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PRIVATE LITIGATION GUIDE

SECOND EDITION

Editors
Nicholas Heaton and Benjamin Holt

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Sweden Q&A

Andrew Bullion, Mikael Treijner, Johan Karlsson and Trine Osen Bergqvist[1]

Effect of public proceedings

1 What is your country's primary competition authority?

Sweden's competition authority is Konkurrensverket (SCA).

2 Does your competition authority have investigatory power? Can it bring criminal proceedings based on competition violations?

The SCA has extensive investigative powers but it does not have the power to bring criminal proceedings based on competition law violations. The SCA's investigations are mainly governed by the Swedish Competition Act. According to the Competition Act,[2] the SCA may:

- require undertakings or other parties to supply information, documents or other material (Chapter 5, Section 1);
- conduct interrogations with persons who are likely to have relevant information (Chapter 5, Section 1); and
- upon prior authorisation from the court, conduct unannounced inspections at the premises of companies and in the homes of board members and employees (Chapter 5, Sections 3 and 5).

Regulation 1/2003 provides the SCA with the right to exercise investigatory powers on behalf of the European Commission (Commission) and national competition authorities of EU Member States.

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2 2008:579.

Additionally, the SCA can, according to the Competition Act (Chapter 3, Section 24) and Section 17 of the Swedish Act regarding Business Bans,[3] apply to the Patent and Market Court that a natural person, who has seriously breached his or her obligations under competition law, is awarded a business ban. A 'business ban' means that the person is banned from having a leading position within any company and he or she is also barred from conducting business as a sole trader.

3 Can private antitrust claims proceed parallel to investigations and proceedings brought by competition authorities and criminal prosecutors and appeals from them?

Yes, technically such stand-alone claims are possible under Swedish law. However, while a previous infringement decision by the SCA is not a prerequisite for bringing actions for antitrust damages, Article 16 of Regulation 1/2003 prevents national courts from taking decisions that run counter to decisions of the Commission or that could conflict with a contemplated decision of the Commission in proceedings that have been initiated. Accordingly, the court must assess whether it is necessary to stay its proceedings.

4 Is there any mechanism for staying a stand-alone private claim while a related public investigation or proceeding (or an appeal) is pending?

There is no mechanism specific to private antitrust actions, but there is a general rule in Chapter 32, Section 5 of the Swedish Code of Judicial Procedure,[4] which allows for a civil proceeding to be stayed if a matter of special importance that is a part of a separate case needs to be decided before continuing with the proceedings. This provision can be applied to stay a private claim while a related public investigation, proceeding or appeal is pending.

5 Are the findings of competition authorities and court decisions binding or persuasive in follow-on private antitrust cases? Do they have an evidentiary value or create a rebuttable presumption that the competition laws were violated? Are foreign enforcers' decisions taken into account? Can decisions by sector-specific regulators be used by private claimants?

The right to claim antitrust damages is regulated in the Swedish Competition Damages Act,[5] which is based on the EU Competition Damages Directive 2014/104. When the Competition Damages Act entered into force on 27 December 2016, it replaced the rules on damages that were previously set out in the Competition Act (Chapter 3, Section 25). The Competition Damages Act is applicable to harm that arose after this date. For harm that arose before that date, the old rules in the Competition Act still apply. To date, there have been very few cases on antitrust damages in Sweden. The guidance provided by case law is thus very limited.

3 2014:836.

4 1942:740.

5 2016:964.

According to Chapter 5, Section 9 of the Competition Damages Act, a final infringement decision under the Competition Act by the SCA or the national court is binding on the court in a private case for antitrust damages. Where such decisions are applicable, the court may not re-examine whether the condemned conduct constitutes an infringement. Decisions from foreign competition authorities are not covered by that provision, but it follows from the EU Competition Damages Directive (Chapter III, Article 9) as well as the preparatory works to the Competition Damages Act that final infringement decisions and judgments from competition authorities in other Member States will constitute prima facie evidence that an infringement has occurred. As regards the Commission's decisions, it follows from Article 16 of Regulation 1/2003 that national courts cannot take decisions running counter to decisions of the Commission. Decisions by sector-specific regulators do not have binding effect or constitute prima facie evidence.

6 Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private antitrust cases?

As described under questions 7 and 8 below, the Competition Damages Act provides certain limitations in the right to use leniency applications as evidence in private actions for damages (Chapter 5, Section 8). Further, the Act provides that the joint and several liability that generally applies to companies that infringe the competition rules (Chapter 2, Section 2), is, when it comes to leniency recipients, limited to the harm on (direct or indirect) buyers and suppliers, and harm that cannot be compensated by other parties to the infringement (Chapter 2, Section 4). Apart from this, leniency recipients do not receive more beneficial treatment than other defendants in private antitrust cases.

7 Can plaintiffs obtain access to competition authority or prosecutors' files or the documents the authorities collected during their investigations? How accessible is information prepared for or during public proceedings by the authority or commissioned by third parties?

Documents prepared by the SCA during the proceedings or received by third parties are public documents and subject to the principle of free access. The principle is, however, subject to several limitations set out in the Swedish Public Access to Information and Secrecy Act,[6] which provides, inter alia, that:

- information received in the SCA's investigations regarding an undertaking's operations, inventions and research results is covered by secrecy if the disclosure may be expected to harm the undertaking in question (Chapter 30, Section 1); and
- information prepared or received in the SCA's investigations of suspected antitrust infringements is covered by secrecy if, with regard to the purpose of the investigation, it is of particular importance that the information is not disclosed (Chapter 17, Section 3).

A decision by the SCA not to disclose information may be appealed to the Administrative Court of Appeal.

6 2009:400.

Moreover, according to Chapter 5, Section 5 of the Competition Damages Act, the European Competition Authorities are not obliged to disclose any documentation or information received under their respective leniency programmes. Leniency applications and settlement submissions may not at any time be subject to an order of disclosure (Chapter 5, Section 5, Paragraphs 1 and 2). Further, information prepared by a natural or legal person specifically for the proceedings of a competition authority and information that the competition authority has drawn up and sent to the parties in the course of the proceedings may not be subject to a disclosure order until the competition authority has closed its proceedings (Chapter 5, Section 5, Paragraphs 3 and 4).

8 Is information submitted by leniency applicants shielded from subsequent disclosure to private claimants?

Information submitted in leniency applications is shielded from disclosure by the Competition Damages Act (Chapter 5, Section 5, Paragraph 1).

9 Is information submitted in a cartel settlement protected from disclosure?

Yes, as with documentation and information submitted under the leniency programmes, information submitted in a cartel settlement is protected from disclosure according to Chapter 5, Section 5 of the Competition Damages Act and in fact inadmissible as evidence (Chapter 5, Section 8).

10 How is confidential information or commercially sensitive information submitted by third parties in an investigation treated in private antitrust damages claims?

Confidential or commercially sensitive information submitted by third parties is often covered by secrecy according to the Public Access to Information and Secrecy Act (Chapter 30, Section 1). This prevents third parties from gaining access to such information. However, a party in an investigation or matter before a court is in principle entitled to have access to information in the case, including information covered by secrecy. According to Chapter 5, Section 5 of the Competition Damages Act, documentation containing information that a person or a legal entity collected especially for the SCA's proceedings is protected from disclosure until the competition authority has closed its proceedings.

Commencing a private antitrust action

11 On what grounds does a private antitrust cause of action arise?

A claim arises on the basis of the defendant's violation of Swedish or EU competition rules. According to the Competition Damages Act, anyone who has suffered harm due to an infringement of competition law, by intent or through negligence, is entitled to damages for the harm caused by the infringement (Chapter 2, Section 1). The Act applies to harm caused by infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union and the corresponding provisions in the Competition Act.

12 What forms of monetary relief may private claimants seek?

A claimant can seek compensation for actual loss and for loss of profits, as well as interest on the amount of damages to be claimed, from the day when the harm arose until the day when payment is made (Chapter 3, Section 1 of the Competition Damages Act). The rate of that interest is calculated in accordance with Section 5 of the Interest Act,[7] namely per year according to an interest rate that corresponds to the reference rate applicable at any given time plus an addition of two percentage points. Punitive damages are not available in Sweden.

For harm that arose before 27 December 2016, the older rules on damages in the Competition Act (Chapter 3, Section 25) are still applicable. These rules do not explicitly stipulate what types of monetary relief a claimant could seek, but the preparatory works to the Competition Act mentions, inter alia, loss of income, loss of profits and loss caused by unfavourable business conditions. The claimant may also seek interest on the damages based on the Interest Act.

13 What forms of non-monetary relief may private claimants seek?

According to the Competition Act (Chapter 3, Section 2), a company that is affected by a violation of Articles 101 or 102 of the Treaty on the Functioning of the European Union or equivalent Swedish laws may bring civil proceedings in Sweden for two types of non-monetary relief: specific performance and declaratory judgment.

14 Who has standing to bring claims?

Any person who has suffered damages due to a competition law infringement, including both direct and indirect purchasers, can bring a claim against the infringer (Chapter 2, Section 1 and Chapter 1, Section 1 of the Competition Damages Act).

15 In what forums can private antitrust claims be brought in your country?

The Patent and Market Court is the competent court in private antitrust claims (Chapter 5, Section 1 of the Competition Damages Act). It handles all competition law matters. It is a division of the Stockholm District Court that specialises in competition, patent and market law. Judgments and decisions made by the Patent and Market Court can be appealed to the Patent and Market Court of Appeal, which is a division of the Svea Court of Appeal.

16 What are the jurisdictional rules? If more than one forum has jurisdiction, what is the process for determining where the claims are heard?

The Patent and Market Court is the only Swedish forum with jurisdiction to hear private antitrust claims brought under the Competition Damages Act. If the Competition Damages Act for some reason would not be applicable, there are specific rules regarding forum in the Code of Judicial Procedure. If no court has jurisdiction, the Stockholm District Court has general jurisdiction to hear claims (Chapter 10 of the Code of Judicial Procedure).

7 1975:635.

17 Can claims be brought based on foreign law? If so how does the court determine what law applies to the claim?

Claims may be brought based on foreign law if there is a legal basis for applying foreign law in the specific case. For example, in relation to the other EU Member States, Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable on non-contractual obligations (Rome II) includes rules on applicable law in competition damages cases.

18 Give details of any preliminary requirement for starting a claim. Must plaintiffs post security or pay a filing fee? How is service of claim affected?

When submitting a claim, the plaintiff is required to pay a filing fee amounting to 2,800 Swedish kronor in general and 900 Swedish kronor for smaller claims (Chapter 42, Section 4 the Code of Judicial Procedure).

The court will not start handling the matter before the filing fee has been paid. When the court has received the filing fee, it will assess whether the statement of claim is complete and whether it includes all the required information. If the statement of claim is complete, the court will serve the claim.

19 What is the limitation period for private antitrust claims?

According to Chapter 2, Section 6 of the Competition Damages Act, which applies for harm that arose after 27 December 2016, an action for damages must be brought within five years of the date when the infringement ceased, and the injured party has knowledge, or may reasonably be assumed to have knowledge of:

- the behaviour as such and the fact that it constitutes an infringement of competition law;
- the fact that the infringement caused harm; and
- the identity of the infringer.

This means that a claim for damages may potentially be made long after the infringement occurred.

For harm that arose between 1 August 2005 and 27 December 2016, to which the older rules in the Competition Act apply, an action for damages must be brought within 10 years of the date when the harm arose (Chapter 3, Section 25). As the start of the limitation period is not dependent on the claimant's knowledge of the infringement, it may be questioned whether this provision is compatible with general principles of EU law and the European Convention on Human Rights. Notably, in a recent judgment from the Amsterdam Court of Appeal, *CDC v Kemira Chemicals*, 4 February 2020, case 200.226.640/01, the older Swedish limitation rules were found to be incompatible with the EU principle of effectiveness. The court emphasised that national limitation rules must be applied in line with EU law, as set out by the EU Court in *Cogeco* (C-637/17, 28 March 2019, ECLI:EU:C:2019:263), and found that a limitation period cannot start before the single and continuous infringement has been finally decided and the injured parties are aware of the facts relating to the cartel and the damage.

20 Are those time limits procedural or part of the substantive law? What is the effect of their expiry?

In general, limitation periods are part of the substantive law. When the time limits expire, the claimant, according to Section 8 of the Swedish Statutes of Limitations Act,[8] can no longer enforce the claim. As limitation periods are a part of substantive law, the defendants must raise the objection itself as the court will not consider it *ex officio*.

21 When does the limitation period start to run?

According to Chapter 2, Section 6 of the Competition Damages Act, the limitation period starts to run on the date when the infringement ceased, and the injured party has knowledge or may reasonably be assumed to have knowledge of :

- the behaviour as such and the fact that it constitutes an infringement of competition law;
- the fact that the infringement caused harm; and
- the identity of the infringer.

For harm that arose before 27 December 2016, it follows from the older rules in the Competition Act that the limitation period starts to run when the harm arose (Chapter 3, Section 25).

22 What, if anything, can suspend the running of the limitation period?

According to the Competition Damages Act, the limitation period is suspended if a competition authority takes actions in respect of the infringement (Chapter 2, Section 7). A new limitation period will start to run from the day of a final infringement decision or the day on which the authority has closed the investigation. The limitation period is also paused if the parties are engaged in consensual dispute resolution (Chapter 2, Section 8).

The former rules in the Competition Act, which apply to harm that arose before 27 December 2016, did not contain any provisions on suspension of the limitation period.

23 What pleading standards must the plaintiff meet to start a stand-alone or follow-on claim?

There is little significant difference in the procedural requirements or pleading standards for filing a stand-alone versus a follow-on damages action. Any statement of claim in a private antitrust matter must meet the general criteria in the Code of Judicial Procedure. This means, inter alia, that the statement of claim must be made in writing and include a specific claim and a description of the circumstances on which the claim is based (Chapter 42 of the Code of Judicial Procedure).

8 1981:130.

24 Is interim relief available? What must plaintiffs show for the court to grant interim relief?

In private claims for injunctions, which may be initiated according to Chapter 3, Section 2 of the Competition Act, if the SCA decides not to investigate a complaint, or to close a case without issuing an order, the court may issue an interim order pending a final judgment (Chapter 3, Section 3 of the Competition Act) if there are 'particular reasons' for doing so. According to the preparatory works, interim orders should only be used in exceptional circumstances.

General provisions on security measures may also be found in the Code of Judicial Procedure (Chapter 15), which may be applied if it is reasonable to assume that the defendant will evade payment. The claimant must show probable cause to believe that he or she has a claim against the other party, that the claim is or can be made the basis of a court proceeding and that it is reasonable to suspect that the opposing part will hinder, render the enforcement more difficult or substantially reduce the value of the right.

25 What options does the defendant have in responding to the claims and seeking early resolution of the case?

The defendant has several options to respond to the claim. The defendant may file a statement of defence, which may include a request for the court to dismiss the claim based on formal or procedural grounds, for example, the lack of jurisdiction. The defendant may also file a counterclaim, or, if the defendant agrees with the claim, admit the claim. If the defendant admits the claim, the parties may ask the court to either remove the case or deliver a judgment confirming a settlement between the parties.

The procedural means for a defendant to achieve an early resolution of the case are limited under Swedish law. According to Chapter 42, Section 18 of the Code of Judicial Procedure a case can as a general rule only be closed by the court after an oral hearing. There are, however, many exceptions to this rule, inter alia, if the claim does not fulfil the minimal requirements (Chapter 42, Section 2) or if a party does not show up to the oral preparation of the case or the oral hearing (Chapter 44, Section 2 and Section 4).

Disclosure or discovery

26 What types of disclosure or discovery are available? Describe any limitations and the courts' usual practice in ordering disclosure or discovery.

As regards the obligation to disclose written evidence, the Competition Damages Act refers to the general rules in the Code of Judicial Procedure, which state that the court may order a defendant, as well as third parties, to disclose documents that may be of relevance as evidence in a case concerning antitrust damages (Chapter 38, Section 2). There are several exceptions from this duty, for example, with regard to legal professional privilege and documents containing professional secrets.

Some provisions regarding disclosure have been implemented in the Competition Damages Act. In general, a court order may be directed to the SCA only if the document cannot be produced by other parties without inconvenience (Chapter 5, Section 4). Further, the Act states that the obligation in the Code of Judicial Procedure to disclose written evidence shall apply also before the legal proceedings are initiated. There are several exceptions. The obligation to

disclose documents does not apply to documents included in the file of a competition authority, if a disclosure would seriously hamper the authority's ability to perform its official duties (Chapter 5, Section 4). Further, the court cannot order the disclosure of settlement submissions or leniency applications (Chapter 5, Section 5).

Additional exceptions apply if there is an ongoing investigation by a competition authority. The court may not order the disclosure of information prepared by a party specifically for the proceedings of a competition authority, or information that the competition authority has drawn up and sent to the parties in the course of its proceedings (Chapter 5, Section 5). These categories of evidence may only be the subject of a court order when the competition authority has closed its investigation. The above exceptions apply to documents in the SCA's file, as well as documents included in the files of other national competition authorities and the Commission. They also apply to copies of any such documents held by other parties, including the undertaking subject to an investigation.

27 How do the courts treat confidential information that might be required to be disclosed or that is responsive to a discovery proceeding? Is such information treated differently for trial?

The hearings are generally conducted in public, but the court may decide to conduct all or parts of the hearings behind closed doors, for instance when confidential information is presented. This means that the public is not admitted to all or parts of the trial. The court's judgments and decisions are generally public.

Parties in a matter before a court are, in principle, entitled to have access to all information in the case, including information covered by secrecy. When the court provides a party access to information covered by secrecy it may restrict the right to disclose the information or the right to use the information outside the proceedings, or both (Chapter 10, Section 4 of the Public Access to Information and Secrecy Act).

For the court to assess whether a document is part of a leniency application or settlement submission and thus protected against discovery, the defendant may be ordered to submit the document to the court (Chapter 5, Section 6 of the Competition Damages Act). Until the court has completed its assessment, other parties will be entitled to access the document only to the extent decided by the court. If the court finds that the document is protected from discovery, the document shall be returned to the holder immediately.

28 What protection, if any, do your courts grant attorney–client communications or attorney materials? Are any other forms of privilege recognised?

According to Code of Judicial Procedure (Chapter 38, Section 2 and Chapter 36, Section 5) communication with the appointed attorney or documentation drafted by that attorney is protected from disclosure. Therefore, written correspondence between a client and its external lawyer is covered by legal privilege and may not be subject to a disclosure order. Further, external lawyers may not testify on matters confided to them by their clients. Advice from in-house lawyers is not covered by legal privilege.

Trial

29 Describe the trial process.

An action for antitrust damages is initiated by means of a summons application to the Patent and Market Court. The proceedings are divided into a preparation and a main hearing. During the preparation, which involves both written submissions and oral hearings, the court investigates what the dispute relates to. When the preliminary hearing has been completed, the court summons the parties and the witnesses to the main hearing. At the main hearing, which is generally conducted in public, the plaintiff presents its claims, followed by the defendant providing its view of the matter and possible counterclaims. When all the evidence has been presented, the parties conclude their case by presenting their closing statements. The main hearing is followed by a deliberation in which the judges discuss the case and decide how they will rule. No external party is entitled to be present during deliberation. What is said during the deliberation is confidential, even after the court has delivered its judgment.

30 How is evidence given or admitted at trial?

In general, all evidence that the parties want to rely on should be presented orally at the trial. The parties may make references to audio or video recordings, or documents only if the court finds it appropriate.

Following the presentation of the claims, the parties go through their written evidence. If the parties have adduced an examination of themselves, they are heard after the presentation of the facts. The witnesses are called one at a time and each of them takes an oath before they are examined. Witnesses are called by each party. The examination starts with the plaintiff's witnesses. Following the examination, the witness will be cross examined by the other parties' attorneys.

Expert evidence is provided in the form of written reports that are presented orally by the expert witness in the main hearing. After the presentation of the report, the other parties' attorneys will have the chance to cross-examine the expert.

31 Are experts used in private antitrust litigation in your country? If so, what types of experts, how are they used, and by whom are they chosen or appointed?

There are usually two economic experts in the judges' panel in private antitrust litigation cases before the Patent and Market Court (Chapter 4 of the Swedish Act on Patent and Market Courts).[9] Upon request from the parties, the court may also appoint experts (Chapter 40 of the Code on Judicial Procedure). The SCA may in certain situations, upon request from the court, assist with the calculation of the damages, but the SCA may refuse to provide such assistance. Furthermore, the parties may present testimony from their own experts, who will often be economic experts (Chapter 36 of the Code on Judicial Procedure).

9 2016:188.

32 What must private claimants prove to obtain a final judgment in their favour?

If the claimant is seeking a cease-and-desist order according to Chapter 3, Section 2 of the Competition Act the claimant needs to show a violation of Articles 101 or 102 of the Treaty on the Functioning of the European Union or the equivalent Swedish stipulations, and that the claimant was affected by this infringement.

If the claimant is seeking damages according to Chapter 2, Section 1 of the Competition Damages Act the claimant must prove that the defendant negligently or deliberately infringed Articles 101 or 102 of the Treaty on the Functioning of the European Union or the equivalent Swedish stipulations and that the claimant has suffered an economic damage due to the infringement.

Claimants have the burden of proof in relation to the entirety of the claim, including the harm suffered, the proximate cause between the infringement and the harm, as well as the quantity of the damages.

However, as described in question 36 below, the court may in some cases estimate the damage to a reasonable amount.

33 Are there any defences unique to private antitrust litigation? If so, which party bears the burden of proving these defences?

In general, the claimant must prove the entirety of the claim. The defendant may, in turn, present evidence to contradict the claimant's claim and to reduce the evidentiary value of the claimant's evidence. There are, in principle, no restrictions on what can be presented as a defence and evidence.

The passing-on defence is explicitly regulated in the Competition Damages Act and may be applied in relation to harm that arose after 27 December 2016. When the claimant is an indirect buyer, there is a rebuttable presumption that an overcharge of a direct buyer has been passed on to the indirect buyer (Chapter 3, Section 5). When the claimant is an indirect supplier, there is a rebuttable presumption that a predatory price applied against a direct supplier has been passed on to the indirect supplier (Chapter 3, Section 6).

34 How long do private antitrust cases usually last (not counting appeals)?

There have as of yet been relatively few cases of private antitrust claims in Sweden that have been finally assessed by the court. So far, most cartel damages claims have settled out of court. For the few abuse of dominance cases where a judgment was handed down, the typical time from filing the claim until a judgment was handed down was between two to four years.

Given the very few cases on antitrust damages in Sweden, it is difficult to provide an accurate time estimate. So, considering the complexity of these types of cases, it is fair to assume that private antitrust damages actions would take at least a year and most often several years (not counting appeals).

35 Who is the decision-maker at trial?

In the Patent and Market Court, which is the court of first instance, the judges' panel generally consists of two legally trained judges and two economic experts, who are the decision-makers at trial (Chapter 4, Section 4 of the Act on Patent and Market Courts). One of the judges is the chair at the trial. In the Patent and Market Court of Appeal, the panel consists of at least three legally trained judges and at least the same number of economic experts as in the lower court (Chapter 5, Section 3 of the Act on Patent and Market Courts).

Damages, costs and funding

36 What is the evidentiary burden on plaintiffs to quantify the damages?

In general, the plaintiff must prove the entirety of the claim, including the harm suffered, the proximate cause between the infringement and the harm, as well as the quantity of the damages. However, when it comes to cartel infringements, the Competition Damages Act provides a rebuttable presumption of harm (Chapter 3, Section 4). This presumption is only applicable to claims for compensation for harm that arose after the entry into force of the Competition Damages Act on 27 December 2016. The older rules have no presumptions of harm.

The court may estimate the size of a damage if the full evidence of the damage occurred is not possible or if it can only be brought with difficulties (Chapter 35, Section 5 of the Code of Judicial Procedure). The same applies if the compensation claimed constitutes a lesser amount and the proof of the extent of the damages can be assumed to entail disproportionate costs or inconvenience. The preparatory materials to the Competition Damages Act,[10] especially refers to this stipulation and adds that this does not, however, excuse the claimant from presenting the available evidence.

37 How are damages calculated?

The plaintiff is in principle entitled to full compensation for all harm caused by the infringement. The Competition Damages Act contains rules to ensure that the plaintiff is not overcompensated. If the plaintiff has reduced its loss by passing on the over- or undercharges to its customer or suppliers, the right to compensation is reduced accordingly (Chapter 3, Section 2). If the claim is brought by an indirect purchaser (or supplier), there is a rebuttable presumption that the over or undercharge has been passed on to it (Chapter 3, Section 5 and 6).

If the parties have difficulties presenting full proof of the harm, the extent of passing-on or both, the court has the power to estimate the damage to a reasonable amount according to the general provisions contained in the Code of Judicial Procedure, as further described at question 36.

Potential compensation received through settlements between other parties and the infringers shall be taken into account in the calculation of the damages. The compensation shall be reduced by the infringer's share of the damage that the settlement is related to, taking into account the relative liability of all infringers for the damage caused by the infringement (Chapter 3, Section 3).

10 Proposition 2016/17:9, pages 48–49.

38 Does your country recognise joint and several liabilities for private antitrust claims?

Yes, joint and several liability exists in Sweden pursuant to Chapter 2 of the Competition Damages Act. If two or more undertakings have participated in the infringement, they are jointly and severally liable for the harm caused by it (Chapter 2, Section 1 of the Competition Damages Act). As a result, an injured party can choose to seek compensation from any of the infringers until it has been fully compensated for the harm occurred.

There are certain limitations to this principle. Undertakings that have been granted immunity from fines by the SCA are jointly and severally liable only to their own (direct and indirect) purchasers (Chapter 2, Section 4). The same applies to micro, small and medium-sized enterprises (as defined by the European Commission Recommendation 2003/361/EG, dated 6 May 2003), provided that the company's market share is below 5 per cent and the application of the normal rules (i.e., joint and several liability) would jeopardise its economic viability and cause its assets to lose all their value (Chapter 2, Section 3). The latter limitation does not apply if the small and medium-sized company has led the infringement, coerced other companies to participate or has previously been found to have infringed competition law. Both limitations apply without prejudice to the right of full compensation. Compensation can thus be sought from this category of companies if the other co-infringers are unable to provide full compensation.

An undertaking that has entered into a settlement with an injured party is jointly and severally liable to that party only if the co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party (Chapter 2, Section 5). The settling parties may also expressly exclude the joint and several liability of the infringer as part of the settlement agreement.

39 Can a defendant seek contribution or indemnity from other defendants, including leniency applicants, or third parties? Does the law make a clear distinction between contribution and indemnity in antitrust cases?

Yes, defendants may seek contributions or indemnities from other defendants, pursuant to Chapter 2, Section 2 of the Competition Damages Act.

A defendant who has paid more than its share of damages has, subject to some limitations, a right of recourse against other co-infringers up to the that infringer's share of the damages (Chapter 4, Section 1 of the Competition Damages Act). The infringers' respective share of the damage is to be decided in light of the infringers' relative responsibility for the harm caused by the infringement. For a party that has been granted immunity from fines under a leniency programme, the amount of contribution shall not exceed the amount of harm caused to its own (direct or indirect) purchasers or suppliers (Chapter 4, Section 2). The right to claim compensation from an infringer who has entered into a consensual settlement with an injured party is limited to compensation that has been paid to other injured parties (Chapter 4, Section 3).

Before the Competition Damages Act entered into force, there were no explicit rules on the right to claim contributions from other infringers, but it would be possible to base a claim for recovery on general compensation law.

40 Can prevailing parties recover attorneys' and court fees and other costs? How are costs calculated?

Yes, prevailing parties may recover their costs of litigation including lawyers' fees and court costs, pursuant to Chapter 18, Section 1 of the Code of Judicial Procedure. According to Chapter 18, Section 8 of the Code of Judicial Procedure, the costs that can be recovered include all costs that were reasonably needed for the preparation and bringing of the claim including attorney's fees.

The reasonableness of the costs incurred is decided by the court. Depending on the degree of success, the court may also apportion the costs. At the end of the trial, the parties will usually submit a claim for costs to the court, which will then assess what the losing party should reasonably pay and make an order to that effect.

41 Are there circumstances where a party's liability to pay costs or ability to recover costs may be limited?

According to Chapter 18 of the Code of Judicial Procedure, the court may decide another allocation of the legal costs under some circumstances. For example, if there are several claims in the same proceedings, and both parties have lost some and won some; if the proceedings were initiated without cause (Chapter 18, Section 3); if the costs were caused by not taking part in oral proceedings, by ignoring court orders; or otherwise caused through negligence (Chapter 18, Section 6).

42 May attorneys act for claimants on a contingency or conditional fee basis? How are such fees calculated?

According to Section 4.2 of the Swedish Bar Associations Guidelines on Good Attorney Practice, members of the Bar Association may not apply contingency fees or conditional fees. The plaintiff may, however, choose to use a lawyer who is not a member of the Bar Association. In civil cases, lawyers are not required to be members of the Bar Association to represent a client in court.

There are different rules for claims brought in class actions. According to the Swedish Group Proceedings Act,[11] the claimant must as a general rule be represented by a member of the Bar Association (Section 11). The claimants may agree with the attorney to make the legal fees conditional on the outcome of the case, provided that the agreement is approved by the court (Sections 38–41).

43 Is litigation funding lawful in your country? May plaintiffs sell their claims to third parties?

Litigation funding is lawful in Sweden. Plaintiffs may also sell their claims to third parties.

11 2002:599.

44 May defendants insure themselves against the risk of private antitrust claims? Is after-the-event insurance available for antitrust claims?

It is not settled under Swedish law whether a defendant can insure itself against the risk of private antitrust claims. We believe such cover is not currently offered by Swedish insurers, but are also not aware of any regulation prohibiting it. An insured who takes out such a policy to the extent available internationally may therefore run a risk that the insurer can invoke the standard provisions in the policy excluding liability where the insurance cover violates any applicable law.

Appeal

45 Is there a right to appeal or is permission required?

According to Chapter 1, Section 3 of the Act on the Patent and Market Courts, leave to appeal is required.

46 Who hears appeals? Is further appeal possible?

An appeal is heard by the Patent and Market Court of Appeal. Further appeal is generally not possible, but the Patent and Market Court of Appeal may allow a decision or a judgment to be appealed to the Supreme Court if it is of importance for the development of the law. In these cases, leave to appeal must also be given by the Supreme Court.

47 What are the grounds for appeal against a decision of a private enforcement action?

Appeals are available both on the facts and on the law. According to Chapter 1, Section 3 of the Act on the Patent and Market Courts and Chapter 49, Section 14 of the Code of Judicial Procedure, leave to appeal may be granted on the following grounds:

- there are reasons to doubt the correctness of the findings of the Patent and Market Court;
- without leave to appeal, it would not be possible to assess the correctness of the findings of the Patent and Market Court;
- the appeal is important for the development of the law; or
- there are other extraordinary reasons to hear the appeal.[12]

Collective, representative and class actions

48 Does your country have a collective, representative or class action process in private antitrust cases? How common are they?

Yes, there are regulations on collective and class redress in the Group Proceedings Act. This Act is also applicable in private cartel damages cases (Chapter 5, Section 2 of the Competition Damages Act). There have only been a few cases concerning claims for antitrust damages in Sweden. None of these were litigated as a class action.

12 Proposition 2015/16:57, pages 289–290.

49 Who can bring these claims? Can consumer associations bring claims on behalf of consumers? Can trade or professional associations bring claims on behalf of their members?

Class actions are governed by the Group Proceedings Act. A class action may be brought by natural or legal persons who have a claim covered by the action (group civil action), certain non-profit organisations (organisation group action) or public authorities (public group action).

50 What is the standard for establishing a class or group?

The standard for establishing a class or a group is that the claimant is representing several people who are not parties to the proceedings, towards whom the proceedings have legal effect. The class is the group of people who the claimant is representing. The Act is based on an opt-in system. Those who want to be part of the group must report this to the court within a specified time frame. Until the expiry of the specified time frame, the group is defined by the claimant.

51 Are there any other threshold criteria that have to be met?

According to Section 8 of the Group Proceedings Act the following criteria must be met:

- the action is founded on circumstances that are common or of a similar nature for the claims;
- group proceedings are not inappropriate;
- the majority of the claims to which the action relates cannot equally well be pursued by individual actions;
- the group, taking into consideration its size, ambit and otherwise, is appropriately defined; and
- the claimant, taking into account its interest in the substantive matter, its financial capacity to bring a group action and the circumstances generally, is appropriate to represent the members of the group.

52 How are damages assessed in these types of actions?

To date, there have been no class actions for antitrust damages, and it is thus not possible to advise how the damages are assessed.

53 Describe the process for settling these claims, including how damages or settlement amounts are apportioned and distributed.

According to Section 26 of the Group Proceedings Act, settlements must be approved by the court in the form of a judgment to be valid. Provided the settlement is not discriminatory towards certain members of the group or otherwise manifestly unfair, the settlement will be approved. If the court is asked to approve a settlement, it is required to inform affected group members.

54 Does your country recognise any form of collective settlement in the absence of such claims being made? If so, how are such settlements given force and can such arrangements cover parties from outside the jurisdiction?

Swedish law does not recognise any form of collective settlement in the absence of class actions.

55 Can a competition authority impose mandatory redress schemes or allow voluntary redress schemes?

The SCA does not have the power to impose mandatory redress schemes or allow voluntary redress schemes.

Arbitration and ADR

56 Are private antitrust disputes arbitrable under the laws of your country?

According to Section 1 of the Swedish Arbitration Act,[13] the civil law effects of competition law infringements may be decided by arbitrators. Private antitrust disputes may thus be settled by arbitration, provided that the parties have agreed to this.

57 Will courts generally enforce an agreement to arbitrate an antitrust dispute? What are the exceptions?

According to Section 1, Paragraph 3 of the Arbitration Act, the private law consequences of competition law between different parties may be decided by arbitration. If an antitrust dispute falls within the scope of an arbitration agreement, then the courts would enforce it upon a party's jurisdictional objection (Chapter 10, Section 17(a) of the Code of Judicial Procedure). Otherwise, the party loses its right to rely on the agreement to arbitrate.

58 Will courts compel or recommend mediation or other forms of alternative dispute resolution before proceeding with a trial? What role do courts have in ADR procedures?

The court cannot compel the parties to conduct an alternative dispute resolution. According to Chapter 42, Section 17 of the Code of Judicial Procedure, if it is not inappropriate considering the nature of the case and other circumstances, the court should work towards an amicable settlement of the dispute and may decide that a dispute is to be settled through alternative dispute resolution, provided that both parties consent.

Advocacy

59 Describe any notable attempts by policy-makers to increase knowledge of private competition law and to facilitate the pursuit of private antitrust claims?

We are not aware of any notable attempts by policy-makers to increase knowledge of private competition law or to facilitate the pursuit of private antitrust claims.

Other

60 Give details of any notable features of your country's private antitrust enforcement regime not covered above.

Not applicable.

13 1999:116.

Appendix 1

About the Authors

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Andrew is a founding partner of Hausfeld and leads the Stockholm office. With over two decades' experience in competition litigation, Andrew has represented dozens of the largest Scandinavian undertakings in proceedings before the UK High Court and the Competition Appeal Tribunal, several European jurisdictions, and the US federal district courts. He has advised several leading auto manufacturers on claims arising from price-fixing cartels including Bearings, Carglass, Maritime Car Carriers, and many of the world's largest manufacturers, retailers, and logistics companies on a variety of matters including the *Air Cargo*, *Capacitors*, *Forex*, and *Trucks* cartel litigations, and defending the *Freight Forwarders* litigation. Andrew holds a post-graduate diploma in EU competition law from King's College London, and clerked for the US Federal Trade Commission Bureau of Competition and Advokatfirman Vinge KB. Andrew is a regular lecturer on EU competition law at the University of Toulouse Master of Law Programme.

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Johan Karlsson heads Vinge's EU, competition and regulatory practice group. With more than 25 years' experience, he is one of the most reputable competition law experts in Sweden and has been, for many years, ranked as one of the best. Johan is the co-author of the Swedish handbook

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Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – explores in depth key themes such as territoriality, causation and proof of damages that are common to competition litigation around the world with jurisdictional overviews and Q&As. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as Brazil, Japan and Mexico.

As the editors of this publication note, 'litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.'

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