

GETTING THE DEAL THROUGH

Private Antitrust Litigation

in 27 jurisdictions worldwide

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Legislation and jurisdiction

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

The Swedish Competition Act (konkurrenslag (1993:20)), which was adopted in 1993, introduced an explicit right to damages for parties who have suffered injury as a result of infringements of the prohibitions in the Competition Act against anti-competitive agreements or abuse of a dominant position. Although the provisions on damages for infringements of the competition rules have been in force for more than a decade, no judgments relating to damages have yet been handed down. A few cases have, however, been settled out of court. In total, about 20 proceedings have been initiated since the Competition Act came into force. In particular, there has been an upsurge in the number of cases concerning damages in the wake of a few large cartel cases recently brought by the Swedish Competition Authority. These proceedings are still pending.

As of 1 August 2005, the circle of those entitled to damages has been widened to include not only undertakings and parties to agreements but also private individuals and other non-undertakings, eg, governmental bodies. The limitation period has further been extended from five years to 10 years.

The number of cases where contractual nullity due to competition law infringements is claimed is increasing. Contractual nullity has successfully been claimed, inter alia, in the *Civil Aviation Authority v SAS* case. In that 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 SAS approximately 600 million Swedish krona and SAS was relieved from paying approximately 400 million Swedish krona to the Civil Aviation Authority.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

Yes, private antitrust actions are mandated by statute.

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 anti-competitive cooperation between undertakings (section 6 of the Competition Act) and one against abuse of a dominant position (section 19 of the Competition Act). These prohibitions mirror the EC prohibitions in articles 81 and 82 of the EC Treaty. It follows from section 7 of the Competition Act that agreements and clauses which infringe section 6 are void. Although not explicitly stated in the Competition Act, it is

established case law that agreements and clauses infringing section 19 are also void.

A private antitrust action on the basis that an agreement or provision is in violation of the Swedish or EC competition rules, and thus void, may be brought under the general procedural rules.

Section 33 of the Competition Act stipulates a right to damages for parties injured as a consequence of infringements of sections 6 or 19 of the Competition Act or articles 81 or 82 of the EC Treaty.

Antitrust class actions may be brought under the Class Actions Act.

Section 23 of the Competition Act stipulates that if the Competition Authority decides in a particular case not to order an undertaking to terminate an infringement of section 6 or 19, an undertaking affected by the infringement may seek such an order from the Market Court. An undertaking may, however, not initiate such proceedings if the Competition Authority's decision is founded on article 13 of EC Regulation 1/2003.

The general courts are competent in private antitrust actions according to the forum rules in chapter 10 of the Code of Judicial Procedure (rättegångsbalken (1942:740)). The competent court is primarily the district court (*tingsrätt*) where the defendant resides or has its seat, as the case may be. An action for damages can also, alternatively, be brought where the infringement took place or where the injury occurred.

Furthermore, the Stockholm District Court is always competent to hear cases relating to damages pursuant to the Competition Act.

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

4 In what types of antitrust matters are private actions available?

Private actions for damages or nullity are available in respect of breaches of both sections 6 and 19 of the Competition Act and articles 81 and 82 of the EC Treaty.

5 What nexus with the jurisdiction is required to found a private action?

As regards international relations, EC Council Regulation 44/2001 (the Brussels Regulation) applies in Sweden. As for jurisdiction issues between Sweden and non-member states, there is no general rule determining whether Sweden has jurisdiction or not, and so cases are judged on a case-by-case evaluation. Simply put, a Swedish court would probably consider itself as having jurisdiction in a case where a Swedish rule on forum would be

applicable, ie, 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.

- 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 provided Sweden has jurisdiction, see question 5), provided they constitute undertakings within the meaning of the Competition Act. Section 3 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 corporation.

- 7 If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

Private action procedure

- 8 Are contingency fees available?

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.

- 9 Are jury trials available?

No.

- 10 What pre-trial discovery procedures are available?

Discovery in the generally accepted meaning of the word does not exist in Swedish law. However, there is a general obligation on a party (whether a party to the proceedings 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 the threat of a fine.

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

As a general principle, documents received or drawn up by a public body (including the Competition Authority and the courts) are public. This principle is, however, made subject to a number of exceptions in the Secrecy Act (*sekretesslagen* (1980:100)), which lists a number of situations where documents are confidential. In the Competition Authority's case files, information on an undertaking's business, operation, inventions and research results must be treated as confidential if 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.

Typically, confidentiality is only maintained as regards third

parties and not as regards a party to the relevant proceedings. However, a party may request that confidentiality be respected regarding certain information even in relation to a party to the proceedings 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.

- 11 What evidence is admissible?

Parties may rely on virtually all kinds of documents, statements and occurrences in attempting to prove their case. The court at its discretion may freely evaluate the evidence presented by the parties. In other words, virtually all kinds of evidence are admissible and the parties cannot rely on any technical rules regarding admissibility of certain forms of evidence. One exception is, however, that written witness statements are not normally allowed.

- 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.

- 13 Can the evidence or findings in criminal proceedings be relied upon by plaintiffs in parallel private actions?

Findings and evidence in criminal proceedings or proceedings brought by the Competition Authority under the Competition Act may be relied upon as evidence in private actions. Such findings will not, however, be binding on the court in the private proceeding.

- 14 What is the applicable standard of proof and who bears the burden?

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' (*visat* or *tyrkt*). This is below the 'beyond a reasonable doubt' level, but does not as such involve a 'balance of probabilities' exercise.

In proceedings for damages under section 33 of the Competition Act, 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. Also in proceedings where the plaintiff claims unenforceability of an agreement due to antitrust law, the burden of proof lies with the claimant. 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.

- 15 What is the typical timetable for class and non-class proceedings? Is it possible to accelerate proceedings?

It is difficult to state on a general basis how long proceedings will take, as it will depend on the circumstances of each case. Depending on the complexity of the case and the number of instances, a case can take roughly from 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.

16 What are the relevant limitation periods?

Section 33 of the Competition Act stipulates that the right to damages for breaches of the Competition Act or articles 81 or 82 of the EC Treaty lapses if no claim is brought within 10 years from the date on which the injury was sustained (irrespective of whether the injured party had knowledge about the injury or its cause, or both). Other events, such as the initiation of an investigation, do not 'stop the clock'.

As to proceedings relating to the enforceability of an agreement, the general rule on limitation applies. Under the Swedish Act on Limitation (*preskriptionslag* (1981:130)), the limitation period is 10 years from the date when the claim arose.

17 What appeals are available?

A private action is first heard in a district court. The judgment of a district court may be appealed to a court of appeal (*bovrätt*). A court of appeal's judgment may be appealed to the Supreme Court (*Högsta Domstolen*). Leave to appeal is required for proceedings before the Supreme Court.

Class proceedings**18** Are class proceedings available in respect of antitrust claims?

Yes.

19 Are class proceedings mandated by legislation?

Yes, class actions are mandated by the Class Action Act (*lag* (2002:599) om grupprättegång), 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 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.

20 If class proceedings are allowed, is there a certification process? What is the test?

There is no certification process as such. However, certain conditions must be fulfilled when bringing a class action, inter alia, the following. 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 to 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 also be suitable to represent the class.

21 Have courts actually certified class proceedings in antitrust matters?

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

22 Are 'indirect claims' permissible in class and non-class proceedings?

Until recently the right to claim damages under section 33 of the Act was limited to undertakings and parties to agreements with the infringing party. This limitation was removed on 1 August 2005. Consumers and entities which are not undertakings (eg, governmental bodies) are therefore now entitled to claim damages even in the absence of a contractual relationship with the infringing party. General tort law principles apply however, eg, regarding proximate cause.

23 Can plaintiffs opt out?

The court must give notice to all group members named in the application advising them that they must opt in by 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.

24 Do class settlements require judicial authorisation?

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

25 If the country is divided into multiple jurisdictions, is a national class proceeding possible?

Not applicable.

26 Has a plaintiffs' class-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, generally, be represented by a member of the Swedish Bar Association.

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

Under section 33 of the Competition Act, compensation shall cover damages caused by the infringement. The preparatory works of the Competition Act state that such compensation shall cover pure financial loss (*ren förmögenhetsskada*), in particular loss of income and loss of or damage to property.

The object of damages for infringement of competition law is to restore the plaintiff's financial situation as if the infringement had never occurred. Therefore, the courts will compare the plaintiff's actual financial situation with the hypothetical financial situation in the absence of the infringement when setting the damages.

Update and trends

The Competition Authority's increased vigilance in relation to cartels and other hard-core infringements might lead to more private actions for damages. This trend can be seen in relation to a large-scale case involving a number of companies in the asphalt surface industry accused of having participated in, inter alia, bid rigging. Recently, the Stockholm District Court delivered its judgment ordering the companies involved to pay aggregate damages exceeding 460 million Swedish krona. Certain companies are in the process of appealing the judgment. Nevertheless, this judgment is interesting also from a private action perspective, as there are a number of cases pending where municipalities who have procured asphalt

surface services from the companies have sued for damages under the competition rules.

Furthermore, a government committee delivered a report in November 2006 with changes to the Competition Act proposed to enter into force in January 2009. Among the changes is an option for the courts to consolidate cases concerning damages on grounds of competition law with cases concerning fines for infringements of the competition rules. The purpose of this would be to make it easier for companies to make common cause with the Competition Authority and to achieve more efficient use of courts' resources.

28 What other forms of remedy are available?

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

29 Are punitive or exemplary damages available?

No.

30 Is there provision for interest on damages awards?

Yes. Interest will accrue on the amounts due from the 30th day after the plaintiff claimed compensation from the defendant in writing or, if no previous claim has been made, from the date of service of the summons application. The interest is 8 per cent above the reference rate of the Central Bank.

31 Are fines imposed by competition authorities taken into account when settling damages?

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

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 thus 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-EEA resident bringing an action before a Swedish court against a Swedish national or a Swedish 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.

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 the general principles of Swedish tort law – jointly and severally liable.

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34 Is there a possibility for contribution and indemnity among defendants?

A party who has been obliged to pay compensation to an injured party has a right of recourse against other liable parties.

35 Is the 'passing on' defence taken into account?

When quantifying the damages, the 'passing on' defence is in principle available. 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.

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 casual link between the two, there are no special grounds of justification as regards liability as such.

As regards the amount of the damages, these can, however, 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.

37 Are there alternative means of dispute resolution available?

Section 1 of the Swedish Arbitration Act stipulates that arbitrators may rule on the civil law effects of competition law as 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, to our knowledge there is to date no Swedish case law from the courts on damages for breach of competition law (although there are a few cases pending). This lack of case law suggests that alternative means of dispute resolution are sometimes used.