon* to deny *Nasdaq*'s competitor *Burgundy* access to *Verizon*'s servers. According to the Authority, the denial of access to *Verizon*'s servers, where both *Nasdaq* and many strategically important clients were hosted, created a competitive disadvantage for *Burgundy*. The court hearings in the case are expected to start in September 2017. The judgement of the Swedish Patent and Market court is expected to provide clarity in how the assessment of anti-competitive behaviour in highly technology-dependent markets should be made.

European Commission's *Google* online comparison shopping case³⁴

The Commission found that *Google* abused its dominance among others on the Swedish online search engine market by giving an illegal advantage to its own comparison shopping service in its search results. *Google*'s own comparison shopping service was shown on the first page of the search results, whereas other comparison shopping services were displayed much lower in the following pages. This practice increased the online traffic for *Google*'s

²⁹ Decision of the Swedish Competition Authority of 15 December 2010, file ref. 402/2010. Robert Moldén, one of the authors of this report worked at that time as a Senior Case Officer at the Swedish Competition Authority and served as senior advisor ("projektråd") to the case-team handling the *Make Up Store* case.

³⁰ File ref. 596/2013.

³¹ Decision of the Swedish Competition Authority of 5 October 2015, file ref. 595/2013.

³² Decision of the Swedish Competition Authority of 4 April 2016, file ref. 658/2015.

³³ Case PMT 7000-15 at the Swedish Patent and Market Court, registered on 27 May 2015. See also the lawsuit of the Swedish Competition Authority of 27 May 2015, file ref. 406/2015. The lawsuit is available at www.konkurrensverket.se/globalassets/konkurrens/stamningsansokan/15-0406_stamningsansokan.pdf.

³⁴ Commission Decision in the Case number 39740. The Decision has not been made public yet. The main points of the reasoning of the Commission can be found in the Commission's Press Release of the 27 of June 2017, IP/17/1784.

services and limited the traffic to its competitors. The abuse was found in 13 European countries and the total fine issued was EUR 2.42 billion.

2.3.1. Cases on Retail Price Maintenance (RPM)

The *Reitan* case of 2006³⁵

According to the franchise agreements between *Reitan Servicehandel i Sverige AB* and its franchisees in the *Pressbyrån* and *7-Eleven* chains, the franchisees had to use a specific computer programme for pricing of their products, which was also used for calculating the franchise fee. Through the computer programme, Reitan supplied its franchisees with recommended consumer prices. The Swedish Competition Authority found that the programme made it practically difficult for the franchisees to set prices individually to consumers. Moreover, the Authority found that the franchisees to a large degree followed the recommended prices. *Reitan* offered to make a voluntary commitment that would make it easier for the franchisees to deviate from the recommended prices and apply individual retail prices. The Swedish Competition Authority accepted these commitments under the threat of fines amounting to SEK 3 million.³⁶ The Competition Authority did not mention the technical aspects of the price setting arrangements. However, the reasoning of the Authority's decision does suggest that the way the technical system was set up constituted the reason behind the Competition Authority's investigation in the first place.

The *Make Up Store* decision of 2010³⁷

In this case, the Swedish Competition Authority started an investigation of *Make Up Store*'s control of the prices set by its franchisees. *Make Up Store* used a certain cashier system, which it also recommended to its franchisees. This system provided fixed prices for all products and only *Make Up Store* was enabled to change the prices in the system, thus making it technically impossible for franchisees to set their own prices. *Make Up Store* also provided the franchisees with shelve-top product information labels with printed prices as well as internal order lists with fixed prices. The Swedish Competition Authority's preliminary view was that this kind of resale price maintenance infringed Chapter 2, Article 1 of the Swedish Competition Act. The company offered voluntary commitments which, in short, consisted of changing the cashier system so that the franchisees were able to change the prices themselves. In addition, the company changed the prices in the order lists from fixed to recommend as well as the routines for the shelve-top product information. The Swedish Competition Authority accepted these commitments and closed the investigation. The decision of the Swedish Competition Authority does mention that there were technical barriers for the franchisees to choose their own prices for *Make Up Store*'s products. Yet, it does not state that the *Make Up Store*'s cashier system required any special legal attention due to the technical nature of such an possibly anti-competitive arrangement.

2.3.2. Cases on Most Favoured Nation (MFN) Conditions

The *Booking.com*³⁸ and *Expedia*³⁹ decisions of 2015

Booking.com, an online travel agency, operated an online platform, on which consumers could search for, compare and book hotel rooms. The consumers could search and compare different hotels on the platform free of charge. Also, the hotels connected to *Booking.com* paid a commission fee only if a booking was made through the platform. However, the agreement between *Booking.com* and the hotels included a term that prohibited the connected hotels from offering a lower price in their own sales channels and on competing platforms. The Swedish Competition Authority's preliminary assessment was that the so called most favoured nation clause or price parity clause could violate the prohibition of anti-competitive cooperation in Chapter 2, Article 1 of the Swedish Competition Act.

At the same time, the Swedish Competition Authority investigated *Expedia*, a competitor of *Booking.com*, for using the same type of price parity clause as the one applied by *Booking.com*. In addition, the agreement between *Expedia* and the hotels contained parity clauses regarding the room availability, cancellation policy and breakfast.

In its decision in the *Booking.com* case, the Competition Authority stated that the price parity clause had effects on both horizontal and vertical relationships. Competition between *Booking.com* and its competitors was restricted,

³⁵ Decision of the Swedish Competition Authority of 6 February 2006, file ref. 994/2004.

³⁶ Case Å 3237-06 at the Stockholm District Court, 24 March 2006.

³⁷ Decision of the Swedish Competition Authority of 15 December 2010, file ref. 402/2010. Robert Moldén, one of the authors of this National Report worked at that time as a Senior Case Officer at the Swedish Competition Authority and served as senior advisor ("projektråd") to the case-team handling the *Make Up Store* case.

³⁸ Decision of the Swedish Competition Authority of 15 April 2015, file ref. 596/2013

³⁹ Decision of the Swedish Competition Authority of 5 October 2015, file ref. 595/2013.

since no competitor cooperating with the hotels connected to *Booking.com* could offer lower prices than the ones on *Booking.com*. Moreover, the clause could constitute a barrier to entry in regard to new and small platforms that are not able to compete with low commission fees. The vertical effects of the price parity clause were however not considered to be problematic from the competition law perspective. The Competition Authority found that hotels and *Booking.com* as such operated on different markets and that the vertical price parity was necessary for *Booking.com* to be able to continue providing the search and comparison services to consumers free of charge. Without such a clause, the hotels would have an incitement to offer lower prices on their own channels, thus escaping the commission fees to *Booking.com*. The Competition Authority came to the same conclusion in its *Expedia* decision, referring to the decision in the *Booking.com* case.

During the investigation, both companies offered voluntary commitments to discontinue the application of their narrow price parity clauses. The Swedish Competition Authority accepted the commitments, asked the Stockholm District Court to place the companies under threats of penalty payments, and closed the investigations, stating that the conduct that was initially regarded as anti-competitive was no longer applied. In both cases, the price parity clauses requiring the hotels to refrain from offering lower room prices on hotels' own websites were not seen as restrictions of competition with the reasoning that the hotels and the online travel agencies did not compete on the same market. Therefore, the Authority concluded that such vertical price parity clauses did not pose any threat to competition.

2.3.3. Cases on Exclusionary Behaviour

The *Onlinepizza* decision of 2016⁴⁰

The Swedish Competition Authority dealt with an online platform *Onlinepizza*, through which consumers could order meals from restaurants that were connected to the platform. After a complaint from *Pizzahero*, a competitor of *Onlinepizza*, the Swedish Competition Authority decided to investigate *Onlinepizza*'s alleged pressure towards its clients to either choose *Onlinepizza* or *Pizzahero*'s platform by applying an exclusivity clause in its agreements with the restaurants. However, the Competition Authority found that the clause in the agreements between *Onlinepizza* and the restaurants did not constitute an exclusivity clause neither formally nor in practice. Therefore, the Authority dismissed the case. It should however be noted that *Onlinepizza* updated the relevant clause, making its non-exclusivity clearer on a voluntary basis during the investigation. The reasoning of the Competition Authority does not include any discussion regarding the fact that the object for the investigation was an online platform.⁴¹

The ongoing *Nasdaq OMX* case⁴²

A case that has received a lot of media attention in Sweden is the ongoing *Nasdaq* case. The Swedish Competition Authority filed a lawsuit against the stock exchange company *Nasdaq OMX AB* for abusing its dominant position in the market for trade services for Swedish, Danish and Finnish shares. The Competition Authority claimed that *Nasdaq* raised a barrier to entry for *Burgundy AB*, a competing stock exchange market, by pressuring *Nasdaq*'s server provider *Verizon* to deny *Burgundy* the possibility to use *Verizon*'s services. Both *Nasdaq* and its clients had their servers placed in *Verizon*'s premises, which reduced the costs and the speed of communication among them. The Competition Authority claimed that by having its servers placed in the same server hall as *Nasdaq* and its clients, *Burgundy* would have been able to reduce the costs and the speed of communication between its actual and potential clients. The Authority's investigation showed that the speed of the communication is one of the main competitive advantages for the stock exchange markets and that the server hall was hosting several of the most important clients in the market. After conducting a dawn raid in *Nasdaq* and *Verizon*'s premises in 2011, the Competition Authority claimed to have found documents proving that *Nasdaq* threatened to move all its business out of *Verizon*'s premises, as well as to make this affect the global relations between *Nasdaq* and *Verizon*, which made the latter to cancel all its negotiations with *Burgundy*. The Competition Authority asked the Swedish Patent

⁴⁰ Decision of the Swedish Competition Authority of 4 April 2016, file ref. 658/2015.

⁴¹ This was the second time *Onlinepizza* was notified to the Swedish Competition Authority – for a more or less the same conduct. The first notification took place in 2013, by another competing online platform *Pizza24*. The Competition Authority did not proceed with the claim and *Pizza24* sued *Onlinepizza* in front of the Swedish Market Court. The Court stated that the relevant market could not be defined and dismissed the claim without discussing the competition rules further; see Judgement of the Swedish Market Court in case MD 2015:1 of 10 February 2015, *Pizza24 Nordic*.

⁴² Case PMT 7000-15 at the Swedish Patent and Market Court, registered on 27 May 2015. See also the lawsuit of the Swedish Competition Authority of 27 May 2015, file ref. 406/2015. The lawsuit is available at www.konkurrensverket.se/globalassets/konkurrens/stamningsansokan/15-0406_stamningsansokan.pdf.

and Market Court to issue a fine of SEK 31 million (around EUR 3 million) against *Nasdaq* for hindering *Burgundy* from competing on fair and equal terms by abusing its dominant position. This corresponds with the highest possible fine under the circumstances according to the Swedish competition legislation.⁴³

The lawsuit of the Competition Authority contains a thorough description of the specifics of the stock exchange market, pointing to its high time and technology sensitivity. In the lawsuit, the Authority argues that big part of all the stock exchange is based on algorithms that are set up in advance and allow the sale and purchase of the stocks to be executed automatically.

The court hearings in the case are expected to start at the Swedish Patent and Market Court in September 2017. In the meantime, *Burgundy* has exited the market. It remains to be seen what base its analysis on the specifics of such a market.

European Commission's Google Online Comparison Shopping Case⁴⁴

One of the most recent cases in which exclusionary anti-competitive behaviour on the Swedish online markets, among others, was punished is the European Commission's decision of the 27th of June 2017 to fine *Google* for abusing its dominant position on the market for online search engines. The Commission opened the case on the European level in 2010 and, seven years later, concluded the investigation by stating that *Google* showed its own comparison shopping service much higher in its search results than *Google's* competitors on the comparison shopping service market online. According to the Commission, this meant that *Google's* competitors received less visitors. Moreover, the abusive practice allowed *Google* to expand its own market shares significantly and to the prejudice of its competitors and the consumers.⁴⁵ *Google* and its parent company *Alphabet* are fined EUR 2.42 billion in total, a fine that will have to be paid if the companies do not stop the abusive practice within 90 days from the Commission's decision. An appeal of the Commission's decision is likely.

2.4. Compensatory Damages Arising from Competition Law Infringements

The possibility of damages in case of competition law violations is regulated in the Swedish Competition Damage Act of 2016.⁴⁶ A company that intentionally or negligently causes damage by infringing Chapter 2, Article 1 or Article 7 of the Swedish Competition Act or Article 101 or Article 102 TFEU is liable for damages that arise from that infringement. The person harmed by the infringement has the right to full compensation for actual loss and for loss of profit, as well as the payment of interest. All companies taking part in an infringement are jointly and severally liable for the damages, however the right to compensation expires by statute of limitations five years after the damage has ceased. It is interesting to note that in cartel cases damage is presumed.

Punitive damages based on competition law infringements are not awarded under Swedish law. The general principle is that the damages awarded cannot be higher than the damages suffered. The principle was recently reiterated in the EU Damages Directive, which explicitly prohibits punitive damages.⁴⁷ The Directive was implemented in Sweden by the Swedish Competition Damages Act of 2016 mentioned above.⁴⁸

A recent Swedish case where a company was sued for damages due to violations of Chapter 2, Article 2 of the Swedish Competition Law by another private undertaking shows that the burden of proof in private damages lawsuits appears to be difficult to meet – at least under the previous regulation of private damages in competition

⁴³ Chapter 3, Article 6 of the Swedish Competition Act.

⁴⁴ Commission Decision in the Case number 39740. The Decision has not been made public yet. The main points of the reasoning of the Commission can be found in the Commission's Press Release of the 27 of June 2017, IP/17/1784.

⁴⁵ According to the Commission, since the beginning of the abuse in each country, *Google's* comparison shopping service increased its traffic 45 times in the United Kingdom, 35 times in Germany, 29 times in the Netherlands, 17 times in Spain and 14 times in Italy. In Sweden, the exclusionary practice was implemented since 2013, but *Google's* increase in the Swedish market is not mentioned in the public documents yet. See the Commission's Fact Sheet on the case, 27 of June 2017, MEMO/17/1785.

⁴⁶ Konkurrensskadelagen (2016:964). The Act implements the EU Directive 2014/104 of the European Parliament and of the Council 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, JOEU 2014 L 349, p. 1.

⁴⁷ Directive 2014/104, see Recital 3.

⁴⁸ Konkurrensskadelagen (2016:964), see Chapter 3, Article 1.

infringement cases.⁴⁹ It remains to be seen whether the new Swedish Competition Damage Act of 2016 will ease the burden in practice.

2.5. Competition Law as a Defence Against Breach of Contracts

Competition law can be used as a defence against allegations of breach of contract by arguing the obligation breached is unlawful. One of the most interesting judgments in Sweden in this regard is the *SAS v Luftfartsverket* case. On 27 April 2001, the Göta Court of Appeal ruled that Luftfartsverket, the Swedish authority in charge of civil aviation, had abused its dominant position by discriminating against *SAS* which had to pay higher fees than its competitors for using a specific terminal at the Stockholm Arlanda airport.⁵⁰ The case did not involve any damages. However, the Göta Court of Appeal found that the abuse by Luftfartsverket entailed nullity, which meant that as a result of the judgment *SAS* was reimbursed for payments of fees and was liberated from future fees to an overall amount of more than 100 million Euro. The judgment was appealed to the Swedish Supreme Court, which on 12 November 2002 decided not to grant leave of appeal.⁵¹

3. Competition Law in the Context of the New Economy

3.1. The Choice Between General or Specific Criteria in Competition Law

The above-mentioned cases show that exclusionary practices occur in internet related business markets in Sweden. However, there are no special criteria for determining whether a practice is exclusionary in internet related markets. The issue has not been discussed in the Swedish Competition Authority's decisions or the Swedish Patent and Market Court's judgements. The criteria are thus the same as under the general rules in the Swedish Competition Act.

The Swedish Retail and Wholesale Council's report of 2017 shows that almost 10% of all trade in Sweden is done online today and that more and more businesses are entering the online arena.⁵² According to the Swedish Retail and Wholesale Council, approximately 20% of all retail sales will take place online in Sweden by 2020 - 2025.⁵³ Thus, from the long term perspective, it is questionable whether the criteria for exclusionary practices in internet related markets should be separated from the traditional markets.

The official report Swedish Competition Authority on e-commerce and the sharing economy in the Swedish markets issued in March 2017 should be mentioned in this context as well. In May 2016, the Swedish government instructed the Swedish Competition Authority to examine the effects of e-commerce and sharing economy on competition and to propose new actions that should be undertaken by the government if needed. The ensuing report concluded that even though online trade is constantly growing, new legislation is not required.

The report shows that consumer behaviour is mainly affected by two factors, namely prices and secure online payment methods.⁵⁴ Issues such as the need for more transparent pricing, the risk for price coordination, the companies' access to digital infrastructure and the importance of electronic identification systems are highlighted in the Authority's report.⁵⁵ However, no new regulation is proposed. Similarly, in the area of the sharing economy, the report mentions that the investigations of the Competition Authority in online markets are increasingly complex, but the Authority concludes that the fact that competition law infringements may take new shapes today does not require new competition rules. At the same, the Authority is of the opinion that the new economy, especially the sharing economy, requires that the investigation methods of the Competition Authority are updated in the same speed as the innovation on the markets.

⁴⁹ Judgment of the Swedish Market and Patent Court of the 29 of June 2017, ref. nr. T 2673-16, *Yarps Network Services AB v Telia Company AB*.

⁵⁰ Judgment of the Göta Court of Appeal in Case T 33-00 *Staten genom Luftfartsverket v Scandinavian Airlines System*.

⁵¹ Decision of the Swedish Supreme Court in Case T 2137-01.

⁵² The same conclusion is made by the Commission in the Report "Final report on the E-commerce Sector Inquiry", SWD(2017) 154 final, as well as the Swedish Competition Authority in the report *Competition and growth in digital markets*.

⁵³ Report of the Swedish Trade Council on the importance of trade ("Handelns betydelse. Då, nu och i framtiden"), 2017, pp. 29-30. The report can be accessed at handelsradet.se/ekonomiska-radet.

⁵⁴ Report of the Swedish Competition Authority on competition and growth in the digital markets, p. 149.

⁵⁵ Report of the Swedish Competition Authority on competition and growth in the digital markets, p. 46 and 149.

In the area of mergers in the sharing economy, the Swedish Competition Authority mentions that other indicators apart from the current market thresholds might be needed to make a proper investigation. Apart from the current merger thresholds, the report suggests using the acquisition price of an online platform as an additional notification threshold.⁵⁶

Thus, the Swedish Competition Authority's view does not appear as completely definite. The above discussed *Nasdaq* case ought to provide more clarity on the application of competition rules in the context of online sales platforms, and possibly on whether the law should become more sensible with regard to companies operating in internet related markets.

3.2. Efficiency as a Defence in Antitrust Cases

In cartel cases, there is room for arguing that a degree of cooperation increases efficiency of the defendant in order to escape the prohibition in Chapter 2, Article 1 of the Swedish Competition Act. However all four requirements listed in the exception in Chapter 2, Article 2 of the same act (which mirrors Article 101(3) TFEU) must be met. Thus, the cooperation must:

- “1. contribute to improving the production or distribution of goods or to promoting technological or economic progress;
2. allow consumers a reasonable share of the resulting benefits;
3. only impose, on the undertakings concerned, restrictions which are indispensable to the attainment of the objective referred to in subsection 1; and
4. do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial proportion of the products in question.”⁵⁷

Generally, once an anti-competitive object or effect of an agreement has been established, it is difficult to argue that efficiency gains should make an agreement or concerted practice escape the prohibition in Chapter 2, Article 1 of the Swedish Competition Act. To the knowledge of the authors of the report, there are no Swedish cases related to online-sales where an anti-competitive horizontal agreement was allowed because of arguments of efficiency. However, it is more likely that the exemption in Chapter 2, Article 2 is applicable in vertical agreements than in horizontal ones.

In general, it is possible for a company in a dominant position to justify a behaviour that would otherwise constitute an abuse by demonstrating that the behaviour can be outweighed or at least counterbalanced by efficiencies arising from that behaviour. However, this is only possible as long as the efficiencies also benefit consumers. Thus, Chapter 2, Article 2 of the Swedish Competition emphasizes the effect of the behaviour on the consumers in the same way as Article 102 TFEU. In the legal doctrine it has been argued that the possibility to justify a behaviour of a dominant undertaking under Article 102 TFEU through the efficiencies that the behaviour creates, corresponds to the exemption rule in Article 101(3) TFEU which is applicable in cartel cases.⁵⁸

4. The Structures of the Markets

4.1. Vertical Restraints in Online Markets

All six Swedish cases discussed above deal with vertical relationships. The conclusion can therefore be drawn that competition rules on vertical agreements are often relevant when online sales platforms come into question. However, in the *Booking.com* and *Expedia* decisions, the Swedish Competition Authority found that only horizontal effects of the most favoured nation clauses applied by the travel agencies constituted infringements of competition law.⁵⁹ Vertical effects were not considered as problematic. This is in line with the general idea behind

⁵⁶ See Report of the Swedish Competition Authority on competition and growth in the digital markets, pp. 155-156.

⁵⁷ Swedish Competition Act of 2017, Chapter 2, Article 3.

⁵⁸ J. Karlsson and M. Östman, *Konkurrensrätten - En handbok*, 5th ed., Karnov Group Sweden AB 2014, Stockholm, p. 668, n. 115 with the reference to L. Henriksson, *Konkurrensrättsöverträdelser – Ekonomisk analys i den juridiska processen*, Norstedts Juridik 2013, Stockholm.

⁵⁹ See the Decisions of the Swedish Competition Authority in *Booking.com*, p. 6 and *Expedia*, p. 3.

Swedish and EU competition law that vertical agreements do not raise the same competition concerns as horizontal agreements.⁶⁰

In principle, all vertical practices are block exempted by Regulation 330/2010⁶¹ if the market share threshold of 30% is not exceeded, with the exception of restrictions that remove the benefit of the block exemption, namely hard-core restrictions and excluded restrictions.⁶² As long as the market shares of the companies engaged in a vertical cooperation do not exceed the mention threshold, the net effect of vertical agreements is presumed not to harm the consumers and is therefore considered to be a safe-harbour, although this presumption can be withdrawn by the Swedish courts if appreciable anti-competitive effects occur.⁶³

There is no *lex specialis* regulating the special case of online sale platforms in Swedish competition law. The rules described above are applied in all relevant competition cases, including the ones relating to online sales platforms. The Commission's Guidelines on Vertical Restraints are, however, more thorough when it comes to online sales.⁶⁴ Paragraph 52 of the Guidelines states that:

“The internet is a powerful tool to reach more and different customers than will be reached when only more traditional sales methods are used and this is why certain restrictions on the use of the internet are dealt with as (re)sales restrictions. In principle, every distributor must be allowed to use the internet to sell products.”

The hard-core restrictions in Article 4 Regulation 330/2010 are also relevant for companies operating in online environments. Hard-core restrictions are very likely to have negative effects on competition even when companies are within the 30% market share threshold mentioned above and are therefore excluded from the scope of the exemption in Regulation 330/2010.⁶⁵ The Commission's Vertical Restraints Guidelines give further guidance on the interpretation of Article 4 Regulation 330/2010 when it comes to online sales.⁶⁶

The Regulation 330/2010 expires in 2022, but the Commission has recently stated that does not see it necessary to review it earlier than what is planned.⁶⁷ Having in mind that the online trade is steadily growing, it is possible that a greater emphasis will be put on the new economy when Regulation 330/2010 is reviewed. For the time period prior the review, one should expect to see more Commission investigations in the e-commerce sectors, in order to “contribute to a consistent application of the EU competition”.⁶⁸

4.2. Agreements of Minor Importance

As a complement to the Swedish Competition Act of 2008,⁶⁹ the Swedish Competition Authority has provided guidelines on how to interpret Swedish competition law. In 2009, the Competition Authority published its present Guidelines on agreements of minor importance.⁷⁰

⁶⁰ J. Karlsson and M. Östman, *Konkurrensrätten - En handbok*, 5th ed., Karnov Group Sweden AB 2014, Stockholm, p. 285. See also CJEU, case C-32/11 *Allianz Hungária Biztosító & Others*, ECLI:EU:C:2013:160. For an in-depth analysis of Swedish competition law related to vertical constraints, see L. Henriksson, *Distributionsavtal – vertikala avtal och konkurrensrättsliga aspekter*, Norstedts Juridik 2012, Stockholm.

⁶¹ Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102, p. 1, Article 4.

⁶² Articles 4 and 5 of the Regulation 330/2010.

⁶³ Commission Guidelines on Vertical Restraints, OJ 2010 C 130, p. 1, para. 176.

⁶⁴ Commission Guidelines on Vertical Restraints, OJ 2010 C 130, p 1.

⁶⁵ See VBER, Article 4 and Recital 10.

⁶⁶ See Commission's Guidelines on Vertical Restraints, paras. 47-64.

⁶⁷ Report from the Commission to the Council and the European Parliament, ‘Final report on the E-commerce Sector Inquiry’, SWD(2017) 154 final, para 74.

⁶⁸ Report from the Commission to the Council and the European Parliament, ‘Final report on the E-commerce Sector Inquiry’, SWD(2017) 154 final, para 75.

⁶⁹ *Konkurrenslagen* (2008:579).

⁷⁰ *Konkurrensverkets allmänna råd om avtal av mindre betydelse (bagatellavtal) som inte omfattas av förbudet i 2 kap. 1 § Konkurrenslagen* (2008:579), KKVFS 2009:1.

These provisions are in most aspects identical with those provided by the EU Notice on agreements of minor importance,⁷¹ which quantifies what is not an appreciable restriction of competition under Article 101 of the TFEU. The main principle of the EU Notice is the same, i.e. that an agreement that would otherwise be caught by Article 101 of the TFEU, respectively Chapter 2, Article 1 of the Swedish Competition Act falls outside the scope of the above mentioned Articles as long as the aggregate market share held by the parties to the agreement does not exceed 10% in case of horizontal agreements and 15 % in case of vertical agreements.⁷²

The Swedish Guidelines do, however, differ from the EU Notice in one important aspect. The Swedish Guidelines contain provisions that are more generous as to the possibility of SMEs to enter into non-hardcore horizontal agreements. Pursuant to Article 7 of the Swedish Guidelines, cooperation between enterprises does not fall under the prohibition of Chapter 2, Article 1 of the Swedish Competition Act as long as the annual net turnover of each of the contracting parties does not exceed SEK 30 million and their joint market share is less than 15%, compared to the 10% market share threshold applicable to horizontal cooperation agreements under the EU Notice.

4.3. Market Power in the Area of Online Sales Platforms

The criterion for market power is not regulated by the Swedish legislator, but market power is recognized as a relevant factor in competition cases. For example, in the *Onlinepizza* decision of 2016, the Swedish Competition Authority explicitly stated that the level of market power affects the extent of an anti-competitive behaviour.⁷³ It did not discuss the definition of market power further. According to the Commission, market power is:

“...the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time. The degree of market power normally required for a finding of an infringement under Article 101(1) is less than the degree of market power required for a finding of dominance under Article 102.”⁷⁴

Market power was also discussed in the Swedish Competition Authority’s recent report on competition and growth in the digital markets. The report states that a large number of users and access to large amounts of data can give a platform significant market power even if it does not have a high turnover. High market value and large number of users are given as two examples of market power in markets where online platforms are used. The report concludes that there is a risk of mergers between platforms with low turnover but strong market power falling outside of the current merger reporting thresholds, even though the merger may de facto significantly impede competition on the market. The Competition Authority suggests to also pay attention to the acquisition price of the target undertaking.⁷⁵

5. Voluntary Commitments and their Effects on the Development of the Law

Chapter 3, Article 4 of the Swedish Competition Act allows companies to make voluntary commitments in cases where a possible competition law infringement has been identified. If the Swedish Competition Authority agreed to the commitments, it may end its investigation. Moreover, the Competition Authority may ask the Patent and Market Court to couple the decision of the Competition Authority with penalty fines in case the company does not comply with the commitment.

Among the cases described above, the ending of an investigation by voluntary commitments appears to be common in the area of internet related markets. When this is the case, the Competition Authority does not take a

⁷¹ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (de minimis), OJ 2014 C 291, p. 1

⁷² The Swedish Guidelines refer to the previous EU Notice on agreements of minor importance, see Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis), JO 2001C 368, p. 7. However, the Commission’s update of the De Minimis Notice in 2014 did not affect the Swedish Guidelines in substance, other than that the Commission’s accompanying guidance document can now be relevant for the classification of a by object restriction, see Commission Staff Working Document “Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice”, SWD(2014) 198 final.

⁷³ Decision of the Swedish Competition Authority of 4 April 2016, file ref. 658/2015, p. 4.

⁷⁴ Commission Guidelines on Vertical Restraints, OJ 2010 C 130, para 97.

⁷⁵ Report of the Swedish Competition Authority on competition and growth in the digital markets, p. 155.

final decision on whether the investigated company committed a competition law offence or not. It does provide certain reasoning behind such decisions, but the precedent effect of such decisions cannot be compared to rulings of the court.

However, this does not necessarily mean that such voluntary commitments go unnoticed. It may be unlikely that a higher court would refer to the reasoning of such decisions, but the Swedish legislator is not prevented from taking decisions of this type into consideration. In fact, the Swedish Government Official Report on increasing the Swedish Competition Authority's powers – a type of a pre-legislative report that later serves as a basis for the adoption and even the interpretation of the legislation – includes the above mentioned *Booking.com* and *Expedia* decisions of the Swedish Competition Authority.⁷⁶

5.1. Burden of Proof

The standard of proof is in practice not entirely the same in cases of non-compliance with voluntary commitments and in cases of competition law violations. Antitrust violations require that it is fully proved that all the relevant criteria in the Swedish Competition Act are fulfilled for the Swedish Patent and Market Court to be able to find that an infringement exists. Neither fines nor damages can be ordered before an infringement is found.

Moreover, the Swedish Market Court's precedence clearly states that administrative fines in competition cases are of a criminal nature.⁷⁷ The result of such a finding is that the European Convention on Human Rights must be taken into consideration where competition law is violated as well. This means that principles such as *ne bis in idem* or the presumption of innocence – as well as the relevant precedent of the European Court of Human Rights – are fully applicable in competition cases where fines are imposed.⁷⁸

However, it should be pointed out that in the case of non-compliance with a voluntary commitment where high penalty fines are coupled with the company's voluntary commitment, it is enough that such a commitment is breached for the company to be forced to pay the penalty fine.⁷⁹ Legally, such penalty fines are not classified as fines for breaching competition law and no aspects of criminal procedure can be applied in these cases.⁸⁰ Therefore, the burden of proof is not necessarily borne by the competition authority when voluntary commitments coupled with penalty fines are breached. Yet, from the perspective of the companies, the effects of the penalty fines, especially when the sum is high, may be similar to those of fines for breaches of competition law.

⁷⁶ Swedish Government Official Report SOU 2016:49 on expanding the decisive rights for the Swedish Competition Authority (En utökad beslutanderätt för Konkurrensverket), SOU 2016:49, p. 159.

⁷⁷ See Decision of the Swedish Market Court in case MD 2015:4 of 17 April 2015, Swedavia, para. 25. The Market Court based its decision on the Judgment of the European Court of Human Rights in the case *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08 and the case C-501/11 P, *Schindler Holding Ltd and others v Commission*, ECLI:EU:C:2013:522, paras 30-38.

⁷⁸ Other Swedish cases where the European Convention on Human Rights was also relevant were Judgment of the Swedish Market Court in case MD 2009:11 of 18 May 2009, NCC AB and others v Swedish Competition Authority, Judgment of the Swedish Market Court in case MD 2013:5 of 12 April 2013, TeliaSonera AB and others v Swedish Competition Authority and Judgment of the Swedish Patent and Market Court of Appeals, ref. nr. PMT 7497/16 of 28 April 2017, Aleris Diagnostik and others v Swedish Competition Authority.

⁷⁹ See Chapter 6 of the Swedish Competition Act.

⁸⁰ See Decision of the Swedish Market Court in case MD 2015:4 of 17 April 2015, Swedavia, paras 44-59.