

Sweden

By Trine Osen Bergqvist
Swedish Competition Authority¹

1. The Swedish Prohibition

Chapter 2, Section 7 of the Swedish Competition Act (2008:579) prohibits abuse of a dominant position. The prohibition reads as follows:

“Any abuse by one or more undertakings of a dominant position on the market is 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.”

The Competition Act entered into force on 1 November 2008. The Act concerns competition law exclusively. The prohibition in Chapter 2, Section 7 has had the same wording since 1993, when it was introduced in the former Competition Act (1993:20). The prohibition is modelled closely on Article 102 of the Treaty of the Functioning of the European Union (TFEU). Like Article 102 TFEU, the list of prohibited practices is not exhaustive.

Similar practises to those covered by the prohibition may also be covered by other areas of law, such as contract law and marketing law.). E.g. may unfair contract terms be set aside as void according to section 36 of the Swedish Contracts Act (1915:218) and misleading marketing is prohibited by Section 10 of the Swedish Marketing Act (2008:486).

2. The judiciary System

Although the substantial prohibition in Chapter 2, Section 7 in the Swedish Competition Act is modelled closely on the prohibition in Article 102 TFEU, the procedural rules differ significantly. In general, the decision-making powers of the Swedish Competition Authority (SCA) are less extensive than those of the Commission and of other competition authorities in the EU.

The SCA may not on its own impose administrative fines. The SCA has to submit a summons of application to the Stockholm District Court and request the court to impose fines.² The District Court’s judgments may be appealed to the Market Court, which is the court of last instance in competition law cases.

The SCA may issue injunctions ordering the dominant to terminate the infringement.³ Injunctions may be imposed under penalty of a fine for default.⁴ The SCA may order the dominant to stop applying a certain agreement, certain terms of an agreement or other prohibited practices, but it may only impose remedies that are proportionate and necessary to bring the infringement to an end.⁵ Structural remedies may not be imposed. Injunctions may be appealed directly to the Market Court.⁶

¹ The views expressed in the report are the personal views of the author and does not necessarily reflect the position of the Swedish Competition Authority.

² Chapter 3, Section 5 of the Competition Act.

³ Chapter 3, Section 1 of the Competition Act.

⁴ Chapter 6, Section 1 of the Competition Act.

⁵ Prop. 1992/93:56 page 90 and prop. 2007/08:135 page 252.

⁶ Chapter 7, Section 1 of the Competition Act.

If the SCA decides not to intervene against an alleged on-going infringement, competitors affected by the conduct may submit a summons of application to the Market Court and request the Market Court, as the first and last instance, to issue an injunction.⁷

Stockholm District Court is involved only in cases concerning administrative fines and in private litigation concerning damages or nullity caused by competition law violations. The District Court is not a specialist court, but it has a specialised chamber dealing with competition law. In competition law cases, the court consists of two legal judges and two judges who are experts in economics. The judgments of the District Court may be appealed to the Market Court, which is the court of final instance.

The Market Court is a specialised court that handles cases relating to the Competition Act, the Marketing Act and other consumer and marketing legislation. The Market Court consists of a chairman and a vice chairman in addition to five special members. The chairman, the vice chairman and one of the special members must be lawyers with experience as judges. The other special members are experts in economics.

The courts' review of a case is not limited to a judicial review. The courts examine all facts of the case and make their own decision on whether the practice constitutes an abuse of dominant position.

3. The Definition of Abuse

The statute contains no definition of abuse. Both the Swedish Competition Authority (SCA) and the Swedish courts have applied the definition of abuse developed by the Court of Justice, defining abuse as “an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of markets where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”.⁸

In its preliminary ruling in *TeliaSonera*, the Court of Justice explained that the term abuse may not only consist of exploitative practices, that directly cause harm to consumers, it may also consist of exclusionary practices that cause consumers harm through their impact on competition.⁹ In *Post Danmark*, the Court of Justice added the phrase “to the detriment of consumers” to its definition of exclusionary abuse. It pointed out that “Article 82 EC applies, in particular, to the conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition”.¹⁰

As opposed to exclusionary abuse, case-law has not developed a single definition covering all types of exploitative abuse. Exploitative abuse in the form of excessive prices has been defined as prices that have “no reasonable relation to the economic value of the product supplied”.¹¹

4. Exploitative and Exclusionary Abuse

Chapter 2, Section 7 of the Competition Act covers both exploitative and exclusionary abuse. The statute does not use the terms exploitative or exclusionary, but from the list of prohibited practices, it is apparent that both types of abuse are covered by the prohibition.

The decisional practice of the SCA makes no explicit distinction between exploitative and exclusionary abuse. Of a total of three cases that led to an intervention from the SCA during the period 1 January 2010 to 1 January 2015, one concerned an abuse that was purely exploitative¹² and two concerned abuses that were mainly exclusionary.¹³ Of the seven judgments from Swedish courts during the same period concerning abuse of

⁷ Chapter 3, Section 2 of the Competition Act.

⁸ ECJ, case 85/76, *Hoffman-La Roche & Co AG v Commission*, ECR 1979 461, pt. 91.

⁹ CJEU, case C-52/09 *TeliaSonera Sverige AB*, ECR 2011 I-527, pt. 24.

¹⁰ CJEU, case C-209/10 *Post Danmark A/S*, ECR 3261, pt. 24.

¹¹ ECJ, case 27/76, *United Brands Company v Commission*, ECR 1978 207, pt. 50.

¹² Case 378/2013 *Swedavia AB*.

¹³ Case 533/2009, *Ekfors Kraft AB* and case 815/2014, *Swedish Match North Europe AB*.

dominant position, one concerned an abuse that was purely exploitative¹⁴, three concerned abuses that were purely exclusionary¹⁵ and three concerned discriminatory abuse¹⁶, an abuse that may be both exclusionary and exploitative. In a recent judgment from the Stockholm District Court concerning price discrimination, the court explicitly differs between exploitative and exclusionary price discrimination.¹⁷

As opposed to exploitative abuses, exclusionary abuses are particularly mentioned in the SCA's prioritisation policy as an example of serious conduct.¹⁸ This is an indication that the SCA is more likely to give priority to a case concerning exclusionary abuse than it is to a case concerning exploitative abuse.

5. Price-based and Non-price-based Abuse

The statute makes no explicit distinction between price-based and non-price-based abuse. However, both the decisional practice from the SCA and case-law from the European courts suggest that when it comes to price-based conduct, a different legal test shall be applied than in non-price based cases.

In price-based cases, the SCA conducts AEC-tests in accordance with the principles in the Commission's Guidance Paper¹⁹ in order to determine whether the price constitutes an abuse of dominant position.²⁰ This practice is in line with recent case-law from the Court of Justice. In its preliminary rulings in *TeliaSonera*²¹ and *Post Danmark*²² the Court of Justice stated that in order to establish a price-based abuse in the form of margin squeeze or selective rebates, it is necessary to show that the price is capable of excluding as efficient competitors, i.e. to conduct an AEC-test. The General Court took a different approach in *Intel*, stating that it is not necessary to perform an AEC-test to conclude that exclusivity rebates constitute abuse of dominant position, but this position was based on the General Court's finding that exclusivity rebates, as opposed to margin squeeze and selective rebates, constitute non-price based conduct.²³ Thus, as regards price-based conduct, it seems to be established case-law that it is necessary to conduct AEC-tests in order to establish that the price is abusive. The Swedish Market Court has at one occasion taken a different approach with respect to non-exclusive discounts, holding that it is not necessary to perform an AEC-test in order to conclude that such a discount is abusive²⁴, but this judgment is quite difficult to reconcile with subsequent case-law from the European courts.

6. The Objective of the Prohibition

When the prohibition was introduced in Swedish law, one of its purposes was to protect small and medium-sized companies from strong competitors, suppliers and customers.²⁵ However, both the SCA and the Commission have on several occasions made it clear that the purpose of the prohibition is to protect competition, not competitors. The Court of Justice has also made it clear that dominance is not in itself a ground for criticism of the undertaking.²⁶

Today, there seem to be two schools of thoughts on what should be considered the objective of the prohibition of abuse of dominant position. The first school sees the goal as to protect the process of competition, the essence being that it is the process or structure of competition that matters, not the outcome/effect of competition. The

¹⁴ MD 2011:28, *Uppsala Taxi 100 000 AB v Swedavia AB and EuroPark Svenska AB*, 23 November 2011.

¹⁵ Svea Hovrätt, case T 10012-08, *Euroclear Sweden AB v Europe Investor Direct AB et al*, 19 January 2011, MD 2011:14, *Bring CityMail AB v Posten Meddelande AB*, 8 June 2011 and MD 2013:5, *TeliaSonera AB v Konkurrensverket*, 12 April 2013.

¹⁶ MD 2011:2, *Stockholm Transfer Taxi i Stockholm AS v Swedavia AB*, 2 February 2011, Stockholm District Court, case T 5995-09, *Preem AB v Gävle Hamn AB*, 31 May 2012 and Stockholm District Court, case T 20621-10, *Verizon Sweden AB v Tele 2 Sverige AB*, 2 February 2014.

¹⁷ Stockholm District Court, case T 20621-10, *Verizon Sweden AB v Tele 2 Sverige AB*, 2 February 2014, page 71-72.

¹⁸ http://www.kkv.se/globalassets/english/about-us/english_prioritisation_policy_for_enforcement.pdf

¹⁹ Guidance on the Commission's Enforcement Priorities in applying Article 82 of the EC Treaty to exclusionary conduct by dominant undertakings.

²⁰ Decision of 3 May 2012 in case 262/2011, *Posten AB*, page 4 and decision of 4 July 2014 in case 721/2013, *Infranord AB*, page 3.

²¹ CJEU, case C-52/09 *TeliaSonera Sverige AB*, ECR 2011 I-527.

²² CJEU, case C-209/10 *Post Danmark A/S*, ECR 3261.

²³ EGC, case T-286/09, *Intel Corp v Commission*, pt. 152.

²⁴ MD 2011:14, *Bring CityMail AB v Posten Meddelande AB*, 8 June 2011 page 14.

²⁵ Prop. 1992/92:56 page 21-22.

²⁶ CJEU, case C-209/10 *Post Danmark A/S*, ECR 3261, pt. 21.

other school sees the goal as to protect competition to the benefit of consumers, that is, to protect competition in order to protect consumer welfare. The latter school is effect or result oriented.²⁷

The overall objective of the SCA is to promote effective competition in the private and the public sector to the benefit of consumers.²⁸

7. Enforcement

The prohibition in Chapter 2, Section 7 of the Competition Act is enforced by the SCA. If the practice investigated also affects trade between EU member states, the SCA will also apply Article 102 TFEU. There is no regulatory authority that has a concurrent power to enforce the Competition Act.

The SCA has not adopted any guidelines with respect to the interpretation of the prohibition. It has adopted a prioritisation policy for its overall enforcement of the Competition Act, but this policy provides no guidance on how to interpret the prohibition or how to identify an abuse. The SCA's interpretation of the prohibition is based on decisional practice of the Commission and case-law from the European courts regarding Article 102 TFEU. The SCA has also explicitly relied on the guidance provided in the Commission's Guidance Paper.²⁹ Although the SCA is not legally bound by the Guidance Paper, and has not committed to consequently follow the principles therein, the Guidance Paper provides important guidance for the SCA's analysis.

According to the SCA:s prioritisation policy, decisions whether or not to investigate a case are based on the seriousness of the problem, the importance of securing a guiding precedent, whether the SCA is the best placed authority to deal with the problem, and whether the SCA is able to effectively investigate and remedy the problem. The seriousness of the problem is based primarily on potential harm to competition and consumers. Exclusionary abuse is explicitly listed as a serious conduct.³⁰

Over the latest years, and in particular following the Commission's adoption of its Guidance Paper, the SCA has applied an economic approach in its enforcement of the prohibition, focusing on the risk of consumer harm. Efficiencies are carefully taken into account in order to avoid interventions against conducts that are truly pro-competitive. In cases concerning price-based abuse, the SCA has conducted AEC-analysis in accordance with the principles of the Guidance Paper.

In the period 1 January 2010 to 1 January 2015, approximately 50 cases³¹ concerning abuse of dominant position was decided by the SCA, of which three cases led to an intervention. During the same period, the SCA decided in 89 cases³² concerning anti-competitive agreements, of which eight cases led to an intervention.

The three cases in which the SCA has intervened against abuse of dominant position are briefly described below.

On 25 August 2010, the SCA ordered the electric utility company *Ekfors Kraft AB* (Ekfors Kraft) to connect the municipal street lighting facilities of Haparanda Stad (Haparanda) to its power grid.³³ The SCA found that access to the grid was objectively necessary in order for Haparanda to be able to operate on the market for street lighting services. In the absence of objective justification, Ekfors Kraft's refusal to supply a connection to its

²⁷ Luc Peepkorn, Conditional pricing: Why the General Court is wrong in *Intel* and what the Court of Justice can do to rebalance the assessment of rebates, Concurrences No 1-2015 I pp. 43-63, pt. 23.

²⁸ <http://www.konkurrensverket.se/en/omossmeny/about-us/uppgifter/>

²⁹ Decision of 3 May 2012 in case 262/2011, *Posten AB*, page 4 and decision of 4 July 2014 in case 721/2013, *Infranord AB*, page 3.

³⁰ http://www.kkv.se/globalassets/english/about-us/english_prioritisation_policy_for_enforcement.pdf

³¹ The figure is based on information in the SCA:s annual report for 2014

<http://www.konkurrensverket.se/globalassets/aktuellt/nyheter/arsredovisning-2014.pdf> page 90, as regards 2014-2012, and information on the SCA:s website <http://www.kkv.se/beslut-och-diarium/> as regards 2010-2011. As regards 2010-2011, the figures are based on the number of closed cases regarding abuse of dominant position, classification number 322, and do not include cases that have been registered as tip cases (classification number 311) and investigated by a competition unit without having the classification number changed to number 322.

³² The figure is based on information in the SCA:s annual report for 2014

<http://www.konkurrensverket.se/globalassets/aktuellt/nyheter/arsredovisning-2014.pdf> page 90, as regards 2014-2012, and information on the SCA:s website <http://www.kkv.se/beslut-och-diarium/> as regards 2010-2011. As regards 2010-2011, the figures are based on the number of closed cases regarding anti-competition agreements, classification number 321, and do not include cases that have been registered as tip cases (classification number 311) and investigated by a competition unit without having the classification number changed to number 321.

³³ Case 533/2009, *Ekfors Kraft AB*.

grid amounted to an abuse of dominant position in violation of Chapter 2, Section 7 of the Competition Act. The decision was appealed to the Market Court, but the appeal was later abandoned.

On 18 June 2013, the SCA brought legal proceedings in the Stockholm District Court against the state-owned airport operator *Swedavia AB* (Swedavia).³⁴ The SCA requested the court to order Swedavia to pay administrative fines amounting to SEK 340,000 for having abused its dominant position by imposing unfair fees at Arlanda airport. The action followed a successful private claim for injunction by the complainant, Uppsala Taxi 100 100 AB (Uppsala Taxi). When the SCA decided not to investigate the case, Uppsala Taxi requested the Market Court to issue an injunction against Swedavia and the parking company EuroPark Svenska AB (EuroPark). The Market Court found one of the fees applied at Arlanda to be abusive and ordered Swedavia and EuroPark to end the infringement.³⁵ Following this injunction, the SCA brought legal proceedings before Stockholm District Court, requesting the court to order Swedavia to pay administrative fees for the violation. Swedavia argued that the case was inadmissible, as the matter had already been resolved by the Market Court, and that the principle of *ne bis idem* meant that the case could not be tried again. In January 2014, Stockholm District Court gave a judgment finding that the principles of *ne bis in idem* did not make the case inadmissible.³⁶ The decision was appealed to the Market Court and the case is still pending.

On 9 December 2014, the SCA brought legal proceedings in the Stockholm District Court against *Swedish Match North Europe AB* (Swedish Match), the manufacturer of wet tobacco sold in Scandinavia as “snus”.³⁷ The SCA asked the court to order Swedish Match to pay administrative fines amounting to SEK 37,982,000 for having abused its dominant position by imposing a new system for shelf labels in Swedish Match’s snus coolers, according to which Swedish Match’s competitors were forced either to follow a detailed label template produced by Swedish Match or accept Swedish Match’s exchanging the existing labels for generic grey/white ones. The SCA found that Swedish Match had a strict application of the labelling system. It did not accept labels with minor deviations from the template, even if they fitted in the existing label holders. In addition, Swedish Match did not always provide an indication of the price of competitors’ products. In certain cases, Swedish Match used non-standard labels for their own low-price snus Kaliber, or removed competitors’ existing labels without replacing them. Internal documents showed that the labelling system was introduced by Swedish Match as part of a strategy to reduce price and brand competition.³⁸ The SCA concluded that the practice amounted to an abuse of dominant position. The case is still pending.

The SCA has at times been criticised, not for putting too many restrictions on company’s legal rights or their business opportunities, but rather for not being sufficiently active in its enforcement of the prohibition against abuse of dominant position.³⁹ The SCA’s application of an effect-based approach, in which the costs of over-enforcement are carefully taken into account, may have contributed to the low number of interventions. As of 1 January 2014, the SCA has established a separate competition unit to handle cases concerning abuse and vertical restraints. The Abuse and Vertical Restraints Unit is headed by the former deputy chief economist, Martin Mandorff, and consists of 18 case officers, of which about fifty percent are economists and the other fifty percent are lawyers. Through increased expertise and more resources, the SCA is expected to be well equipped to enforce the prohibition.

8. Judgments from the Courts

During the period 1 January 2010 to 1 January 2015, Swedish courts have decided on seven cases concerning abuse of dominant position. Of these seven cases, one was initiated by the SCA, three was initiated by complainants following a SCA decision not to investigate the case, and three were private enforcement cases with claim for stand-alone damages. During the same period, Swedish courts have decided on five cases concerning anti-competitive agreements, of which three were initiated by the SCA, one was initiated by a complainant following a SCA decision not to investigate the case and one was a private action concerning the nullity of an agreement.

The judgments concerning abuse of dominant position are briefly described below.

³⁴ Case 378/2013 *Swedavia AB*.

³⁵ MD 2011:28, *Uppsala Taxi 100 000 AB v Swedavia AB and EuroPark Svenska AB*, 23 November 2011.

³⁶ Stockholm District Court, case T 9131-13, 13 January 2014.

³⁷ Case 815/2014, *Swedish Match North Europe AB*.

³⁸ For further information, see the SCA’s fact sheet on

http://www.konkurrensverket.se/globalassets/english/news/2014_815_swedishmatch_eng.pdf.

³⁹ Global Competition Review’s rating 2014 of the SCA’s work 2013.

In *Euroclear Sweden AB*, a Swedish Court of Appeal awarded damages in a private enforcement case.⁴⁰ The case followed a refusal from Euroclear Sweden AB (Euroclear) to supply share registers with complete information about shareholders in Swedish companies. Euroclear had previously supplied share registers with complete information about shareholders, but with no prior notice Euroclear started to supply share registers without personal identity numbers and street addresses to the shareholders. Euroclear was found to have abused its dominant position, not only during the period it had explicitly refused to supply complete share registers, but also during the period it had charged excessive prices for supplying the same.

The case *Stockholm Transfer Taxi i Stockholm AB* concerned an action for injunction by the taxi company, Stockholm Transfer Taxi i Stockholm AB, against the airport operator Swedavia AB (Swedavia) following a decision from the SCA not to investigate the case.⁴¹ The complainant argued that Swedavia abused its dominant position by allocating taxi lanes in a discriminatory way between different taxi companies. The Market Court agreed that, as a cause of the limited space outside the terminal, rules governing the use of the area should, to the extent possible, be competition neutral. However, the Market Court found that Swedavia's allocation was based on customer demand. Considering that the facts of the case did not support the claim that the allocation led to a competitive disadvantage for the complainant or even a cementation of the market, the Market Court concluded that the practice did not constitute an abuse.

Bring CityMail is another case in which the complainant brought an action directly before the Market Court.⁴² The case started with a complaint from Bring City Mail AB (CityMail) to the SCA against its main competitor on postal services, the incumbent postal operator *Posten Meddelande AB* (Posten). CityMail argued that Posten's sorting discount of SEK 0.2 per item on pre-sorted bulk-mail had a foreclosing effect and that it was thus abusive. Posten claimed that the discount was based on cost savings caused by the customers' pre-sorting of the mail. Posten also argued that the effective price CityMail would have to offer in order to compete with Posten was above CityMail's long run average incremental costs, and that the discount could thus not be exclusionary. In accordance with the Commission's Guidance Paper, the SCA performed an AEC-test. As the AEC-test did not show that the discount was capable of foreclosing as efficient competitors, the SCA decided to close the case.⁴³ When the case was brought before the Market Court, the court did not have access to the AEC-test carried out by the SCA. Posten did submit its own AEC-test, but not the underlying cost data. Unlike the SCA, the Market Court considered that it was not necessary to perform an AEC-test in order to conclude that the discount amounted to an abuse of dominant position. Applying a more formalistic approach than the SCA, the court found it obvious that the discount was capable of restricting customers from making their purchases from CityMail or force CityMail to squeeze its margins, and that the discount was thus abusive.

In *Swedavia AB*, the Market Court gave a judgment on a pre-order fee for taxi charged by the parking company EuroPark Svenska Aktiebolag (Europark) and the airport operator Swedavia AB (Swedavia).⁴⁴ The case has its origin in 2011, when Swedavia and EuroPark introduced a new system for pre-ordered taxis. The system consisted of two service levels. At the first service level, customers who had pre-ordered a taxi were picked up by the taxi driver at the pre-order desk. For this service, a fee of SEK 25 was charged. At the second service-level, an additional charge of SEK 25 was charged for the taxi driver meeting the customer with a name sign at the arrival gate. The complainant, Uppsala Taxi 100 000 AB (Uppsala Taxi), argued that the fees constituted abuse dominant position through unfair trading conditions, alternatively excessive pricing and/or bundling. When the SCA rejected the complaint, the complainant brought actions before the Market Court. The Market Court considered that the fee for the second service level was unfair and thus abusive. The conclusion was not based on the fee being excessive in relation to the cost, but on the fact that the costs on which the fee was said to be based lacked necessary connection with the service. The fee for the first service level was, however, found to be cost motivated and thus not abusive.

In *Preem*, the Stockholm District Court gave a judgment regarding price discrimination in a stand-alone claim for damages.⁴⁵ The oil company Preem AB (Preem) claimed that the port Gävle Hamn AB (Gävle Hamn) had applied discriminatory prices, by charging higher port fees from Preem than it charged from another customer, Arlanda Flybränslehantering AB (Afab). The District Court agreed with Preem that the differences in price was

⁴⁰ Svea Hovrätt, case T 10012-08, *Euroclear Sweden AB v Europe Investor Direct AB et al*, 19 January 2011.

⁴¹ MD 2011:2, *Stockholm Transfer Taxi i Stockholm AS v Swedavia AB*, 2 February 2011.

⁴² MD 2011:14, *Bring CityMail AB v Posten Meddelande AB*, 8 June 2011.

⁴³ Decision of 3 May 2012 in case 262/2011, *Posten Meddelande AB*.

⁴⁴ MD 2011:28, *Uppsala Taxi 100 000 AB v Swedavia AB and EuroPark Svenska AB*, 23 November 2011.

⁴⁵ Stockholm District Court, case T 5995-09, *Preem AB v Gävle Hamn AB*, 31 May 2012.

not economically motivated, but pointed out that a price differentiation does not necessarily constitute price discrimination. The court held that, in order for a price differentiation to be abusive, it must lead to a competitive disadvantage for the company that claim to be discriminated. Considering that Preem did not compete on the same market as Afab, and that Preem's competitors were charged the same fees as Preem, the court concluded that the price differentiation did not lead to a competitive disadvantage for Preem and that it was thus not abusive.

In the case *TeliaSonera Sverige AB*, the Market Court ordered the Swedish telecom operator *TeliaSonera Sverige AB* (TeliaSonera) to pay an administrative fine amounting to SEK 35 million for having abused its dominant position in the broadband market, ADSL, through a margin squeeze.⁴⁶ In doing so, the Market Court upheld the judgment of the Stockholm District Court finding the abuse⁴⁷, but reduced the fine from SEK 144 million to SEK 35 million. The fine is still by far the highest ever imposed in a Swedish case concerning abuse of dominant position. The case was initiated in 2004, when the SCA brought an action before the Stockholm District Court, requesting the court to order TeliaSonera to pay administrative fines of SEK 144 million for applying a pricing strategy amounting to margin squeeze between the wholesale price for its resale products for ADSL broadband and the resale price for its ADSL services to end-users. In January 2009, the District Court referred the case to the Court of Justice for a preliminary ruling regarding the interpretation of the application of Article 102 TFEU. The questions were answered through a preliminary ruling on 17 February 2011.⁴⁸ In short, the Court of Justice stated that a pricing practice whereby the margin between the wholesale prices and the retail price is insufficient to cover the costs which that undertaking must incur in order to gain access to the retail market, may constitute an abuse of dominant position. The Court of Justice clarified that a margin squeeze may, in itself, constitute an independent form of abuse distinct from that of refusal to supply.⁴⁹ In accordance with these principles, the Stockholm District Court found that TeliaSonera's pricing strategy constituted an abuse and ordered TeliaSonera to pay administrative fines of SEK 144 million. Upon appeal, the Market Court upheld the finding of abuse, but lowered the administrative fines to SEK 35 million, mainly by reducing the period in which the pricing was found to be abusive.

In *Verizon Sweden AB*, the Stockholm City Court rejected a claim from Verizon Sweden AB (Verizon) for damages following alleged price discrimination by Tele 2 Sverige AB (Tele 2).⁵⁰ The case concerned fees paid by Verizon for the termination of phone calls in Tele 2's network. Similar fees were paid by Tele 2's competitor TeliaSonera AB (TeliaSonera), but because of a disagreement concerning the size of the fees, TeliaSonera withheld parts of its payments. After an administrative court decided on the size of the fees to be paid by TeliaSonera, Tele 2 repaid an amount of approximately SEK 93 million to the company. Verizon claimed that Tele 2 should make a similar retrospective adjustment of Verizon's fees, so that the fees actually paid were the same for TeliaSonera and Verizon. The Stockholm District Court started by pointing out that price differentiation does not necessarily amount to price discrimination. In order for the price differentiation to be abusive, it must lead to a competitive disadvantage upstream or downstream. The court found that Tele 2's retrospective payment of a lump sum did not lead to a competitive advantage for TeliaSonera, the main reason being that a company's pricing strategy is influenced by variable costs, but not by the payment of a lump sum. The court also rejected the claim that Tele 2's charging of different prices to competitors and its own subsidiaries constituted unlawful price discrimination. Verizon appealed the judgment, but the appeal was subsequently withdrawn.

Like the SCA, the Swedish courts have gradually shifted its enforcement of the prohibition to a more economic and effect-oriented approach. The judgments from the Stockholm District Court and the Market Court in *TeliaSonera*⁵¹ were both based on the effect-based principles set out in Court of Justice's preliminary ruling. The Market Court's judgment in *Posten*⁵² was however based on a more formalistic approach.

Whereas the SCA has been criticised for being too passive in its enforcement of the prohibition, the Market Court has been more active. It has on several occasions issued injunctions in cases that were first rejected by the

⁴⁶ MD 2013:5, *TeliaSonera AB v Konkurrensverket*, 12 April 2013.

⁴⁷ Stockholm District Court, case T 31862-04, *Konkurrensverket v TeliaSonera AB*, 2 December 2011

⁴⁸ CJEU, case C-52/9, *Konkurrensverket v. TeliaSonera Sverige AB*, ECR 2011 I-0000.

⁴⁹ CJEU, case C-52/9, *Konkurrensverket v. TeliaSonera Sverige AB*, ECR 2011 I-0000 pt. 56.

⁵⁰ Case T 20621-10, *Verizon Sweden AB v Tele 2 Sverige AB*, 7 February 2014.

⁵¹ Stockholm District Court, case T 31862-04, *Konkurrensverket v TeliaSonera AB*, 2 December 2011, and MD 2013:5, *TeliaSonera AB v Konkurrensverket*, 12 April 2013.

⁵² MD 2011:14, *Bring CityMail AB v Posten Meddelande AB*, 8 June 2011.

SCA. But even the Market Court's enforcement of the prohibition has received some critical remarks. It has been argued that the Market Court has been less receptive than the SCA to the analytical framework provided in the Commission's Guidance Paper⁵³ and that its approach is inconsistent with the Court of Justice's standards in *Post Danmark*.⁵⁴

⁵³ Ulf Öberg, Andreas Reindl and Mattias Schain, Report on the abuse of dominance legislation in Sweden, *The Dominance and Monopolies Review 2013*, page 275.

⁵⁴ Ulf Öberg, Andreas Reindl and Mattias Schain, Report on the abuse of dominance legislation in Sweden, *The Dominance and Monopolies Review 2013*, page 278.