Working Session

"Damage claims in competition matters: The dawn of a new era?"

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National Report of Sweden

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QUESTIONNAIRE

CHAPTER I: STATUS QUO OF PRIVATE ENFORCEMENT

1. **How would you summarize in few lines the status quo of private enforcement in your jurisdiction?**

    a. ***[For Non-EU Member States]*** **Can individuals (or only consumer organisations) file an antitrust damage claim? Who can bring an antitrust damages claim? (i.e. are there any requirements or limitations to standing in private enforcement proceedings?)**

    If yes, what is the legal basis (codified or case law) and are they able to submit both stand alone and follow-on actions?

    N/A

    b. [***For EU Member States]*** **Can individuals file an antitrust damage claim regardless of the implementation of Directive 2014/104/EU (private enforcement Directive)?**

    If yes, are they able to submit both stand alone and follow-on actions?

    In Sweden, it is possible for individuals to file an antitrust damage claim regardless of the implementation of Directive 2014/104/EU (hereafter the "**private enforcement Directive**"). This follows from the Swedish Competition Act (the "**Competition Act**"). Yet, the number of filed claims has so far been relatively low. Individuals are able to submit both stand alone and follow-on actions.

2. ***[For EU Member States]*** **Has your country already implemented/started implementing the private enforcement Directive?**
    - **If No: Do you believe that your country will meet the deadline?**
    - **If Yes: Please give the status quo of the implementation by highlighting in few lines what you consider the most important aspects of the implementation of the private enforcement Directive into national law in your country.**

    The Swedish Ministry of Enterprise and Innovation has drafted a legislative proposal, *Konkurrensskadelagen*, in order to implement the private enforcement Directive.[1] It is suggested that the *Konkurrensskadelag*, hereafter the "**Act on Antitrust Damages Actions**"), is to enter in force by 27 December 2016. The act

[1] The legislative proposal is published in the Ministry Publications Series, DS 2015:50 *Konkurrensskadelag*.

includes provisions on, inter alia, liability, calculation of compensation, recovery, and legal proceedings. Since the act is intended to implement the private enforcement Directive, and the act is subject to changes (the deadline for comments is in February 2016), this report will only briefly and only where applicable mention the contents of the proposed act.

CHAPTER II: COURT AND PROCEDURE

3. What is (are) the court(s) in charge of antitrust private enforcement?

a) Is there a specialized court specifically for antitrust based claims?
If No: are there specific chambers for antitrust claims within the civil/commercial courts?
If Yes: is the court composed only by judges, also economic experts and/or other persons?

There are at present no specialized courts for antitrust damage claims in Sweden. The courts in charge of such claims are therefore the general courts (district courts, courts of appeal and the Supreme Court). The Competition Act however provides that Stockholm district court always is competent to try an antitrust damage claim. Stockholm district court may also, upon application by the Swedish Competition Authority, order an undertaking to pay an administrative fine due to infringements of the prohibitions in the Competition Act or the Treaty of the Functioning of the European Union ("**TFEU**"). Stockholm district court may, where appropriate, decide that an action for damages shall be consolidated with a case for imposition of a fine. Stockholm district court has a special chamber for, inter alia, antitrust cases.

As regards group actions, certain district courts are competent to try such actions as first instance.

In relation to antitrust damage claims, the general courts are composed only by judges. No economic experts or other professionals take part of the general courts. However, if a damage action is consolidated with a case for imposition of a fine (see above), the district court will, if there is a main hearing, consist of economic experts and legally-qualified judges. The court may also at the request of a party, and if it is necessary, call upon an expert to obtain an opinion on the matter. The parties themselves may also obtain opinions from private economic experts and use them as evidence in the case.

Noteworthy is that according to a government bill[2], two new courts, *Patent- och marknadsdomstolen vid Stockholms tingsrätt* (hereafter the "**Patent and Market court**") and the superior court, *Patent- och marknadsöverdomstolen vid Svea hovrätt* (hereafter the "**Superior Patent and Market court**") will be established by 1 September 2016. If the Riksdag (the Swedish Parliament) passes the bill, the courts will inter alia try competition law cases and antitrust damage claims. Both judges and economic experts will, generally, be part of the Patent and Market court. As regards group actions, it is suggested by the Swedish Ministry of Enterprise and Innovation in the Ministry Publications Series mentioned in question two that the Patent and Market court shall be competent (see Question 8 regarding group actions).

b) May the court impose interim measures?

The court may at the request of a party, provided that certain conditions are fulfilled, grant interim measures, such as interim attachment orders. The applicant generally has to provide security to compensate the other party for any damage it may incur as a result of an order.

If the Swedish Competition Authority decides, in a particular case, not to order an undertaking to cease infringements of competition law, the Market Court[3] may make such an order at the request of an undertaking that is affected by the infringement. If particular grounds exist, such an obligation may be imposed for the period until a final decision is taken on the matter.

c) May the trial proceed in parallel and independently of a National Competition Authority investigation?
If so, how likely it is that the court suspends the case up to the National Competition Authority decision?

The trial may in theory proceed in parallel and independently of the Swedish Competition Authority's investigation. The court may, under certain circumstances order a stay of the proceedings. This could be the case if it is of exceptional importance that a matter which is subject to another court proceeding, or a proceeding of another kind, is determined first. The court will only order a stay of the proceedings at the request of a party, i.e. it will not make such an order at its own discretion.

[2] Prop. 2015/16:57 *Patent- och marknadsdomstol*.

[3] Provided that the government bill is passed, the Patent and Market court will from the 1 September 2016 try these matters.

d) Is the decision subject to appeal?
If Yes, does the 2nd (and/or 3rd) instance court assesses both the merit of the case and the law?

Decisions from the district courts are subject to appeal to the courts of appeal (second instance) and thereafter to the Supreme Court of Sweden (third and final instance). These courts shall make their own assessments of the law and the merits of the case, however, they are bound by the parties' claims and the circumstances brought forward by the parties. In order for a damage claim to be tried by the courts of appeal and the Supreme Court, a leave to appeal has to be granted. If an antitrust damage action is consolidated with a case for imposition of a fine, such a decision can only be appealed to the Market Court (see however below regarding the cessation of the Market Court).

Following the implementation of the Patent and Market court, a decision from the court regarding damages may be appealed only to the Superior Patent and Market court provided that a leave to appeal is granted. As a main rule, the Superior Patent and Market court will be the last instance unless it is of importance for the guidance of the application of law that the matter is tried by the Supreme Court. The Market Court will, following the implementation of the new courts, cease to exist.

4. What nexus with the jurisdiction is required to bring a private action to a court within your jurisdiction (and to keep it there)? Is there room for forum shopping (eg, is an "anchor defendant" sufficient (*cf* ECJ, C-352/13))?

There are no general rules in Swedish national law regarding Swedish jurisdiction in civil and commercial matters. Such regulation is however found in the Brussels I Regulation[4], which applies in relation to the Members States of the EU, and the Lugano convention[5]. Following the rules in the Brussels I Regulation, an action can be brought in Sweden against a Swedish defendant or a defendant that has a branch, agency or establishment in Sweden. A private action can also be brought in Sweden if the harmful event occurred or may occur in Sweden. In the case of several defendants it is possible to bring an action against all of the defendants in Sweden if one of them is domiciled in Sweden. Following the ruling of the European Court of Justice in case C-352/13, even if the applicant would withdraw its action against the sole co-defendant domiciled in Sweden, this would presumably not result in a lack of jurisdiction of the relevant court in relation to the remaining defendants.

[4] Regulation (EU) No 1215/2012.

[5] 2007 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Outside the scope of Brussels I and Lugano, the nexus with the jurisdiction that is required to bring a private action before a Swedish court is fairly equivalent to the rules that determine which of the Swedish courts that has jurisdiction in a strictly domestic case and the rules described above. It is however uncertain if the principle of jurisdiction based on an anchor defendant would apply in an international case even though such a rule exists in relation to domestic cases.

5. **How long does a single (or collective) antitrust private enforcement action in first instance usually take?**

The number of antitrust damage claims has so far been relatively low in Sweden. An antitrust private enforcement action (i.e. damage action) in the first instance should however be expected to take approximately two years.[6] Ultimately, this will however depend on the complexity of the case, the parties and the evidence submitted.

6. **Who bears the legal costs (court fees, the own representation costs and the representation costs of the opposite party)?**

Generally, the losing party shall reimburse the opposing party for its litigation costs, including court fees and the opposing party's representation costs, to the extent that the costs were reasonably incurred to safeguard the party's interest. There are however some exceptions to this rule, which will not be provided for in detail in this report.

If a case concerns several claims and the outcome is split, each party must bear its own costs, or one party will be awarded an adjusted amount. If the parties agree on a settlement of the dispute, each party shall bear its own costs unless otherwise agreed.

7. **In your jurisdiction, are there any alternative funding options or fee arrangements that can be put in place by the plaintiff (for example conditional fee or damages based agreements)? Please outline and give examples if so. What rules on the assignment/bundling of claims exist in your jurisdiction that could allow third parties to buy claims from cartel victims?**

As stated above (Question 6), the general rule in tort cases is that the losing party shall reimburse the winning party's litigation costs.

Under the rules of the Swedish Bar Association, an attorney's fees must be reasonable based on, among other things, the scope, nature, degree of difficulty and importance of the assignment, the attorney's skills and proficiency, and the results

[6] Based on information received during contacts with Stockholm District Court on 13 January 2016.

of the attorney's labor. Fees shall generally be based on an hourly rate or a fixed fee. The Swedish Bar Association's rules generally do not accept contingency fees arrangements.

Risk sharing agreements may be permitted if 'particular reasons' make it necessary. This could for example be the case where it otherwise would be difficult for the client to gain access to justice or where the assignment is part of a cross-border dispute and a risk sharing agreement has been concluded for the dealings outside of Sweden and this agreement constitutes a prerequisite for the attorney's assignment.

In addition, in cases brought under the Swedish Group Proceedings Act (see below Question 8), risk sharing agreements concluded between the plaintiff(s) and an attorney may be approved by a court, if found reasonable with regard to the nature of the substantive matter and not based solely on the value of the subject matter of the dispute.

In general, there are no legal restrictions under Swedish law on third party-financing or assignment of claims, or any restriction on third parties to buy claims from cartel victims.

8. Beside antitrust private actions, does your jurisdiction dispose of a collective redress system?

- **If Yes, how it is applicable to antitrust private enforcement, (e.g. direct/indirect purchasers, consumers and/or clients)?**
- **Do collective redresses operate through an opt-in or an opt-out system? In case of an opt-out system, how is the class defined?**
- **How is it coordinated with the individual actions' framework?**

Under Swedish law, there is a collective redress system (the Swedish Group Proceedings Act) which, according to travaux préparatoires, is applicable to antitrust damage actions.[7] It is proposed that the possibility to use the collective redress system in antitrust damage actions should be clearly stipulated in the Act on Antitrust Damages Actions.

A group action may be instituted as a private group action, an organization action or a public group action. A private group action may be instituted by a natural person who, or a legal person that, has a claim that is subject to the action. An organization action may be instituted by a non-profit organization that, in accordance with its rules, protects consumer or wage-earner interests in disputes between consumers and a business operator regarding any goods, services or other utilities that the business operator offers to consumers. The Consumer Ombudsman may for example initiate public group actions.

[7] Prop. 2004/05:117 *Skadestånd enligt konkurrenslagen, m.m.* p. 28 and pp. 31-33.

A group action may only be considered if certain conditions are met. For example, the action should be grounded on circumstances that are common or of similar nature for the group members' claims.

The application of the Swedish Group Proceedings Act to antitrust damage claims is not limited to certain persons, e.g. consumers or direct/indirect purchasers.

The collective redress system operates through an opt-in system.

The assessment of liability for damages is the same as if there is an individual action. A party to a group action may however not simultaneously bring an individual action regarding the same issue against the same defendant before court. Also, a party to an individual action may not be part of a group action regarding the same issue and defendant.

The Group Proceedings Act provides certain special rules on the legal proceedings, such as litigation costs.

CHAPTER III: EFFECT OF NATIONAL DECISIONS, BURDEN OF PROOF, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

9. Are National Competition Authority decisions relevant for individual antitrust claims, in particular

- **as presumption / proof of the infringement in the follow-on case? (f.i. does it matter for the division of the burden of proof between parties if the action is a follow on damages case or a stand-alone action? If so, please elaborate on any difference with regard to the burden of proof)**
- **in terms of the *quantum* of the compensation?**
- **for the limitation period?**
- **else?**

The plaintiff generally has the burden of proof to show that the conditions for liability are met and should bring forward any relevant evidence for this purpose, which may include decisions from the Swedish Competition Authority (or a superior court's decision). Following Swedish procedural law however, a court is not bound by the Swedish Competition Authority's (or a superior court's) decisions since the court has to make an own assessment of the matter based on the evidence brought forward by the parties. However, such decisions will most probably be of high relevance to the court (see below, Questions 20 and 21).[8] In order to implement Article 9 of the private enforcement Directive, it is proposed that the Act on Antitrust Damages Actions should stipulate that a final infringement decision cannot be tried again in a following action for damages.

[8] See also Karlsson, Johan & Östman, Marie, *Konkurrensrätt – En handbok*, 5th ed. Stockholm, Karnov Group Sweden AB, 2014, p. 1191.

10. What are the relevant limitation periods (taking into account question 9 above)?

An antitrust damage claim must be made within ten years from the day that the damage occurred. It is however proposed that, in order to implement Article 10.1-4 of the private enforcement Directive, this limitation period should be modified in the Act on Antitrust Damages Actions.

11. What is the liability regime as regard parents for the infringement of their subsidiaries?

As a main rule, a parent is not liable for its subsidiaries' liabilities. There are a few exceptions to this rule. For example, the corporate veil can be pierced/lifted (*ansvarsgenombrott)* under a certain, very limited and somewhat debated, circumstances according to Swedish case law. In other aspects, relevant EU case law applies.

12. Please describe limits and scope of joint and several liability for antitrust infringements performed by undertakings (in particular between cartelists) in civil litigation. Does this differ from liability vis-à-vis the authorities?

If two or more parties are liable for the same damage, they are as a main rule jointly and severally liable. This means that a party wishing to claim damages, may bring an action against any (or all) of these parties. It is proposed that the Act on Antitrust Damages Actions, in order to implement Article 11.2-4 of the private enforcement Directive, should include modifications on this rule, for example as regards small and medium sized companies.

Vis-à-vis the authorities, parties that have been involved in for example a cartel are responsible for their own involvement.

CHAPTER IV: DISCLOSURE OF EVIDENCE

13. What evidence is admissible in individuals' actions for antitrust infringements?

- **Is there any pre-trial discovery procedure available?**
- **Is there any evidence protected by legal privilege?**

Virtually, there are no restrictions upon the admissibility of evidence and the parties may rely on almost all kinds of evidence they find relevant when attempting to prove their case (the principle of *fri bevisföring*). Even if evidence has been accessed in an unlawful way it may be brought forward in a court proceeding. Further, the principle of free evaluation of evidence (*fri bevisvärdering*) is of outmost importance in the Swedish legal system. It means that the court may freely evaluate the evidence presented by the parties.

There are however a few exceptions as regards the admissibility of evidence. For example, certain persons who are under an obligation of secrecy may not be heard as witnesses concerning matters entrusted to, or found out by them, in their professional capacity unless it is allowed by law or consent is given by the person whose benefit the obligation of secrecy applies. This applies to, for instance, members of the Swedish Bar Association, certain professional health care providers, and authorized patent attorneys.

Evidence may – in relation to discovery – be protected by legal privilege (see below under Question 14).

There is however no general pre-trial discovery procedure available under Swedish law.

In order to implement Article 7 of the private enforcement Directive, it is proposed that the Act on Antitrust Damages Actions should limit the admissibility of certain evidence in antitrust damage actions, such as leniency statements and settlement submissions which are obtained solely through access to a competition authority's file. The implementation of the private enforcement Directive will therefore to some extent derogate from the principle of *fri bevisföring*.

14. Can the court order the discovery of evidence to defendants or to third parties? Please describe its limits and scope.

Anyone (party or third party) holding a written document that can be assumed to be of importance as evidence is in general obliged to produce it. There are however certain exceptions to this rule, such as documents protected by legal privilege, documents held by other persons who are not obligated to witness (see above under 13), and written communications between a party and a related person. The obligation to produce written documents does not extend to jottings or personal notes prepared exclusively for one's private use unless extraordinary reason exists for their production.

When someone is obliged to produce a written document as evidence, and a party to a proceeding requests the document, the court may order that person to produce it. The person against whom the order is made should be afforded an opportunity to state his or her views. The requested documents must be sufficiently identified and the party making the request must state what he or she intends to prove with the documents.

If a public document can be assumed to be of importance as evidence, the court may order that the document should be disclosed. This does not apply as to a document containing information which is confidential pursuant to certain provisions of the Public Access to Information and Secrecy Act, such as confidentiality due to foreign affairs, military defence or national financial policy. Further, this does not apply to a document, the content of which is of the kind that

a person who has dealt with the document may not be heard as a witness as regards the document. Also, this does not apply if the production of the document would involve the disclosure of a trade secret, unless there is extraordinary reason for it.

In order to implement Article 6.5-6.8 and 6.10 of the private enforcement Directive, it is proposed that limitations on the duty to produce evidence will be implemented in the Act on Antitrust Damages Actions. It is for instance proposed that a court will not be able to order discovery of copies of leniency statements and settlement submissions held by a competition authority. It is also proposed that a competition authority should only be requested to produce evidence in its file if it can be assumed that the evidence may not reasonably be provided by someone else.

15. Do the claimants and/or courts have access to the National Competition Authority's files? If so, also during a pending investigation? Please describe its limits and scope.

Generally, neither the claimants nor the courts have direct access to the Swedish Competition Authority's files. A party wishing to access documents with the Swedish Competition Authority has to make a request to the authority. However, under the Freedom of the Press Act, a person can only be denied access to public documents if there is a restriction by law – such restrictions are mainly stipulated in the Public Access to Information and Secrecy Act. The Swedish Competition Authority will therefore examine the requested information and decide if the information, according to the Public Access to Information and Secrecy Act, is confidential. If the information is confidential, the request cannot be granted (however, such a decision is subject to appeal). Information on a party's internal affairs, trade secrets etc. is generally confidential if it can be assumed that the disclosure of the information would cause damage to the party. Confidentiality does not prevent an individual that is party to a matter – and therefore entitled to access information on the matter – to obtain documents or other material in the matter, unless it is of exceptional importance that the information is not disclosed. As to information in the Swedish Competition Authority's pending investigations on infringements, the Public Access to Information and Secrecy Act provides that such information is confidential, if it is of exceptional importance with regards to the purpose of the investigation that the information is not disclosed.

Please note that the plaintiff generally has the burden to proof to show that the conditions for liability are met (see Question 20). A court will therefore not independently request information or files from the Swedish Competition Authority.

CHAPTER V: THE PASSING-ON OF OVERCHARGES

16. Are indirect purchasers entitled to claim compensation, and which limitation do they face?

The Competition Act does not contain any limitations as to who is entitled to damages. Anyone, including indirect purchasers, consumers and other entities, may claim damages. The right to compensation will ultimately be decided by the court, and the plaintiff has the burden of proof and must show that he has suffered harm in the form of an indemnifiable injury and that there is a causal relationship between the harm and the infringement of competition law (see below, Questions 20 & 23).

The current legislation is generally deemed to be in accordance with Article 12 of the private enforcement Directive. However, it is proposed that the Act on Antitrust Damages Actions will include provisions on the quantification of compensation for a damage incurred on another level of the supply chain.

17. Are victims of "umbrella damages" entitled to protection against antitrust infringements and to compensation in court?

Swedish competition law does not provide for any specific provisions on joint and several liability for infringements of competition law, general principles of tort law apply (see Question 12). Neither does Swedish competition law limit the group of persons who could claim damages for an antitrust infringement, the infringing undertaking shall compensate for any damage which is caused by the infringement. Swedish law should therefore be considered in line with the case-law of the Court of Justice, more specifically with the judgment in Case C-557/12, *Kone*, confirming that any person is entitled to claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101 TFEU.

To satisfy the requirements of Article 11.6 of the private enforcement Directive, as regards damages to injured parties other than the direct or indirect purchasers or providers of the infringers, it is proposed that a new provision is included in the Act on Antitrust Damages Actions. The new provision will implement the general rule of joint liability requiring the infringer to pay compensation for any damage caused based on a distribution between the infringers taking into account their relative responsibility for the damage.

18. Is the passing-on defence allowed?

Yes, in principle, the passing-on defence applies in Sweden. The burden of proof lies with the defendant, who should present any evidence he or she deems necessary to support his or hers statement of opposition. This includes the possibility for the defendant to invoke that the claimant has passed on the

overcharge on to the downstream sector. However, according to a basic principle of Swedish tort law, the right to damages only covers loss actually sustained. The current legislation is generally considered to be in accordance with Article 13 of the private enforcement Directive.

In order to fulfil the requirements of Article 14 of the private enforcement Directive, it is proposed that the Act on Antitrust Damages Actions will introduce new rules on presumptions of the burden of proof in cases of passing-on of overcharges in accordance with the directive.

CHAPTER VI: DAMAGES

19. What form of compensation can be granted by national courts for antitrust violations?

In particular, can national courts accord punitive damages or treble damages or compensatory function exclusively?

The right to damages under the Competition Act is limited to full compensation for the damage which is caused by the infringement. This includes not only compensation for actual loss suffered, but also for any loss of profits resulting from the infringement, including interest from the time that the harm occurred until compensation is paid. It does not, however, include any right to punitive damages.

It is proposed that the above principles will continue to apply under the Act on Antitrust Damages Actions (by way of implementation of Article 3 of the Directive).

CHAPTER VI: QUANTIFICATION OF HARM

20. What do individuals have to prove in court in order to successfully obtain compensation for antitrust damages, who bears the burden of proof?

Under the Competition Act (and as proposed in the Act on Antitrust Damages Actions), a plaintiff has a right to damages caused by an antitrust infringement, if such infringement has been caused wilfully or by negligence. As stated above (Question 9), the plaintiff generally carries the burden of proof to show that the conditions for liability are met. As the general rules on standard of proof applicable in tort cases will apply also to cases concerning private enforcement of competition law, the plaintiff will carry the burden of proof regarding any and all elements of the claim. Thus, the plaintiff must show that: (i) an actual infringement has occurred; (ii) the plaintiff has suffered indemnifiable damage; and (iii) a causal relationship exists between the infringement and the damage. The applicable standard of proof requirement is that the relevant facts must be ”proven” or

”shown”. Pursuant to general applicable procedural principles, once the plaintiff has discharged its burden of proof, the burden is then shifted to the defendant.

Also, it should be noted that a private party bringing a damages action has the same burden of proof as the Swedish Competition Authority would have in bringing a public enforcement action. Thus, the principles that have evolved on the burden and standard of proof applicable to the Swedish and EU competition law apply.

It is proposed that the Act on Antitrust Damages Actions will include a provision pursuant to which it is presumed that a cartel infringement have caused harm (in line with Article 17.2 of the Directive).

21. Is there a difference between stand alone and follow-on actions?

As regards the legal implications of a decision from the Swedish Competition Authority in a follow-on action, please see the answer to Question 9 above.

As noted above, the burden and standard of proof is the same in public and private enforcement claims. Furthermore, the burden of proof is not different *per se* in stand alone and follow-on actions. However, as accessibility of evidence is naturally an important factor for any prospective private plaintiff in determining whether or not to initiate a damages action, and as the investigative tools available to a private party for gathering evidence are far more limited than those available to the Swedish Competition Authority, stand alone actions would therefore unlikely to be brought unless the potential plaintiff already has access to sufficient evidence to prove the claim. A prior or simultaneous public action by the Swedish Competition Authority will therefore in general have substantial evidentiary value in a private action (due to the investigatory powers of the Swedish Competition Authority).

22. How is damage quantified?

As noted above (Question 19), a victim of an antitrust infringement is entitled to full compensation for the damage which is caused thereby. Such compensation is assumed to cover pure economic loss, such as loss of profits due to reduced revenues and/or increased costs, as well as any other loss caused by the infringement. In theory, the compensation should restore the injured party to the position it would have occupied had the infringement not occurred, and it is therefore for the court to consider the injured party’s actual economic status compared to an alternative hypothetical scenario in which the infringement did not occur. As such calculations are often difficult, different types of methods have in practice been employed in Swedish tort law, including but not limited to, benchmarking, cost- based models, statistical analyses and simulation models.

In addition, and as an exception to the general rule that the parties shall be responsible for bringing forth evidence on the case, the Swedish Code of Judicial Procedure contains an explicit provision, giving the Swedish courts the power to

estimate the extent of the damages claimed by an injured party. This is a general mandate and not restricted to the field of antitrust law, and this provision has been applied in practice in cases where it has been considered excessively difficult for the plaintiff to fully substantiate the extent of the harm suffered.

Swedish courts also have a general possibility to, at the request of a party, obtain an opinion from a public authority regarding issues that require special professional knowledge. Thus, the Swedish Competition Authority could in theory be called upon within the scope of a private damages case to assist on the quantification of damages (provided that this is deemed appropriate by the Swedish Competition Authority). The limits and scope of this possibility are however not entirely clear, as the Swedish Competition Authority has so far never been asked to deliver such an opinion.

23. What defence is recognized, if any, for defendants (besides the passing-on defence (question 18 above), if applicable)?

Aside from the general efficiency defences provided for in the substantive antitrust prohibitions in Articles 101 and 102 TFEU and the Competition Act, the following noteworthy potential defences could be raised.

As noted above (Question 20), damages pursuant to an antitrust infringement are only awarded under Swedish law if the infringement has been caused wilfully or by negligence. In related case law (concerning the imposition of a fine), the Market Court has considered this requirement met in cases where the defendant undertaking, or someone acting on its behalf, could not have been unaware of the fact that the examined conduct in fact restricted competition.

In addition, and in implementation of Article 19 of the private enforcement Directive, it is proposed that the Act on Antitrust Damages Actions will include a provision that states that consideration shall be given to any consentual settling of the claim when compensation is quantified. A defendant could therefore, when applicable, claim that the damages payable should be reduced by the settled amount.

24. What is the role of economic experts, if any?

Economic experts may in some cases be part of the court (see Question 3a above).

It is customary that the parties provide evidence in the form of economic experts in any complex antitrust cases.

25. What other types of experts are typically engaged in your jurisdiction?

Generally, there are no legal restrictions on the kind of experts that may be engaged in the context of antitrust damage actions or in civil court proceedings in general in

Sweden. In complex cases, it is quite customary for the parties to provide evidence in the form of experts, e.g. in the technical field applicable in the case.

26. In case of follow-on claims, are the fines imposed by the national – or supranational – competition authority taken into account in evaluating the quantification of damages?

There is no legal ground under Swedish law to take any fines imposed by a competition authority into account when evaluating the quantification of damages in a private action. As noted above (Question 19), the underlying principle under Swedish law is that a plaintiff is entitled to full compensation for the damage which is caused by the antitrust infringement.

Conversely however, it is possible for the Swedish Competition Authority and/or courts to take into account a consentual settlement when quantifying the fines to be imposed on an undertaking. Currently, the Competition Act includes a general possibility for a court to take into account a non-exhaustive list of circumstances when calculating the fines to be imposed. While payment made by the defendant pursuant to a consentual settlement is not explicitly listed in the relevant provision, it is noted in the travaux préparatoires that a court may take such payments in regard when calculating the fine.

It is proposed that the Act on Antitrust Damages Actions will include an explicit provision on this matter, implementing Article 18.3 of the private enforcement Directive.

CHAPTER VII: ALTERNATIVE DISPUTE RESOLUTION

27. Is there any form of alternative dispute resolution available in your jurisdiction?

If yes, in which form, and how do they coordinate with the civil and criminal proceedings regarding antitrust infringements?

According to the Swedish Arbitration Act, arbitrators may also rule on the civil law effects of competition law as between the parties, e.g. damages relating to infringements of the Competition Act or the nullity of anti-competitive agreements. Following the doctrine laid out by the ECJ in Case C-126/97, *Eco Swiss*, EU competition law is considered public policy, meaning that an arbitral award may be set aside under certain limited circumstances (see also below Question 29).

There is no other applicable alternative dispute resolution system available in Sweden.

CHAPTER VIII: SETTLEMENTS

28. Please briefly set out the settlement mechanisms (if any) in your jurisdiction, for instance:

- **settlements requiring court approval;**
- **settlements outside of proceedings;**
- **timing of settlement;**
- **etc.**

In Sweden, no approval from the court is required for a settlement. A plaintiff can either choose to withdraw the claim or the parties can agree to end the proceedings. In either case, the court is obliged to cease the proceedings by issuing a decision to end the proceedings. The parties may request the court to confirm the settlement in a written judgment.

CHAPTER IX: RECENT CASE LAW

29. Please give an example of noteworthy cases or authorities in your jurisdiction rendered in the last 18 months which are relevant to the content of this questionnaire.

In June 2015, the Supreme Court delivered its judgment in a case between The Absolut Company AB and Systembolaget AB, concerning a challenge of an arbitral award, in which the plaintiff had successfully claimed damages on the grounds that Systembolaget had abused its dominant (monopoly) position on the purchasing market for alcoholic beverages in Sweden.

The Supreme Court dismissed Systembolaget's appeal and concluded, among other things, that the arbitral tribunal's competition law assessment was clearly not contrary to mandatory EU competition law. The Supreme Court also noted that, even if the assessment made by the arbitral tribunal would have been incorrect to the extent that it was not supported by the substantive rules on the prohibition against abuse of dominant position, this would not mean that such a stricter application of the law would cause the arbitral award to be invalid.[9]

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