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Interim Measures in Antitrust Investigations – Note by Sweden

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Sabine ZIGELSKI
Sabine.Zigelski@oecd.org, +(33-1) 45 24 74 39.

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Sweden

1. Introduction

1. In this paper, Sweden shares its experiences and lessons learned with the successful imposition of interim measures in two cases. The Swedish Competition Authority (SCA) has in recent times begun considering interim measures more often and has imposed such measures in two cases in the last few years, one concerning a likely abuse of a dominant position and one concerning likely anticompetitive agreements in vertical relationships.

2. In the following, the two cases where interim measures were adopted are presented. Lessons learned from these two cases are then discussed and finally an outlook is provided. First, however, the preconditions for interim measures according to the Swedish Competition Act are described briefly.

2. The Swedish framework for interim measures

3. According to chapter 3, section 1 of the Swedish Competition Act, the SCA may order an undertaking to end an infringement of the prohibition against anticompetitive agreements or the prohibition against abuse of a dominant position. Such a decision may be taken in the interim, that is to say temporarily during the time that is necessary to conclude the full investigation of the case.[1] The legal requirements for adopting an interim decision can be summarised as follows:

- It is likely that an infringement has occurred;[2]
- There is a risk that competition would be irreparably harmed if a decision were delayed until the case has been fully investigated; [3]
- The interim measures are proportionate.[4]

4. Interim measures may include specific remedies to ensure that the infringement is brought to an end.[5] The decision by the SCA may be appealed to the Patent and Market Court and, with leave to appeal, to the Patent and Market Court of Appeal.[6]

3. The case concerning fitness aggregators

5. In September 2019, the SCA received a complaint from a so-called fitness aggregator concerning exclusive agreements concluded between its largest competitor, IMWITHBRUCE (hereafter "*Bruce*"), and fitness studios. Fitness aggregators offer

[1] Chapter 3, section 3 Swedish Competition Act.

[2] See final judgement by the Patent and Market Court in case PMÄ 17901–19, p. 7.

[3] Prop. 1997/98:130 p. 62; see also prop. 1981/82:165 p. 217 ff.

[4] Prop. 1997/98:130 p. 62.

[5] Chapter 3, section 3, Swedish Competition Act.

[6] Chapter 7, section 1, point 2, Swedish Competition Act.

consumers a membership at a fixed monthly fee, via a mobile application, allowing them to book fitness classes and use facilities at a range of fitness studios listed with the aggregator. This type of service was launched in Sweden in 2017.

6. The exclusive agreements in question were concluded between *Bruce* and a significant share of the fitness studios that *Bruce* collaborated with in Sweden's two largest cities, Stockholm and Gothenburg. The agreements prohibited the fitness studios from collaborating with competing fitness aggregators.

7. The SCA investigated the case as a potential infringement of the prohibition against restrictive agreements set out in Chapter 2, Section 1 of the Swedish Competition Act.

8. The initial analysis indicated that *Bruce's* practice of signing exclusive agreements with fitness studios was likely to have anticompetitive effects. A survey of fitness studios conducted by the SCA indicated that a large portion of fitness studios valued the ability to cooperate with more than one fitness aggregator (i.e. multi home). That in turn suggested that the exclusivity agreements had effects in terms of artificially inducing single-homing among fitness aggregators.

9. According to the SCA's preliminary findings, fitness aggregators operated on a market with indirect network effects, where the number of connected studios affects the aggregator's attractiveness from the viewpoint of consumers, and the number of consumers connected to the fitness aggregator affects the aggregator's attractiveness from the viewpoint of the fitness aggregators. One implication of this was that *Bruce's* competitors risked having their offer to consumers devalued when they were restricted, as a consequence of *Bruce's* exclusive agreements, from signing more fitness studios to their platforms.

10. The apparent indirect network effects present on the market also influenced the SCA's assessment of whether competition would be irreparably harmed if an intervention were to be delayed until the case had been fully investigated. The exclusive agreements with fitness studios foreclosed fitness aggregators from important input suppliers, i.e. the fitness studios, in an emerging market. If *Bruce* had been allowed to continue to apply the exclusivity agreements and to enter into new ones during the investigation, there would have been a risk of *Bruce* gaining a strong market position, exacerbated by the indirect network effects, that would continue even after the termination of the exclusive agreements.

11. Regarding proportionality, the SCA considered that *Bruce*, as the largest fitness aggregator in Sweden, would still be able to provide consumers and fitness studios with a competitive and profitable offer, even without the exclusive agreements. Therefore, interim measures were deemed proportionate.

12. In December 2019, the SCA adopted an interim decision preventing *Bruce* from applying exclusivity clauses in existing agreements with fitness studios in the Stockholm and Gothenburg metropolitan areas and from entering into new agreements containing equivalent clauses with said studios.[7] *Bruce* was also ordered to inform the fitness studios of the decision. The decision was appealed to the Patent and Market Court, which upheld the decision. *Bruce* then requested, but was not granted leave to appeal to the Patent and Market Court of Appeal.

[7] Decision on interim measures by the Swedish Competition Authority in case nr. 572/2019. Available online (in Swedish) at: https://www.konkurrensverket.se/contentassets/c6d51b9b8877458eb00e248f1f3acb38/19-0572-traning.pdf

13. In June 2020, *Bruce* offered voluntary commitments which included a limit to the number of exclusivity agreements that *Bruce* could enter into with fitness studios for a duration of two years. The SCA accepted the voluntary commitments and ended the investigation in July 2020.[8]

4. The case concerning data on housing sales

14. This investigation into the undertaking *Svensk Mäklarstatistik AB* was initiated in May 2021 after the SCA received a complaint by one of the undertaking's customers, *Valueguard Index Sweden AB*. *Svensk Mäklarstatistik* has for around 10 years supplied data on housing sales in Sweden (owner-occupied housing only) (hereafter "the data") to *Valueguard*. Both *Svensk Mäklarstatistik* and *Valueguard* use the data to produce statistics on housing prices in Sweden. *Valueguard* has throughout the entire contractual period had a right to publish its statistics once per month. During re-negotiation of the contract between the two parties, a dispute began when it became clear that *Svensk Mäklarstatistik* no longer wanted to grant a right to publish statistics to *Valueguard*. This then led to the complaint to the SCA.

15. The SCA is investigating the case as a potential abuse of a dominant position in the form of a refusal to supply an existing customer. The relevant market in the case was preliminarily defined as "updated data concerning housing sales in Sweden". There are several other sources for data on housing sales in Sweden, but the initial investigation indicated that these did not maintain the quality necessary for producing statistics on housing prices necessary in the relevant downstream market(s), with regard to both how up-to-date the data is and the number of sales that are covered. *Svensk Mäklarstatistik* is thus the only party that can currently supply this data and therefore a monopolist. It is also not feasible that another undertaking will be able to collect the data in question in the short term. The data is then used in a downstream market preliminarily defined as "public statistics on the development of the housing market in Sweden".

16. With regard to the alleged abuse in the case, the initial assessment of a refusal to supply is, in accordance with case law from the Court of Justice of the European Union subject to the so-called *Bronner*-criteria.[9] The SCA, in accordance with these criteria, firstly considered that the data, including the right to publish statistics, was *necessary* to be able to compete in the downstream market for public statistics (se directly above). Secondly, the refusal to grant a right to publish statistics would eliminate all effective competition from that downstream market. Thirdly, the SCA considered that the argument that all of *Svensk Mäklarstatistik's* customers should be treated equally could not be accepted as an objective justification for the refusal.

17. An important issue in this case were the circumstances leading to the necessity to adopt an interim decision quickly, only about four weeks after the complaint was registered. At that time, the contract between the parties had already expired and had only been extended provisionally. *Svensk Mäklarstatistik* had sent a new contract, without a right to publish statistics, to Valueguard and demanded that Valueguard sign the contract to continue its supply of the data. The SCA considered that competition risked being

[8] Final decision by the Swedish Competition Authority in case nr. 572/2019. Available online (in Swedish) at: https://www.konkurrensverket.se/contentassets/40edba85fe39493fb38321381b79f477/19-0572_beslut-och-bilaga-1.pdf

[9] Case C-7/97 Bronner EU:C:1998:569, p. 41.

irreparably damaged if supply of the data including the right to publish statistics had ceased, because this would have meant that Valueguard could not have continued publishing its monthly statistics, something that had previously been done for ten years without interruption.

18. The SCA also considered the interim measure of obliging *Svensk Mäklarstatistik* to continue to supply the data together with the right to publish statistics to be proportionate.

19. The full investigation in the case is still ongoing, but the SCA took a decision ordering interim measures on 1 July 2021.[10] In that decision, the SCA ordered *Svensk Mäklarstatistik* to continue supplying the data including the accompanying right to publish statistics based on that data in the same manner as according to the previous contract (that is to say, once a month).

20. The SCAs interim decision was appealed to the Patent and Market Court, which upheld the SCAs decision.[11] *Svensk Mäklarstatistik* decided not to seek appeal before the Patent and Market Court of Appeal.

5. Lessons learned

21. The sections below present some of the lessons learned from these cases. All of these lessons relate to the question of when interim measures may be suitable to adopt, but viewed from different perspectives.

5.1. Digital markets and the risk of "tipping"

22. Digital markets, or platform markets, tend to exhibit characteristics that may cause anticompetitive effects from certain conducts to materialize faster and be more irreparable than in more traditional markets. As exemplified by the *Bruce* case, the presence of (indirect) network effects may be such a market characteristic that amplifies the effect of exclusionary behaviour from market players with market power.

23. More generally, when network effects and/or economies of scale are substantial on a market, the risk of the market "tipping" in favour of the incumbent engaging in exclusionary conduct may be particularly high. When a market has tipped because of anticompetitive conduct, the effects may not easily be reversed by decisions by a competition authority. If such market features are observed, interim measures at an early stage could be an important tool for competition authorities to use in order to stop irreparable harm from occurring.

24. Market players in the digital world may often operate many different services that are interconnected, sometimes called "digital ecosystems". In such instances, a conduct concerning a specific service within the digital ecosystem could influence market outcomes in relation to other services within the same ecosystem – sometimes in intricate ways – causing the incumbent to extend its market power regarding one service to other services.

[10] Decision by the Swedish Competition Authority in case nr. 348/2021. Available online (in Swedish) at: https://www.konkurrensverket.se/globalassets/dokument/konkurrens/beslut/interimistiskt-beslut/21-348.pdf.

[11] See final judgement by the Patent and Markets Court in case PMÄ 11170-21. Available online (in Swedish) at: https://www.konkurrensverket.se/globalassets/dokument/konkurrens/domar/pmd-pma-mal-nr-11170-21-maklarstatistik.pdf.

25. Additionally, when new digital services and markets have emerged, as is arguably more common within digital sectors, a competition authority may have to be particularly vigilant and observant of indications of exclusionary behaviour by a "first mover" that, for instance, artificially tries to induce single-homing behaviour among its user base (as in the *Bruce*-case).

26. A potentially complicating factor when analysing exclusionary effects on digital markets is how to distinguish between market outcomes caused by fundamental market features – e.g. indirect network effects and economies of scale or scope – and anticompetitive effects stemming from specific behaviours. If a market is susceptible to tipping, even in the absence of any specific exclusionary conduct, interventions from competition authorities may not change the market outcome.[12]

5.2. Clarifying the legal threshold for imposing interim measures

27. The possibility of imposing interim measures has been a tool available to the SCA since 1993.[13] Yet, this possibility has been used relatively sparingly. The same is true for the European Commission.[14] As illustrated in the section above, in the context of competition concerns in digital markets, the question of why this tool is not used more often has been raised with a view to the fast-moving nature of these markets.[15] The last time the SCA had imposed interim measures before the *Bruce*-case presented above was in 2012.[16] Considering this gap between decisions, one of the difficulties in deciding whether to impose interim measures in a given case can be the scarcity of case law clarifying the legal threshold for the adoption of such a decision. This uncertainty is aggravated by the fact that interim measures are by definition imposed at a stage where the investigation is not yet finished. There is in other words a double uncertainty: that concerning the legal threshold for interim measures and that concerning the potential competition law infringement.

28. Given the general terms in which competition rules are framed, an important task of competition authorities is to ensure that these rules are clarified by legal precedent. It follows that competition authorities must occasionally decide in cases where there is no previous precedent to enable that such precedent can be created. The SCA has also taken this circumstance into consideration when deciding whether to adopt interim measures in the two cases presented above. Uncertainty in these cases concerned amongst other things the legal standard to which an infringement of competition rules would need to be

[12] See for instance: Swedish Competition Authority, The competition on digital platform markets in Sweden: Summary (2021). Available online at : https://www.konkurrensverket.se/globalassets/dokument/informationsmaterial/rapporter-och-broschyrer/rapportserie/rapport_2021-1_summary.pdf

[13] Konkurrenslag (1993:20), section 25.

[14] The last interim decision taken by the Commission before the Broadcom case (AT.40608), decided in 2019, was in IMS Health, decided in 2001.

[15] See for example: Unlocking Digital Competition – Report of the Digital Competition Expert Panel (March 2019) available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unloc

king_digital_competition_furman_review_web.pdf, p. 6; Mantzari, Despoina, Interim Measures in EU Competition Cases: Origins, Evolution and Implications for Digital Markets (2020). Available online at SSRN: https://ssrn.com/abstract=3544877.

[16] Decision by the Swedish Competition Authority in case number 501/2012.

established and how irreparable harm would need to be shown. Both cases were appealed, but only in the lower instance court. The attempt to gain leave to appeal was rejected in the *Bruce*-case. Given that the rulings in the Patent and Market Court were relatively case-specific, there remains some uncertainty as to the legal threshold for interim measures, but this has been reduced given the SCA's experiences gained in these cases.

5.3. How to identify a case where irreparable harm to competition may occur

29. As mentioned above, one of the uncertainties when deciding whether to adopt interim measures is how and when irreparable harm to competition may occur. An initial fact that has to be taken into account is the time it takes to complete an ordinary investigation of a potential competition law infringement. The SCA aims to complete investigations within a maximum of 23 months. Thereafter a decision may be appealed to the Patent and Market Court and the Patent and Market Court of Appeal. A final decision in a case of a competition law infringement may thus not be reached for several years.

30. In some cases, such as that concerning *Svensk Mäklarstatistik*, it may be possible to pinpoint a specific date when irreparable harm will occur. Even so, the date on which harm would occur shifted during the initial investigation. This was because the complainant had to make a decision as to whether or not to sign the contract that had been supplied by *Svensk Mäklarstatistik*. If a contract had been concluded, irreparable harm may have occurred once the complainant was no longer able to publish its statistics. However, the complainant ultimately decided not to sign the contract, which meant that irreparable harm would occur once data delivery was liable to cease. Given the extremely short timeframe within which the initial investigation occurred (four weeks), this was a significant challenge for the SCA.

31. Nevertheless, being able to pinpoint a date when irreparable harm will occur is likely primarily the case where a refusal to supply an existing customer is concerned. The majority of cases are more likely to concern harm that occurs more gradually, such as the *Bruce* case. In such cases, the relevant question should be to ask whether competition would still be possible once the ordinary investigation is concluded. As elaborated above, given the market at issue in the *Bruce* case, the answer to that question was likely to be negative.

6. Conclusion

32. The importance of interim measures as a tool for competition authorities has been increased by the development of digital markets that benefit from network effects and may be prone to tipping. As noted by the SCA in its recent sector inquiry, in these markets, interim measures may be an important tool to preserve competition.[17]

33. In Sweden, there is as yet no final-instance judgement concerning interim measures imposed by the SCA. Such precedent is desirable to give further guidance on the preconditions for imposing interim measures. This is especially relevant for the question of the evidentiary burden with respect to whether an infringement of competition rules has occurred. The absence of a clear precedent makes it more difficult for the SCA to assess cases that may require interim measures. Nevertheless, the successful imposition of interim

[17] Swedish Competition Authority, Competition on digital platform markets in Sweden: Summary (2021). Available online at: https://www.konkurrensverket.se/globalassets/dokument/informationsmaterial/rapporter-och-broschyrer/rapportserie/rapport_2021-1_summary.pdf

measures in two recent cases indicates that interim measures are a real possibility in cases where irreparable harm may occur before a decision can be taken based on a full investigation of the case.

34. Another important aspect accentuating the importance of interim measures is the fact that investigations of potential competition law infringements are very time-consuming. If a likely infringement can be established in a case where irreparable harm to competition would occur before an investigation can be expected to be completed, interim measures should be considered. This should be done despite the lack of established case law in cases where new markets or practices are concerned.