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Competition in Capital Markets – Note by Sweden

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Sweden

1. Introduction

1. This contribution focuses on the question of regulation and competition regarding SME growth markets in Sweden and the EU. It begins by describing Sweden's unique position in the EU as the only Member State with three competing SME growth market operators. It then provides a detailed description of an investigation by the Swedish Competition Authority (SCA) in 2022 into an alleged abuse of dominance relating to the market for growth company listings in Sweden which resulted in interim measures being imposed by the authority. The contribution concludes by describing certain recent regulatory developments on an EU level which have a bearing on competition between different SME growth markets, and the SCA's role in advocating for competition-enhancing amendments.

2. The market for growth company listings in Sweden

2. Improving the conditions for capital market financing for SMEs is a specific objective of the EU and forms part of plans to establish a Capital Markets Union. The opportunity for SMEs to list on growth markets is one element of this objective.[1]

3. Sweden occupies a unique position as the only EU Member State with three competing SME growth market operators. The three growth markets in Sweden are Nasdaq's First North, NGM's Nordic SME, and Spotlight Stock Market. The different markets' offerings vary, and they target different customer groups.

4. In 2021, trading turnover on Swedish growth markets accounted for as much as 68% of the total trading turnover across all EU growth markets. In addition, as of 2022, companies listed on Swedish growth markets had, on average, the lowest market capitalization in the EU. In 2021, the average company on a Swedish growth market had a market capitalization of SEK 402 million. In Denmark, the average market capitalization was 50% higher, even though Denmark was the EU country with the second-lowest average market capitalization. This suggests that Swedish growth markets have been particularly successful in attracting smaller companies, which is one of the objectives of EU capital markets policy.

5. The competitive dynamics of this market formed the backdrop to the SCA's investigation of Nasdaq's proposed secondary-listing initiative in 2022.

3. The SCA's investigation of an alleged abuse of dominance (Nasdaq)[2]

6. In May 2022, Nasdaq announced that it intended to start trading in the shares of certain companies listed on its competitor NGM's growth market Nordic SME (a practice known as secondary listing). Nasdaq stated that it would not list these shares on Nasdaq's

[1] European Commission, SME listing on public markets, https://finance.ec.europa.eu/financial-markets/financial-markets-policy/securities-markets/sme-listing-public-markets_en

[2] Case 366/2022, available here: https://www.konkurrensverket.se/konkurrens/tillsyn-arenden-och-beslut/arendelista/nasdaq-stockholm-aktiebolag/

own growth market, but rather on an ordinary Multilateral Trading Facility (MTF), and would not seek the companies' consent to do so.

7. According to EU rules on markets in financial instruments (MiFID II[3]), if a company's shares are listed on an SME growth market, another trading venue may only trade in those shares if the issuing company has been informed and not objected. The rationale of this rule is to prevent a fragmentation of trading liquidity across different markets. However, the specific wording of the consent requirement in 2022 only covered a situation involving secondary listing on *another SME growth market*, and did not address a situation where secondary listing was done on an ordinary MTF.

8. NGM alleged to the SCA that this conduct was unprecedented, and only practically possible because Nasdaq had taken advantage of a loophole in the financial rules. It alleged that the conduct amounted to an abuse of a dominant position, and petitioned the SCA to adopt an interim decision to prevent the secondary listing of shares of companies listed on NGM's growth market in the manner that had been announced.

9. The SCA initiated an investigation, focusing its assessment on whether the conduct was capable of foreclosing competitor NGM, and whether the conduct departed from competition on the merits.

3.1. The SCA's assessment of foreclosure

10. Among other things, the SCA took into account the two-sided nature of growth markets and the existence of indirect network effects with feedback loops. The SCA noted that Nasdaq's competitors primarily focused their offerings on attracting issuing companies, while Nasdaq's strength and market position was on the trading side, thanks partly to its trading platform encompassing its significantly larger regulated market. However, competition between the markets was centred primarily on attracting issuers.

11. It was alleged that Nasdaq, owing to its market position, would be able to set lower transaction fees than its competitors. Evidence provided during the initial investigation suggested that as a result, a "best execution" obligation under MiFID[4] could require brokers to route their trading to Nasdaq, and that this shift could happen within days. The SCA found that approximately half of all trading in growth companies on NGM was concentrated in the 15 companies identified for secondary listing by Nasdaq. As a result, the SCA found it reasonable to assume that a substantial share of the trade on NGM's platform could move to Nasdaq, resulting in a significant reduction of income for NGM.

12. The SCA's preliminary investigation therefore concluded that it was likely that Nasdaq's conduct was capable of causing foreclosure.

3.2. Whether Nasdaq's conduct amounted to competition on the merits

13. The SCA noted that it is typically larger companies that are subject to secondary listing, and that those companies generally do not run any risk of being harmed by a fragmentation of liquidity, even if trade takes place on different markets at the same time. While there are some examples of SMEs being subject to secondary listing under certain circumstances, these are uncommon and typically involve secondary listing in other

[3] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

[4] Best execution means that brokers are obliged to execute client orders under the conditions that are most advantageous to the client.

countries with the aim of reaching new investors. In the course of its investigation, the SCA did not find any examples of a dominant company carrying out the secondary listing of shares on competing growth market, or on an MTF that is not registered as a growth market, in the same country or geographic market as the growth market on which those shares are already listed, let alone without the issuer's consent.

14. As noted above, the purpose of the provisions in MiFID II regarding issuer consent for secondary listing of growth market shares is to protect the issuer from fragmented liquidity. In the course of an evaluation of the framework governing SME growth markets, the European Securities and Markets Authority (Esma) had in fact proposed that the consent requirement be broadened such that consent would be required for any secondary listing of financial instruments whose primary listing was on an SME growth market, on the grounds that it would mitigate the risk of liquidity fragmentation.[5]

15. The SCA considered that all these circumstances suggested that the purpose of the scope of the consent requirement in MiFID II was not to allow secondary listing on other types of non-growth markets in a way that would risk liquidity fragmentation. Rather, the rules had not foreseen that protection against such secondary listing would be needed. Some SMEs listed on the NGM market suggested to the SCA that Nasdaq's actions were circumventing the intention of the rules by taking advantage of a regulatory loophole.

16. Taking all relevant factors into account, the SCA made the preliminary assessment that the conduct did not amount to competition on the merits.

3.3. Interim decision

17. Taking into account the imminent launch date and evidence that trading could shift to Nasdaq within days, the SCA found that the cumulative conditions for issuing an interim decision were fulfilled. The authority adopted an interim decision prohibiting Nasdaq from carrying out the secondary listing of shares in companies listed on NGM's Nordic SME growth market on a trading venue that was not an SME growth market without the issuer giving explicit consent.

3.4. Closure of the investigation

18. After the interim decision, Nasdaq informed the SCA that it would refrain from offering secondary listing in NGM-listed shares without the issuers' consent. It stated that the suspension would remain in place for two years, or until there was clarity on whether the ongoing review of MiFID II would lead to legislative amendments concerning issuer consent.

19. In light of Nasdaq's assurances, the SCA decided that there were no longer grounds to continue the investigation. It therefore closed the case and revoked its interim decision.

4. Subsequent regulatory developments

20. Ahead of EU negotiations on the revision of MiFID II in late 2022, the Swedish government consulted the SCA and other stakeholders. The SCA submitted an opinion to government advocating for a change to the provision regulating consent for secondary listing of shares on SME growth markets. The SCA proposed that the wording clarify that

[5] ESMA, *MiFID II Review Report: Report on the Functioning of the Regime for SME Growth Markets* (Final Report, ESMA70-156-4103, 25 March 2021)

consent should be required for secondary listing on another "trading venue" rather than the existing rule requiring consent for secondary listing on another "SME growth market".[6]

21. In the course of negotiations between Member States on revisions to MiFID II, this broader consent requirement was subsequently added, and formed part of the package of amendments agreed by the co-legislators. The amendment entered into force in late 2024, to be transposed into national law by Member States by June 2026.

5. Conclusions

22. The development of SME growth markets has been viewed as an important pillar in the EU's work to develop a single market for capital, and provide businesses with a greater choice of funding at lower costs. Sweden is currently the only EU Member State with three competing SME growth market operators. This context emphasizes the potentially significant impact of the SCA's enforcement work in the area.

23. The SCA's investigation also highlights the importance of having the power to adopt interim measures in an effective manner to prevent irreparable damage to competition. Indeed, from complaint to interim decision, the SCA's preliminary investigation took less than three weeks.

24. The investigation also emphasizes the role of competition enforcement even in the context of highly regulated markets. In this case, the SCA's action can be seen to have filled a regulatory gap to ensure the continued proper functioning of markets and prevent competitive harm while awaiting new legislation.

25. Finally, the subsequent legislative process leading to amendments to MiFID II underlines the important role that competition authorities can play in advocating competition-enhancing reforms. It also demonstrates how lessons from enforcement activity can inform broader advocacy work.

[6] Opinion in matter 810/2022