Private Antitrust Litigation 2020

Contributing editor
Francesca Richmond

LEXOLOGY®
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2003
Seventeenth edition
ISBN 978-1-83862-145-2

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Private Antitrust Litigation 2020

Contributing editor
Francesca Richmond
Baker McKenzie LLP

Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Private Antitrust Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Italy and Portugal a new global overview.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Francesca Richmond of Baker McKenzie LLP, for her continued assistance with this volume.

LEXOLOGY®
Getting The Deal Through

London
July 2019

Reproduced with permission from Law Business Research Ltd
This article was first published in August 2019
For further information please contact editorial@gettingthedealthrough.com

Contents

Global Overview 3
Francesca Richmond
Baker McKenzie LLP

China 5
Ding Liang
DeHeng Law Offices

England & Wales 13
Elizabeth Morony, Ben Jasper and Oliver Carroll
Clifford Chance LLP

France 45
Mélanie Thill-Tayara and Marion Provost
Dechert LLP

Germany 53
Alexander Rinne
Milbank LLP

Greece 61
Dimitris Loukas and Kostas Manikas
Potamitis Vekris Law Firm

Israel 68
David E Tadmor and Shai Bakal
Tadmor Levy & Co

Italy 76
Eva Cruellas Sada and Salvatore Gaudiello
Gianni, Origoni, Grippo, Cappelli & Partners

Japan 83
Hideto Ishida and Takeshi Suzuki
Anderson Mōri & Tomotsune

Mexico 89
Lucía Ojeda Cárdenas, José Enrique Espinosa Velasco, Felipe García Cuevas, Mariana Carrión Valencia, Ernesto Álvarez Castillo and Priscila Monge Kincaid
SAI Law & Economics

Netherlands 95
Erik Pijnacker Hordijk, Willem Heemskerk and Susanne Kingma
Pels Rijcken & Droogleever Fortuijn

Norway 101
Siri Teigum, Eivind Vesterkjær, Eivind Sæveraas and Heidi Jorkjend
Advokatfirmaet Thommessen AS

Portugal 108
Mário Marques Mendes and Pedro Vilarinho Pires
Gómez-Acebo & Pombo (GA_P)

Spain 115
Pedro Suárez Fernández, Antonio de Mariano Sánchez-Jáuregui and Javier Pérez Fernández
Ramón y Cajal Abogados

Sweden 122
Stefan Perván Lindeborg, Fredrik Sjövall, Sarah Hoskins and Mårten Andersson
Mannheimer Swartling

Switzerland 128
Daniel Emch, Anna-Antonina Gottret and Stefanie Schuler
Kellerhals Carrard

Turkey 134
M Fevzi Toksoy, Bahadır Balkı and Ertuğrul Can Canbolat
ACTECON

United States 141
Paul Eckles, Karen Hoffman Lent, Matthew Martino, Tara Reinhart and Jane Klinger
Skadden, Arps, Slate, Meagher & Flom LLP

Sweden

Stefan Perván Lindeborg, Fredrik Sjövall, Sarah Hoskins and Mårten Andersson
Mannheimer Swartling

LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

The former Swedish Competition Act (1993:20), which was adopted in 1993, introduced an explicit right to damages for parties that had suffered injury as a result of infringements of the prohibitions in the Competition Act against anticompetitive agreements or abuse of a dominant position. This act was replaced by the current Competition Act (2008:579), which came into force on 1 November 2008. The current act retained the wording of the former act regarding the right to damages but also introduced the possibility of bringing private enforcement actions together with cases of administrative fines brought by the competition authority. This means that damages and fines can be consolidated into the same proceeding.

In December 2016, the Swedish Competition Damages Act (2016:964) entered into force, implementing Directive 2014/104/EU (Damages Directive) and replacing the provision on damages in the Competition Act. In general, the new act introduces both clarifications and substantive changes. It applies to infringements that occurred after 27 December 2016. The former rules and case law will therefore still apply to infringements that occurred before 27 December 2016, with the exception of the procedural rules in Chapter 5, sections 3 to 9, which are applicable to cases raised after 25 September 2014. The new rules include provisions limiting the right to access documents in a competition authority's case file, as well as a rule providing that infringements found by a competition authority or a court are binding in subsequent actions for damages. In addition, the new rules specify the passing on of over or undercharges and introduce a shortened limitation period.

Although the provisions on damages for infringements of competition rules have been in force for more than 20 years, only a limited number of 'pure' competition damages cases have been tried by Swedish courts. The Svea Court of Appeal's 2011 judgment in *Europe Investor Direct AB et al v Euroclear Sweden AB*, where the plaintiffs were awarded damages due to Euroclear's abuse of dominance, long remained the only case to have been finally ruled upon by a court. However, in June 2017, the appeal court rendered its judgment in *Yarps Network Services AB v Telia Company AB (Yarps*). The court dismissed Yarps' claim of damages against Telia (formerly TeliaSonera) for abuse of a dominant position through margin squeeze. In December 2017, the court similarly overturned Tele 2's damages claim in *Tele2 Sverige AB v Telia Company AB*, another follow-on claim relating to Telia. There are of course also cases that have been settled out of court (see question 37). A number of cases have also been subject to arbitration, such as *V&S Vin & Sprit v Systembolaget*, in which the claimant was awarded damages for an abuse of dominance by Systembolaget, the Swedish retail monopoly for alcoholic beverages.

There are a number of cases where contractual nullity due to competition law infringements is claimed. Contractual nullity has successfully been claimed, inter alia, in *Civil Aviation Authority v SAS*. In this case, the appeal court found that the Civil Aviation Authority had abused its dominant position by applying discriminatory prices. The Civil Aviation Authority was obliged to repay approximately 600 million kronor to the airline SAS, and SAS was relieved from paying approximately 400 million kronor to the Civil Aviation Authority.

Furthermore, recent years have seen several cases where undertakings have used their right to bring action in court themselves in matters where the competition authority has decided not to pursue an undertaking's complaint. Such an action may, for example, involve seeking an injunction that requires another undertaking to cease certain behaviour in breach of the prohibitions against anticompetitive cooperation and abuse of a dominant position (see question 3), under penalty of a fine. In *Saint-Gobain Isover AB v Nordvästra Skåne Södra Halland Energi AB, Uppsala Taxi v Europark Svenska Aktiebolag and Swedavia AB* as well as in *Bring CityMail Sweden AB v Posten Meddelande AB*, the defendants were found to have abused their dominant positions and ordered by the Swedish Market Court to cease the abusive behaviour. More recently, in *Association of Swedish Wholesalers of Car Parts v KIA Motors Sweden AB*, the Swedish Market Court found that KIA's application of a condition in its new car warranty was anticompetitive and ordered KIA to cease applying the condition. In *Visita v Booking.com BV and Bookingdotcom Sverige AB*, the Swedish tourism association Visita sought an injunction requiring Booking.com to cease applying narrow price parity clauses that restrict hotels from advertising lower fees for hotel rooms on their own websites. The Patent and Market Court of Appeal dismissed Visita's claim in May 2019.

An ongoing case, involving issues of lis pendens in cross-border competition disputes, is *Bong AB et al v Office Depot Svenska AB et al*. Bong, an addressee of the European Commission's 2014 *Envelopes* cartel settlement decision, has requested a negative declaration asking the Patent and Market Court to declare that Bong is not liable to pay damages to Office Depot. Parallel proceedings for damages, initiated by Office Depot, are ongoing in the UK (see question 38).

Applicable legislation

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Yes. Private antitrust actions are mandated by statute. Indirect purchasers may bring claims.

3 | If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

There are two antitrust prohibitions in Sweden, one against anticompetitive cooperation between undertakings (section 1, Chapter 2 of the Competition Act) and one against the abuse of a dominant position (section 7, Chapter 2 of the Competition Act). These prohibitions mirror the prohibitions in articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). It follows from section 6, Chapter 2 of the Competition Act that agreements and clauses that infringe section 1, Chapter 2 are void. Although not explicitly stated in the Competition Act, it is established case law that agreements and clauses infringing section 7, Chapter 2 are also void. A private antitrust action on the basis that an agreement or provision is in violation of the Swedish or EU competition rules, and therefore void, may be brought under the general procedural rules.

The Competition Damages Act contains several provisions, specifically in Chapters 2 to 4, governing the right to damages for injuries caused by infringements of sections 1 or 7, Chapter 2 of the Competition Act, articles 101 or 102 of the TFEU or of another EU member state's equivalent national legislation in accordance with Regulation (EC) No. 1/2003.

Sections 1 and 2, Chapter 3 of the Competition Act stipulate that if the competition authority decides in a particular case not to order an undertaking to terminate an infringement of the prohibitions on restrictive agreements or abuse of dominance, an undertaking affected by the infringement may seek such an order from the Patent and Market Court. An undertaking may, however, not initiate such proceedings if the competition authority's decision is founded on article 13 of Regulation (EC) No. 1/2003.

The Patent and Market Court (organised as part of the Stockholm District Court) serves as a first-instance court, while the new Patent and Market Court of Appeal (organised as part of the Svea Court of Appeal) is the court of second, and last, instance (the Patent and Market Court of Appeal may, however, allow a judgment to be appealed to the Supreme Court). The Patent and Market Court and the Patent and Market Court of Appeal are competent to hear private antitrust cases.

In addition, the Arbitration Act (1999:116) stipulates that the civil law effects of competition law may be the subject of arbitration.

PRIVATE ACTIONS

Availability

4 | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions for damages or nullity are available in respect of breaches of both sections 1 and 7, Chapter 2 of the Competition Act and articles 101 and 102 of the TFEU. An infringement ruling by a competition authority is not a prerequisite for a private antitrust action. However, under section 9, Chapter 5 of the new Competition Damages Act, a final ruling by a competition authority or the court determining an infringement of the competition rules is binding and may not be re-examined in a subsequent action for damages. This rule also applies when the European Commission has found an infringement of article 101 or 102 of the TFEU, or when such a finding has been upheld by the Court of Justice of the European Union.

Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

As regards international relations, Regulation (EC) No. 44/2001 (Brussels Regulation) applies in Sweden. As for jurisdiction issues between Sweden and non-EU member states, there is no general rule determining whether Sweden has jurisdiction or not, and so cases are evaluated on a case-by-case basis. Simply put, a Swedish court would probably consider itself as having jurisdiction in a case where a Swedish rule on forum would be applicable, that is, where the defendant resides or has its seat in Sweden, as the case may be, or alternatively, if the infringement took place or the injury occurred in Sweden. Related Issues are currently pending before the Patent and Market Court of Appeal in the *Bong v Office Depot* case, see question 1 and 38.

Under the Brussels Regulation, parties may agree that a court in a member state should have jurisdiction to try a claim between the parties, as long as at least one of the parties is domiciled in a member state. Certain formal requirements apply to such agreements on jurisdiction.

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Private actions can be brought against corporations and individuals (including those from other jurisdictions, as long as Sweden has jurisdiction, see question 5), provided they constitute undertakings within the meaning of the Competition Act. Section 5, Chapter 1 of the Competition Act defines an undertaking as a natural or legal person engaged in activities of an economic or commercial nature. An action for damages cannot, however, be brought against an employee of an infringing entity.

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

Litigation may be funded by third parties. Within the framework of a class action, a plaintiff may agree with his or her counsel that the fee should depend on the outcome of the case. Such an agreement requires the approval of the court. Otherwise, the Swedish Bar Association does not accept that its members charge contingency fees.

Jury trials

8 | Are jury trials available?

No. Jury trials are not available.

Discovery procedures

9 | What pretrial discovery procedures are available?

Discovery in the generally accepted meaning of the word does not exist in Swedish law. Under the Swedish system, pretrial exchanges of documents can only be made on a voluntary basis. However, within the framework of a court procedure, there is a general obligation on a party (whether a party to a proceeding or a third party) holding a written document that can be assumed to be of importance as evidence to produce that document. A court may issue an order to that effect. A party seeking such an order from the court should identify the document and explain what information is included in the document. The party obliged to produce the document may be compelled to do so under threat of a fine.

The general rule on disclosure is subject to certain exceptions. Legally privileged documents (correspondence between client and attorney) need not, for instance, be disclosed.

As a general principle, documents received or drawn up by a public body (including the Swedish Competition Authority and the courts) are public. This principle is, however, subject to exceptions in the Public Access to Information and Secrecy Act (2009:400), which lists a number of situations where documents are confidential. In the Swedish Competition Authority's case files, information on an undertaking's business operations, inventions and research results must be treated as confidential where the undertaking in question may be expected to suffer injury if the information is disclosed. In cases under the Competition Act before courts, similar rules apply. In addition, following Sweden's implementation of the EU Damages Directive, the general Swedish rules on disclosure do not cover certain other types of document held by a competition authority, such as leniency applications, settlement submissions, etc.

Typically, confidentiality is only maintained as regards third parties and not as regards a party to the relevant proceeding. However, a party may request that confidentiality be respected regarding certain information even in relation to a party to the proceeding in question (where there are particularly strong reasons for doing so).

It is possible to appeal against a decision not to disclose a document, but not against a decision to disclose a document.

Admissible evidence

10 | What evidence is admissible?

In general, parties may rely on virtually all kinds of documents, statements and occurrences in attempting to prove their case. The court may freely evaluate the evidence presented by the parties at its discretion. One exception is that written witness statements are normally not allowed; however, as of 1 November 2008, a written statement may be used as evidence so long as the parties agree to it and it is not manifestly unsuitable. In addition, under the new Competition Damages Act, certain documents accessible to a party only through its access to a competition authority's case file are not admissible in damages actions. This provision therefore constitutes a departure from the general Swedish procedural rules of evidence.

Legal privilege protection

11 | What evidence is protected by legal privilege?

Written correspondence to and from external lawyers held by the lawyer or by the client is protected by legal privilege and may not be subject to a court order to produce such documents. External lawyers are also prevented from giving evidence on matters confided to them in their practice. Advice from in-house lawyers is not legally privileged in Sweden.

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Competition law infringements are not criminalised under Swedish law.

Utilising of criminal evidence

13 | Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Competition law infringements are not criminalised under Swedish law (see question 12). Findings and evidence in proceedings brought by the Swedish Competition Authority under the Competition Act may be relied upon in private actions. There is no protection from private actions for leniency applicants. The new Competition Damages Act does, however, contain a provision limiting the joint and several liability of an immunity recipient. The Swedish Competition Authority follows the Swedish administrative law principle of public access to official records. As a general rule, all documents received or drawn up by the Swedish Competition Authority are to be considered public, although secrecy rules apply for documents that contain confidential information, such as trade secrets and information related to leniency applications, etc (see question 9).

Stay of proceedings

14 | In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

Under section 5, Chapter 32 of the Swedish Code of Judicial Procedure, the court can decide on a stay in a proceeding if it is of extraordinary importance that a question which is subject to another legal proceeding is decided before the proceeding continues. For example, if a competition authority has initiated an ongoing proceeding regarding fines owing to a breach of an antitrust prohibition, the court can decide on a stay in a proceeding regarding damages owing to the same alleged breach. The new Competition Damages Act also contains a complementary provision stipulating that the court may decide on a stay of proceedings if the parties have entered into settlement negotiations. This does not constitute a substantive change of Swedish procedural rules, but rather a clarification that settlement negotiations warrant a stay of proceedings. The case must, however, be reopened within two years, as set out in the EU Damages Directive.

Standard of proof

15 | What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

The general rules on evidence for civil law cases are applicable to cases concerning damages for infringements of the Competition Act. The standard of proof is that the relevant fact must be 'proven' or 'shown'. This is below the 'beyond reasonable doubt' level but does not, as such, involve a 'balance of probabilities' exercise. The Competition Damages Act based on the Damages Directive, contains some specific rules of evidence. First, harm is presumed when the infringement is a cartel. Furthermore, indirect purchasers are presumed to have suffered losses if they can show that there has been an infringement that has led to an overcharge and that the claimant has purchased products affected by the infringement. The same principle applies to indirect providers.

In proceedings for damages, the plaintiff has the burden of proof in relation to the infringement, intent or negligence, the injury suffered and the causal link between the infringement and the injury. In proceedings where the plaintiff claims unenforceability of an agreement due to competition law, the burden of proof lies with the claimant. With respect to, for example, a passing on defence, the burden of proof lies with the defendant. Under general principles of procedural law, once a party has

discharged its burden of proof in a given respect, the burden then shifts to the other party.

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

It is difficult to state on a general basis how long proceedings will take, because it will depend on the circumstances of each case. Depending on the complexity of the case and the number of instances, the length of a case can vary between roughly one year for a 'simple' case with no appeal to perhaps five years or more for a complex case in three instances. There are no formal possibilities to accelerate proceedings.

Limitation periods

17 | What are the relevant limitation periods?

Under the new Competition Damages Act, the right to damages for a breach of the Competition Act or articles 101 or 102 of the TFEU lapses if no claim is brought within five years from the date on which the infringement ceased, provided that the claimant knew, or could reasonably have been expected to know:

- of the behaviour and the fact that it constituted an infringement of competition law;
- of the fact that the infringement of competition law caused harm to it; and
- the identity of the infringer.

The limitation period is interrupted if a competition authority initiates proceedings (including dawn raids) with respect to the conduct for which damages are sought.

For breaches of the Competition Act or articles 101 or 102 of the TFEU that do not meet the above standard, the general limitation period set out in the Swedish Act on Limitation (1981:130) applies. The general limitation period is 10 years from the date when the claim arose. The general limitation period also covers proceedings relating to the enforceability of an agreement.

Appeals

18 | What appeals are available? Is appeal available on the facts or on the law?

As indicated in question 3, a private action is first heard in the Patent and Market Court. The judgment of the Patent and Market Court may be appealed to the Patent and Market Court of Appeal. Leave to appeal is required. The Patent and Market Court of Appeal is the court of last instance, although the court may allow a judgment to be appealed to the Supreme Court. Appeal is available both on the facts and on the law.

In a consolidated damages and fines case, the Patent and Market Court is the competent court of appeal and leave to appeal is required.

COLLECTIVE ACTIONS

Availability

19 | Are collective proceedings available in respect of antitrust claims?

Yes. Collective proceedings are available in respect of antitrust claims.

Applicable legislation

20 | Are collective proceedings mandated by legislation?

Yes. Class actions are mandated by the Class Action Act (2002:599), which entered into force on 1 January 2003. There are three forms of class actions:

- a private class action may be initiated by any person or entity, provided that such person or entity has a claim of its own and is a member of the class;
- an organisation class action may be brought by certain organisations without them having claims of their own. Such actions may be initiated by consumer and labour organisations and must, as a general rule, concern disputes between consumers and providers of goods or services; and
- a public class action may be initiated by an authority authorised by the government to act as plaintiff and litigate on behalf of a group of class members. This form of action is intended to allow authorities to pursue claims where the public interest, in a broad sense, suggests that action should be taken.

21 | If collective proceedings are allowed, is there a certification process? What is the test?

There is no certification process as such, but certain conditions must be fulfilled when bringing a class action. The questions of fact must be common or similar to the entire class. Although the threshold for fulfilling this requirement is set rather low, a class action will not be permitted if there are substantial individual differences between the claims within the class. The law also requires that a class action is the best alternative compared with other forms of procedure such as joinder of claims and the pilot case model. In addition, the group must be suitable with regard to, inter alia, size and character. It must also be well defined, to enable individuals to establish whether they are covered by the class action. The plaintiff must be suitable to represent the class.

Certification process

22 | Have courts certified collective proceedings in antitrust matters?

No antitrust class proceedings have so far been brought in Sweden.

Opting in/out

23 | Can plaintiffs opt out or opt in?

The court must give notice to all group members named in the application advising them that they must opt in through a written notice to the court by a particular date. If a group member does not notify the court within the specified time limit (typically one month), he or she will not be covered by the class action. An opt-in notice becomes binding after the stipulated time limit has run out. Group members are thus prevented from opting out at a later stage. A group member can, however, intervene as a party to the dispute and withdraw his or her individual claim.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

Yes. The court must approve any settlement entered into by the plaintiff on behalf of the group members. Such an approval shall be given unless the terms of the settlement are discriminatory or otherwise unreasonable.

National collective proceedings

25 | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

No. It may be noted, however, that unlike the general rule that parties in legal proceedings are not required to have legal representation, claimants in private class actions and organisation class actions must, in general terms, be represented by a member of the Swedish Bar Association.

REMEDIES AND LIABILITY

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

Under section 1, Chapter 3 of the Competition Damages Act, compensation shall cover actual loss, loss of profit and interest.

The object of damages for infringement of competition law is to restore the plaintiff's financial situation to that which it would have been had the infringement never occurred. Therefore, when determining the damages, the courts will compare the plaintiff's actual financial situation with the hypothetical financial situation in the absence of the infringement.

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

The court may in some circumstances order security measures if there is reason to suspect that the defendant is trying to evade payment.

Punitive damages

29 | Are punitive or exemplary damages available??

No. Swedish law does not provide for punitive or exemplary damages.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

Yes. If the Competition Damages Act is applicable, interest accrues from the day the harm occurred to the day payment is effectuated.

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

No. Fines imposed by competition authorities are not taken into account when determining damages.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Normally, the losing party bears the legal costs. The winning party can therefore recover all reasonable litigation costs from the losing party. The costs may also be apportioned between the parties depending on the degree of success of each party.

Under Swedish law, a non-European Economic Area resident bringing an action before a Swedish court against a Swedish national or legal person must, at the defendant's request, furnish security to guarantee payment of the costs for the judicial proceedings, which the person or company may be ordered to pay.

In the case of class actions, where the defendant is liable for the plaintiff's litigation costs but is unable to pay, group members have a duty to use the received compensation to pay for the plaintiff's litigation costs.

If a case regarding administrative fines is consolidated with a claim for damages brought by a plaintiff, the plaintiff will only risk bearing the particular costs added to the case by the claim for damages, therefore, not the opposite party's costs relating to the administrative fines part of the case.

Joint and several liability

33 | Is liability imposed on a joint and several basis?

When two or more undertakings are liable for the same injury caused by an infringement of competition law, they are, according to section 2, Chapter 2 of the Competition Damages Act, jointly and severally liable. This is in line with general principles of Swedish tort law and was therefore applicable even before the new act was enacted. However, a novelty in the new Act is the limitation of joint and several liability as regards small and medium-sized undertakings in section 3, Chapter 2. A similar limitation is provided for immunity recipients.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

A party who has been obliged to pay compensation to an injured party has a right of recourse against other liable parties. Such claims may be pursued after a judgment or settlement. Co-infringers are held jointly and severally liable for the harm caused by the infringement and a co-infringer has the right to obtain a contribution from other co-infringers if it has paid more compensation than its share. The share is determined by examining the infringer's turnover, its market share and its role in the breach.

Passing on

35 | Is the 'passing on' defence allowed?

When quantifying damages, the passing on defence is available in principle. Such a defence would be successful if it has a bearing on the injury suffered by the plaintiff, since the defendant is only liable to compensate injury actually sustained by the plaintiff.

In section 2, Chapter 3 of the Competition Damages Act, it is specifically stipulated that damages for over- or undercharges should exclude any loss that has been passed on. Further, there are two provisions in the new act that soften the burden of proof for indirect purchasers or providers claiming damages for losses incurred through a 'passing on' of over- or undercharges.

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

As long as the plaintiff has been able to prove the existence of an intentional or negligent infringement, actual injury and the causal link between the two, there are no specific grounds of justification as regards liability as such.

As regards the amount of the damages, this can be reduced if the plaintiff has contributed, by fault or negligence, to the injury sustained. Also, if the plaintiff has benefited from the infringement, this would have an impact on the amount of the damages.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

Section 1 of the Swedish Arbitration Act stipulates that arbitrators may rule on the civil law effects of competition law between the parties. Parties may also freely decide to settle disputes out of court.

No public figures or studies on these issues are available. However, there are relatively few Swedish court cases to date on damages for breach of competition law that have led to final judgments (see question 1). This suggests that alternative means of dispute resolution are used.

UPDATE AND TRENDS

Hot topics

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

Sweden remains a country with a relatively low rate of private enforcement initiatives. This year's rulings in *Visita v Booking.com and Bong v Office Depot*, however, serve as important contributions to the Swedish case law on private actions in the competition sphere.

Visita v Booking.com is not a damages case, but an action under the Swedish Competition Act to seek an injunction against behaviour in relation to which the Authority has previously decided to close an investigation (see question 3). Visita, a trade organisation for the hospitality industry, argued that Booking.com's narrow price parity clauses, which restrict hotels from advertising lower prices for hotel rooms on their own websites, were anticompetitive (wide parity clauses having already been dealt with via an earlier case closed by the Authority with commitments). Following the Patent and Market Court, the Patent and Market Court of Appeal concluded that the clauses in question were not intentionally anticompetitive. In contrast to the lower instance, however, the Court of Appeal did not find Visita's evidence on anticompetitive effects convincing and its case was dismissed. In addition to contributing to the ongoing and somewhat inconsistent development on how price parity clauses are viewed throughout Europe, this adds to the growing number of recent Swedish competition cases in which the Patent and Market Court of Appeal has reversed a judgment from the Patent and Market Court due to a claimant's failure to demonstrate anticompetitive effects.

In the summer of 2018, a number of companies in the Office Depot group threatened legal action in the English High Court for an alleged loss suffered as a consequence of the 'Envelopes' cartel, subject to a European Commission settlement decision in 2014. In response, Bong launched a claim for a negative declaration before the Patent and Market Court of Stockholm, Sweden, asking the Court to declare that Bong was not liable to pay any damages to Office Depot, as the claim was time-barred and Office Depot had not suffered any damage. Shortly afterwards, Office Depot launched a claim for damages before the High Court in London – which caused a delicate lis pendens issue. One key question in the Swedish case is whether a Swedish Court is competent under article 8.1 of the Brussels Regulation to try an action for a negative declaration against all Office Depot claimant companies, in line with the ECJ's *CDC Hydrogen Peroxide* case. The Patent and Market Court found itself competent to try the case against the Swedish Office Depot subsidiary – and ruled in favour of Bong with respect to this claim – but did not consider the connection to the other Office Depot claimants, domiciled in other EU member states, sufficient to ground jurisdiction under article 8.1 of the Brussels Regulation. The case as regards this principally important question is currently on appeal to the Patent and Market Court of Appeal.

MANNHEIMER SWARTLING

Stefan Perván Lindeborg
stefan.pervan.lindeborg@msa.se

Fredrik Sjövall
fredrik.sjovall@msa.se

Sarah Hoskins
sarah.hoskins@msa.se

Mårten Andersson
marten.andersson@msa.se

Norrlandsgatan 21
PO Box 1711
111 87 Stockholm
Sweden
Tel: +46 8 595 060 00
Fax: +46 8 595 060 01
www.mannheimerswartling.se

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

ISBN 978-1-83862-145-2