With great power comes great responsibility: proposal for increased powers for Swedish Competition Authority is seen in new light following recent failure to block merger in court

The Swedish Competition Authority (SCA) is one of only a small number of competition authorities in the EU that lack the authority to impose fines or obligations and prohibit mergers. Such measures in Sweden lie within the sole authority of the relevant courts. The Swedish government is currently in the process of assessing whether the SCA should enjoy such powers. A proposal has been put forward that the statutory amendments should be effective as of 1 January 2018.

On 24 November 2016, shortly after the proposal was circulated for a formal consultation, the Swedish Patent and Market Court of Appeal rejected an appeal by the SCA to block the acquisition of Powerpipe AB (Powerpipe) by Logstor Sverige Holding AB, a subsidiary of Logstor A/S (jointly ‘Logstor’), owned by private equity.

The case centred on the SCA’s standard of proof and the definition of the geographical market. The appeal court’s judgment is one of the few court precedents in the field of merger control in Sweden, and it is also interesting in the context of the current consideration of whether or not to increase the SCA’s powers.

Background to the Logstor case

In September 2015, Logstor notified its acquisition of Powerpipe to the SCA. The SCA decided to launch an in-depth investigation.

The SCA concluded that there was a risk that the merged entity would gain a dominant position, thereby weakening competition to the detriment of Swedish customers. Thus, the SCA initiated proceedings before the Stockholm District Court to prohibit the merger. The parties to the proposed merger were two out of a total of four manufacturers of pre-insulated pipes used for district heating in Sweden, and the SCA claimed that the parties were the main competitors on the market. The SCA further argued that the merger would substantially weaken competition because it would result in one dominant producer with an approximately 80 per cent share of the Swedish market.

Following a trend in reviews of mergers by competition authorities globally, the SCA relied heavily on internal documents to support its arguments. For example, the SCA stated that although internal documents indicated that Logstor expected synergies to result from the merger, internal documents also indicated that Logstor’s purpose in carrying out the acquisition was defensive in nature. According to the SCA, an internal document from Logstor from August 2014 (entitled Logstor Competitor Analysis) showed that Logstor’s intention behind the acquisition was not only to eliminate a competitor that aggressively competed on price in respect of Swedish customers, but also to remove the risk of another company acquiring Powerpipe. Also, to support its arguments in relation to competition conditions and market shares, the SCA referred to a Vendor Due Diligence (VDD) report produced by a major auditing firm in connection with the acquisition of Logstor by its current private equity owner in 2012.

Logstor and Powerpipe disputed the SCA’s claim and argued that there was no specific support for limiting the geographical market to Sweden. On the contrary, Logstor and Powerpipe argued, the current market conditions confirmed that the market was Europe-wide.
On 4 August 2016, the court rejected the SCA’s request to prohibit the merger. In its judgment, the Stockholm District Court considered, contrary to the view of the SCA, that the geographic market for the manufacturing and distribution of pre-insulated pipes used for district heating was broader than national in scope. According to the court, the relevant geographic market was northern Europe, in which Powerpipe would have only a 35 per cent market share as a result of the proposed merger. Accordingly, taking into consideration the other characteristics of the market, the court found that a market share of 35 per cent was not indicative of a dominant position.

Ruling of the Patent and Market Court of Appeal

The SCA appealed the judgment to the Patent and Market Court of Appeal, the highest court in Sweden to which a case concerning the prohibition of a merger can be appealed. In its appeal, the SCA claimed that the court erred in its methodology of defining the relevant geographic market, which in turn resulted in an erroneous judgment to allow the acquisition.

As evidence, the SCA again referred to the parties’ internal documents, which in the SCA’s view illustrated how competitors and conditions on the market differ between EU countries. In the SCA’s opinion, these differences indicated that the relevant geographic market was national in scope. The SCA also referred to internal strategy documents in which Logstor described Powerpipe as ‘a key competitor threat’ and ‘a major headache on the Swedish market’.

On 24 November 2016, the appeal court upheld the court’s judgment, thereby approving the merger.

Both parties maintained their arguments as regards the scope of the geographical market, the SCA arguing that the market was Sweden and Logstor and Powerpipe arguing that the market was the EEA and Switzerland.

In an overall assessment of the evidence in relation to the relevant geographical market, the appeal court came to the conclusion that the SCA had not convincingly established that the relevant market was limited to Sweden. As regards the VDD report cited by the SCA, the appeal court noted that, when assessing the VDD report’s value as evidence, the court must take into account that the VDD report had been produced about four years ago and that it was created in connection with a divestment of Logstor. (That is, even though the VDD report was an important document, it was produced by an auditor instructed by the seller and, therefore, is likely to include subjective opinions rather than facts.) Thus, the appeal court concluded that the information in the VDD report could not be used as a basis for establishing the market shares of the market players either in Sweden or in other countries.

Further, the appeal court noted that the SCA had not presented an alternative definition of the market and there was no other investigation in the case that indicated an alternative definition. Based on this factor, the appeal court concluded that the views of Logstor and Powerpipe must form the basis for the further assessment, that is, that the relevant geographical market should include the EEA and Switzerland. On that basis, the appeal court concluded that there was no support in the investigation for the notion that the merger between Logstor and Powerpipe would create or strengthen a dominant position, or that it would otherwise have a negative effect on competition. Accordingly, the appeal court permitted the merger.

Comments

Even though the SCA must go to court in order to prohibit a merger, final judgments in such cases have been rare in Sweden. In the vast majority of cases where the SCA has declared its intention to go to court, the merging parties have decided not to proceed with the concentration. In the past ten years, there have only been seven merger cases where prohibition has been the SCA’s main claim. Out of these seven cases, the action was withdrawn in four (because the parties
abandoned or modified the merger), the court agreed with the SCA to prohibit the merger in one, and the court decided to go against the SCA in two (one of them being the recent Logstor case, the other being dismissed on procedural grounds).

Going even further back in history, the SCA has lost a merger case in court on geographic market definition before. In 1998, the SCA requested that the courts prohibit Swedish manufacturer Optiroc’s acquisition of Stråbruken. The SCA claimed that the merger would create a dominant position on several Swedish building material markets. Both the lower court and the appeal court rejected the SCA’s claim, the latter concluding that there were several factors indicating that the geographic market was wider than national in scope.

Therefore, the Logstor case is the second case in which the SCA has failed to prove its view of the geographic market. Overall, in Swedish merger control history the SCA has only ‘won’ one out of five contentious cases where a judgment has been rendered. The SCA has similarly struggled in antitrust cases. For instance, the fines the SCA has asked the court to impose have been reduced by approximately 75 per cent on average in final judgments.

If the SCA had enjoyed the power to prohibit mergers at the time of the Logstor case, the merger would likely have been prohibited. The process would then have been reversed, with the possibility for the merging parties to appeal the SCA’s decision.

In a press release concerning the Logstor case, the SCA stated that, following the judgment, the standard of proof required of the SCA by the courts. In terms of legal certainty, it is crucial that the standard of proof is not in effect lowered if the decision-making powers are transferred to the SCA. On the contrary, a competition authority with such increased powers should set its own bar higher, since the effects of its decisions will be more profound. The SCA’s colleagues in European Competition Network (ECN) can surely testify that it is quite a tall order to get the checks and balances right, while at the same time avoiding a system that is unduly cumbersome.

It may be disputed whether it originates from the French revolution or from a Marvel comic, but the saying ‘with great power comes great responsibility’ is something that both the legislator and the SCA should keep in mind when proceeding with the legislative proposal.