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Sweden wants to see more private antitrust enforcement

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The European Commission has decided that private antitrust enforcement in the EU should increase. A Swedish governmental committee agrees, and proposes several mechanisms of an allegedly litigation-promoting nature. It is proposed that the new rules shall come into force on April 1, 2005.

Similar to EU competition law, Swedish competition law sits astride public law and civil law. Not only do public authorities have enforcement powers, but violations of Section 6 of the Swedish Competition Act of 1993 (equivalent to Article 81 of the EC Treaty) and Section 19 (equivalent to Article 82) also give rise to civil law consequences. The prohibitions are thus within the providence of the regular judge. It is indeed explicitly stated in the *traveaux préparatoires* of the Swedish Competition Act that it is essential that the system be self-propelled. In other words, the public enforcer can never deal with all infringements. However, in Sweden as in most EU Member States private antitrust litigation has been scarce to say the least.

Although some *Euro-defence* cases have been litigated, no damages suit has ever been adjudicated by a Swedish court (although a number of cases have been settled during the proceedings). Even though there are several reasons for this, those of a procedural nature are of interest here. At the outset, it must be stated that the modernisation process, including its implementation into Swedish national competition law, has itself paved the way for enhanced private enforcement by *inter alia*, making Article 81.3 (and its counterpart in the Swedish Act) directly applicable as well as providing for various forms of cooperation between competition authorities and the courts. Nonetheless difficulties remain and manifest most strongly in the long-standing procedural traditions of the member states. In an attempt to tackle these difficulties in Sweden, a governmental committee (the 'Committee', *SOU 2004:10*) has made several proposals aimed at facilitating private enforcement. The most important proposals are dealt with in this article and include; the extension of the category of parties entitled to damages, and a new procedural instrument aimed at facilitating the gathering of evidence.

Extension of parties entitled to damages

Pursuant to the present wording of Section 33 of the Competition Act, an undertaking which intentionally or negligently infringes any of the substantive prohibitions (or Articles 81 or 82 of the EC Treaty) shall be liable to compensate any loss incurred by 'another undertaking or a contracting party'. The Committee suggests that this limitation should be removed, thus making it clear that any party who has suffered injury as a result of an infringement is, in principle, entitled to damages.

There are several reasons for this proposal. First of all, it is deemed unwarranted to exclude governmental agencies, county councils and municipalities from the right to obtain damages in circumstances where such parties do not act as undertakings and are not contracting parties. An example of such circumstances would be a bid-rigging situation. Under the present rules, it would seen that damages can not be sought in such a case other than from the company which happens to prevail in the tender. (In an intermediary judgment, the Stockholm District Court recently ruled to the contrary, but the case is likely to be appealed.)

The second main implication of the proposal concerns consumers' right to damages. At present, consumers who have a contractual relationship with the infringer are entitled to damages, whereas others, i.e. broader categories of consumers, are not. According to the Committee, this difference in consumers' right to compensation for loss, depending on whether or not a contractual relationship with the infringer exists, is unwarranted.

Whether broader categories of consumers should be entitled to claim damages can be debated. On the one hand, the fundamental aim of the competition rules is to promote consumer welfare. This indicates that consumers should in principle have a valid claim to be held harmless by way of obtaining damages. On the other hand, there are other effective sanctions, notably fines, which may be used to deal with infringers, in the best interest of society as a whole and consumers as a group. In other words, the question of whether non-contracting consumers should be entitled to claim damages must be assessed in the light of the specific

rationale of the damages provision, contained in Section 33 of the Competition Act.

For the purpose of this publication, suffice it to say that this issue has been much discussed in various fora, and there seems to be little consensus on the point. Although the Committee sheds surprisingly little light on it, presumably the provision is of both a preventive and a reparative nature. In any event, another difficult issue not elaborated upon by the Committee is under which precise circumstances damages should be awarded. Under the new rules, a consumer C, who has bought a product from distributor B, should in principle be entitled to damages due to manufacturer A's excessive pricing amounting to an abuse of a dominant position. But from whom can C claim damages – only from A, only from B, or from either A or B? And what about reseller B? Irrespective of whether B has passed on a part of or the entire excessive pricing to C (which however is relevant for the amount C is entitled to), it can be assumed that B has suffered damage of a more general nature, *inter alia* since its overall profit and probably also the market share has diminished. Can B obtain compensation for this type of damage from A even if the entire excess price has been passed on?

Above all, the answers appear dependent on the Swedish legal view on the concept of passing on, what forms of damage that are deemed legitimate, and on whether a party can be obliged to pay damages to several other parties in an amount exceeding the 'original damage'. Furthermore, Swedish law contains a principle under which third party injuries cannot be a basis for a legitimate claim for damages, something which could have a bearing on the antitrust field.

As stated, the Committee provides few details on the uncertainties mentioned above, and leaves them to the courts to clarify. Although doing so is certainly not unheard of in Scandinavian legal tradition, the issues at stake here are so complex as to warrant explanation. In any case, it remains to be seen whether the extension of the *ratione personae* of the damages provision will lead to enhanced private enforcement. In view of the relatively recent adoption of a class action system in Sweden, this cannot be ruled out.

Proposal for a procedural instrument aimed at facilitating the collection of evidence in antitrust damages cases

In practice, equally important as the assessment of which party has the law on its side is the evaluation of what a potential plaintiff believes he can prove in court. Tort cases are almost always coupled with difficulties when it comes to proving the claim, and antitrust damages cases are no different. The elements to be proven in such a case (by the plaintiff; cf. Article 2 of Council Regulation 1/2003) include an infringement (as regards Section 6/Article 81: object or effect to restrict competition, the relevant market, appreciability, effect on trade etc.) and the requisites for damages (intent or negligence, the existence of an injury, the extent of the injury, and its relevant causal link to the infringement). In the event there is already a decision from a competition authority in the same matter, the infringement is easily proven, but the remaining requisites often still require specific proof.

The Committee concludes that the injured party's gathering of evidence must be facilitated or assisted in some way, and proposes the adoption of a new procedural instrument referred to as an investigation of evidence (*bevisundersökning*). Accordingly, in an action for antitrust damages, the plaintiff may request the court to order a search for evidence at the defendant's premises. The search may cover all aspects of the claim, i.e. not only the extent of injury but also all elements of the alleged infringement (the latter being a prejudicial issue for the right to damages).

Broadly speaking, the new procedural instrument resembles the competition authorities' power to carry out on-the-spot investigations. Although a similar instrument exists in civil proceedings relating to infringements of IP rights, it is largely a novelty in Sweden and will hence be controversial among traditionalists. However, even leaving aside such general concerns, the basic question is whether the new instrument required. This calls for a brief consideration of the present law on evidence.

As regards already available means of proof, i.e. how the plaintiff's case can be proven it is fundamental under Swedish law that, any evidence is allowed, i.e. irrespective of how it has been collected. This follows from 'the principle of free evidence'. Means of proof explicitly mentioned in the Code of Judicial Procedure are examination of a witness, party examination, documentary evidence, views (generally applied where a specific piece of evidence for practical reasons cannot be physically brought to the courtroom), and expert examination, appointed either by the court or a party. Of greatest interest here is documentary evidence. Under the Code of Judicial Procedure, 'anybody holding a written document that can be assumed to be of importance as evidence is obliged to produce it'. Failing to do so, the court may issue a disclosure order, which can be subject to a fine and enforced by the enforcement authority.

However, the right to disclosure is qualified, which results in parties being reluctant in practice to make disclosure claims. Firstly and perhaps most importantly, the plaintiff has to be 'sufficiently precise' about which documents he or she wishes to obtain (which presupposes knowledge of the identity of the holder). In other words, disclosure may not, be used in order to 'search' for evidence. In order to surmount this problem, a court-lead disclosure examination may be held with the opposing party and third parties with the aim of identifying documents, establishing which documents have significance as evidence, and ascertaining the holder of such documents. Secondly, the documents claimed must have 'significance as evidence'. This means that the information must carry some weight for the case as it is being pleaded. Thirdly, unless there are extraordinary reasons the information may not contain business secrets i.e. business plans, drawings, customer registers, distribution lists, sales prognoses, agreements with third parties, price lists etc. unless there are extraordinary reasons. This criterion is of prime importance in antitrust cases, since it is generally such information that the parties wish to obtain. But there are ways to mitigate this problem. Pursuant to the Swedish Secrecy Act of 1980, a document may, irrespective of its confidentiality, be disclosed where the relevant authority or court finds that the inconvenience which would otherwise bar disclosure can be avoided by ordering the receiving party not to divulge the information.

The following is also of interest for a party's position as regards evidence. In general under Swedish law, the standard of proof applicable in non-criminal cases is 'reasonable certainty' (*visat/styrkt*). However this unwritten rule is not absolute, as the courts have been prone to reduce the burden of proof in respect of cetain elements which are typically difficult to prove, notably the causal link in tort cases. The standard of proof applied here is more of a qualified 'balance of probabilities' doctrine (*klart mera sannolikt*) than the general standard. In addition, the Swedish Code of Judicial Procedure contains an explicit provision under which the court may make an estimation of reasonable damages in case the claimant encounters difficulties in proving the exact extent of an injury. Furthermore, at times the courts invoke a so-called duty of rebuttal, i.e. requiring the opposing party, in circumstances where the other party has been capable only of submitting insufficient circumstantial evidence, to provide an explanation of such evidence. If such an explanation is not given, although this should reasonably have been possible, the court may find that the applicable standard of proof has been reached.

In view of the above, it can be concluded that there already exists several mechanisms of procedural law to 'assist' an antitrust damages claimant, and here it must be questioned as to whether the proposed instrument will be of any additional benefit. It is important to note that the major difficulty in relation to disclosure, i.e. the identification of documents or classes of documents requested, is also inherent in the new procedural instrument. It remains to be seen whether the proposal in this regard will be endorsed by the Government in its up-coming bill.

Case up-date

Trade Organisation's price lists stopped

In order to assist members and non-members in setting prices, a Swedish trade organisation offered different price lists for about 20,000 articles. It argued that this was necessary to assist small companies in particular, which often lack the resources to produce their own price lists. However, the Competition Authority disagreed, and held that the price lists could result in market prices becoming more rigid and higher than if left to the individual companies to determine. Hence a violation of Section 6 of the Competition Act (the equivalent of Article 81.1 of the EC Treaty) was established. No fine was imposed.

Competition Authority sues eight car dealers

Eight car dealers in southern Sweden are suspected of having infringed the Competition Act by agreeing on prices, discounts and market sharing for new and used cars. The eight firms risk fines totalling SKr157.5m.

Intermediate judgment favours Competition Authority in Asphalt Cartel Case

The Competition Authority has filed a summons application with the Stockholm District Court requesting that fines of approximately SKr1.6bn be imposed on 11 companies in the asphalt surface industry. One of the suspected participants in the cartel was the production unit of the Swedish National Road Administration. Since part of the alleged cartel's activities relate to procurements by the very same National Road Administration, the question arose as to whether there can be anti-competitive cooperation at all, within the meaning of Section 6 of the Competition Act (equivalent to Article 81.1 of the EC Treaty), where a division of an authority has participated in a bid-rigging cartel against itself. In an intermediate judgment, the Market Court, on appeal, concluded that the Administration primarily acted as a supplier, and that it hence cannot be excluded that the substantive criteria in Section 6 have been met.

Competition Authority sues towing firms

Upon suspicion of a cartel arrangement amounting to price-fixing among towing firms, the Competition Authority has sued two companies claiming fines of some SKr100m.

Cross-border raids at natural gas companies

For the first time the Swedish Competition Authority has made a joint dawn-raid effort with another authority in the EU, in this case the Danish authority. The suspicion is that anti-competitive cooperation and abuse of a dominant position have taken place in the natural gas market.

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