The International Handbook on Private Enforcement of Competition Law

Edited by

Albert A. Foer

The American Antitrust Institute, Washington, DC, USA

Jonathan W. Cuneo

Cuneo, Gilbert & LaDuca, LLP, USA

Associate Editors

Randy Stutz

Research Fellow, American Antitrust Institute

Bojana Vrcek

Ph.D., M.E.S., Research Fellow, American Antitrust Institute

Edward Elgar
Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2010925997

ISBN 978 1 84844 877 3

Typeset by Servis Filmsetting Ltd, Stockport, Cheshire
Printed and bound by MPG Books Group, UK

22 Sweden

Marcus Glader[1] *and Peter Alstergren*[2]

Introduction

Since 1993, the Swedish Competition Act has expressly provided that private parties may bring damages claims for competition law violations. This damages provision has not only survived subsequent legislative amendments, it has also been modified to increase the possibilities of bringing such actions. In 2003, Sweden also enacted the Group Proceedings Act, which allows private group actions for damages.

Despite these legislative tools, private damages case law based on competition law violations remains very sparse. Most of the few private damages cases that have made it to court have been settled out of court.[3] At present only a single case, which related to an abuse of a dominant position, has resulted in court-awarded damages under the Competition Act's damages provision (currently under appeal). However, a number of damages actions based on cartel violations are pending, and many expect private damages to play a more important role in the future.

This chapter outlines the Swedish legislative framework for private enforcement of competition law, discusses the interaction between public and private competition law enforcement, and describes the types of private actions (including group actions) that are available. Practical considerations relating to gathering evidence, standards of proof and the determination of damages are also addressed. Finally, we conclude by commenting on the European Commission's (Commission) recent regulatory initiatives from a Swedish perspective.

1. The role of attorneys

There are no general limitations under the Code of Conduct of the Swedish Bar Association (or the official Commentary thereto) governing how an attorney may solicit

[1] Resident partner, Advokatfirman Vinge, Brussels, Belgium.
[2] Associate, Advokatfirman Vinge, Stockholm, Sweden.

[3] See *e.g.* Stockholm City Court, T 8-1319-94, *Privpak AB v. Posten Distribution AB*, where the plaintiff claimed approximately SEK 78 million from the state-owned postal operator based on an abuse of dominance claim (withdrawn following a settlement); T 8-738-96, *CityMail Sweden AB v. Posten Sverige AB*, where the plaintiff claimed approximately SEK 68 million from the state-owned postal operator based on an abuse of dominance claim (withdrawn following a settlement); T 8-1093-98, *BK Tåg AB v. Statens Järnvägar*, where the plaintiff claimed approximately SEK 30 million in damages from the state-owned railroad operator based on an abuse of dominance claim (withdrawn following a settlement); T 8122-00, *Weba Kemi AB v. Arla ekonomisk förening*, October 9, 2002, where the court dismissed, on substantive grounds, an action for damages due to a claimed breach of the two primary prohibitions under the 1993 Competition Act; and T 17228-99, *Powerpipe Holding AB v. ABB Asea Brown Boveri Ltd*, February 4, 2003, where the plaintiff, among other things, claimed approximately SEK 315 million in damages based on the defendant's participation in a European-wide cartel (a settlement was reached and legalized by the court).

existing or potential clients. Thus, an attorney is generally free to approach potential clients proposing to bring a private action for damages. The only relevant exception is that members of the Swedish Bar may not solicit clients in a manner that takes advantage of someone's distress (*i.e.* 'ambulance chasing'), but this seems unlikely to be relevant for damages claims due to competition law infringements.

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 of the attorney's labor. Fees shall generally be based on an hourly rate or a fixed fee. The Swedish Bar's rules generally do not accept contingency fees arrangements whereby an attorney enters into a risk sharing agreement with a client based on the outcome of the case. Risk sharing agreements may be permitted only where 'particular reasons' make it necessary. This would 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 Group Proceedings Act, risk sharing agreements concluded between the plaintiff(s) and an attorney can be approved by a court.[4]

2. Legislative framework

a. The basic damages provision

The Swedish competition legislation dates back to July 1, 1993 and the implementation of the 1993 Competition Act (1993:20). In anticipation of Swedish membership of the EU, the Act was modeled after the then applicable EC competition law framework. As noted in the introduction, private litigation was foreseen and facilitated by the inclusion of a specific damages provision. The 1993 Competition Act was continually amended and updated, and in 2005 several amendments were implemented to increase the incentives to bring private actions. The rules on standing were expanded to include all persons and entities that had suffered losses (whereas previously, standing was restricted to 'companies and contracting parties'), the statutory limitation period was extended (from five to ten years) and an express right to base claims on violations of Articles 81 and 82 of the EC Treaty[5] was included (whereas previously, the 1993 Competition Act only referred to the corresponding national provisions as the basis for such claims).[6]

The current Competition Act (2008:579) (Competition Act) entered into force on November 1, 2008. The Act's damages provision (Chapter 3 §25) provides that if an undertaking 'intentionally or negligently infringes any [of the Competition Act's two

---

[4] Sections 38–41 of the Group Proceedings Act (2002:599). A court may approve the agreement if it is reasonable with regard to the nature of the substantive matter. However, a court is prevented from approving a risk agreement if the fees are based solely on the value of the subject matter of the dispute.

[5] On December 1, 2009, the Treaty of Lisbon came into effect, amending the Treaty Establishing the European Community (EC Treaty) that is now called the Treaty on the Functioning of the European Union (TFEU). Therefore, all references to Articles 81 and 82 of the EC Treaty now reference Articles 101 and 102 TFEU.

[6] See Government Bill 2004/05:117, pp. 25–30, 33–36 and 70–71.

primary prohibitions or] Article 81 or 82 in the EC Treaty, the undertaking shall compensate the damage that is caused thereby.' This applies without any industry-specific exemptions. As the Competition Act does not go further and comprehensively regulate private enforcement, this provision must be interpreted in conjunction with Swedish civil procedural law and tort law in the context of private damages actions.

b. Prohibited practices

The Competition Act includes two primary prohibitions: a ban on anticompetitive agreements or concerted practices (Chapter 2 §1) and a ban on the abuse of a dominant position (Chapter 2 §7). These prohibitions are practically identical to Articles 81 and 82 of the EC Treaty. In theory, damages claims may be based on any competition law infringement, regardless of whether it stems from a horizontal or vertical relationship or whether it occurs in the context of a contractual agreement. In practice, however, only damages actions alleging cartel activity or the abuse of a dominant position have been brought before Swedish courts.

c. Standing

The Competition Act does not contain any express provisions on standing. Swedish courts will therefore determine standing by looking at the underlying purpose of the act and the general principles of tort law. In essence, the scope of potential claimants is limited by the need to show an identifiable and indemnifiable injury as well as a causal link between the injury and the competition law violation.[7]

Competitors operating in the same market as the infringer or companies that operate in upstream or downstream markets are typically entitled to bring damages claims, provided they have suffered economic losses as a result of an infringement. Nothing prevents a contracting party to an anticompetitive agreement from claiming damages against its counterparty. Public authorities have also been entitled to seek damages when, for example, a public procurement was affected by bid-rigging. In such instances it is possible for public authorities to claim damages not only from the company with which the procuring authority entered into a contract, but also from other cartel members.[8] Finally, end-consumers may likewise be entitled to damages, even if they have not been in a direct contractual relationship with the infringing undertaking, so long as they can show a concrete injury caused by the violation.[9]

d. Limitation period

According to the Competition Act (Chapter 3 §25), the right to damages lapses 'if no action is brought within ten years from the date when the damage was caused.'[10]

---

[7] See Wetter, Carl, J. Karlsson and M. Östman (2009), Konkurrensrätt – en kommentar (4 ed.), Thomson Reuters, p. 865.

[8] See *e.g.* Svea Court of Appeal, T 9597-04, *Skanska Sverige AB v. Linköpings kommun et al.*, July 5, 2006, where the court concluded that all members of a tender cartel may be liable to pay damages to a procuring municipality.

[9] See Wetter (note 7 above), pp. 865–866.

[10] The statutory limitation period was extended from five to ten years on August 1, 2005. For claims that arose before this date, the five year limitation period applies. This could be compared

The only way to interrupt the period of limitation is consequently to bring a legal action.[11] Other ways of interrupting the period of limitation that generally are applicable to tort or contractual claims (*e.g.* serving the debtor with a written demand) do not apply.

Additionally, the statute provides that the limitation period starts to run when the 'damage was caused'.[12] This may have practical consequences where damages arise at a later point in time than when the tortuous act took place and in cases of continuing infringements where damages also arise continuous (*i.e.* 'new and additional' losses arises over time). In *Europe Investor Direct AB et al. v. VPC*[13] (described below), the court concluded that an abuse of dominance through a refusal to supply had led to profit losses for the claimant. The court estimated these losses for each relevant year. Since any damages that had accrued prior to December 5, 2000 were subject to the statute of limitations,[14] the court, for that particular year, made an estimation of how much of the annual losses had been incurred after the cut-off date.

e. Choice of forum

Two principal fora are available for a private damages claim. First, under general procedural law, a plaintiff may bring suit in the competent court for tort claims, which is the district court where the defendant resides.[15] Where the plaintiff seeks to bring a group action pursuant to the Group Proceedings Act (described below), such matters are handled by specifically designated district courts in each Swedish county.[16]

Second, under a special forum provision in the Competition Act (Chapter 3 §26), Stockholm City Court is always deemed competent to hear actions for damages for competition law violations. A consideration for a plaintiff contemplating opting for Stockholm City Court is that this court is generally deemed to be better versed in competition law issues as decisions by the Swedish Competition Authority (SCA) are generally appealed to the court and assigned to its specific division for competition law cases.[17]

In either instance, appeals are heard by one of five Swedish Courts of Appeal,

---

to the rules on administrative fines, where the statutory limitation period runs from the time when the infringement *ceased* (Chapter 3 §20).

[11] It follows from general legal principles that an action is deemed to be brought on the date when the prospective plaintiff submits a summons application to a court. See *e.g.* Government Bill 1979/80:119, p. 56.

[12] The statutory text quoted above is the most authoritative translation of the Competition Act. The Swedish wording reads that the right to damages lapses '*om talan inte väcks inom tio år från det att skadan uppkom*'. In our view, the translation of the word '*uppkom*' to 'was caused' is slightly misleading. A more precise translation would be 'occurred' or 'arose'.

[13] Stockholm City Court, joined cases T 32799-05 and T 34227-05, *Europe Investor Direct AB et al. v. VPC AB*, November 20, 2008.

[14] Prior to August 1, 2005, the statutory limitation period was five years. See note 10 above.

[15] See Chapter 10 of the Code of Judicial Procedure (1942:740).

[16] Section 3 of the Group Proceedings Act.

[17] Certain decisions by the SCA are nevertheless appealed to other courts: (i) the Competition Act lists certain types of cases that are appealed to or heard by the Market Court as the sole judicial instance; and (ii) decisions taken by the SCA that are governed by administrative law where appeals are heard by the County Administrative Court in Stockholm as the court at first instance.

depending on which court has appellate jurisdiction over the district court where the action was filed. Further appeals may be heard by the Supreme Court.

Outside the realm of traditional court proceedings, the Arbitration Act provides that arbitrators 'may rule on the civil law effects of competition law as between the parties.'[18]

3. Public vs. private enforcement

The SCA is entrusted with the public enforcement of the Competition Act. Any investigation and subsequent action by the SCA may cover infringements of the two Swedish primary prohibitions as well as infringements of Articles 81 and 82 of the EC Treaty.

The public enforcement remedies available to the SCA include injunctions ordering an undertaking to terminate a competition law infringement (Chapter 3 §1) and decisions to accept voluntary commitments to bring a perceived infringement to an end (Chapter 3 §4). However, the SCA does not have authority to issue administrative fines unless the company accepts such a fine (Chapter 3 §§16–18). In disputed cases, the SCA must bring an action seeking administrative fines before Stockholm City Court, which may subsequently be appealed to the Market Court.[19]

The public and private components of the Competition Act's two primary prohibitions are generally enforced independently and the SCA will not directly assist a private party seeking to obtain damages caused by a competition law infringement.

Nevertheless, given private plaintiffs' often limited access to evidence, prior or simultaneous public action may, in practice, be a pre-condition to a successful private action, particularly in cartel cases. As will be explained, private litigants can make use of the public procedures in different ways.

4. Private actions

Plaintiffs have several procedural alternatives for bringing damages claims and/or claims for equitable relief.

a. Stand-alone actions

The formal requirements for initiating a private action for damages are fairly easy to meet.[20] If the requirements are satisfied, the district court will issue a writ of summons calling upon the defendant to answer the case. However, the court shall *ex officio* (without a prior motion or request) dismiss a summons application if it is manifest that

---

[18] Section 1 of the Arbitration Act (1999:116).

[19] The Swedish Market Court is a specialized court that handles cases related to the Competition Act as well as cases under the Marketing Act (2008:486) and other consumer and marketing legislation. The Market Court is the highest court of appeal for these cases. The court consists of a chairman and a vice chairman plus five special members. The chairman, the vice chairman and one of the special members are lawyers with experience as judges while the other special members are experts in economics.

[20] Chapter 42 §1 of the Code of Judicial Procedure. A summons application must state a distinct claim, a detailed account of the circumstances invoked as the basis of the claim, a specification of the evidence offered and what shall be proved by each item of evidence adduced and the circumstances rendering the court competent to handle the case (unless this is apparent from what is otherwise stated in the summons application).

the case cannot proceed due to a procedural impediment. The court may also (without a prior motion or request) decide to dismiss the case without issuing a writ of summons if the plaintiff's statement does not constitute a legal basis for the case or if it is otherwise clear that the case is unfounded.[21]

Accessibility of evidence is a key consideration for a prospective private plaintiff in determining whether to initiate a damages action. The investigative tools available to a private party for gathering evidence are far more limited than those available to the SCA. Stand-alone actions are therefore unlikely to be brought unless the potential plaintiff already possesses evidence considered sufficient to prove the claim. In this respect, it is unsurprising that the only private Competition Act claim to result in court-awarded damages was an abuse of dominance case, as an injured party is more likely to possess relevant evidence in an abuse of dominance case than in a cartel case.

In *Europe Investor Direct AB et al. v. VPC*,[22] the plaintiff was a group of companies processing and selling various forms of investor information. The plaintiff brought a damages claim against VPC (now Euroclear Sweden), the Swedish central securities depository, for terminating the supply of address information for shareholders in listed companies. Stockholm City Court found for the plaintiff, concluding that VPC was a monopolist in the market for the supply of information contained in share registers of listed companies and, as such, had abused its dominant position by refusing to continue the supply. The plaintiff was awarded damages of approximately SEK 3.9 million plus interest as well as compensation for litigation costs. The judgment has been appealed and will be heard by Svea Court of Appeal.

In this case, the facts appear to have been generally undisputed, which probably contributed to the plaintiff's successful action. The plaintiff had purchased the relevant information for several years, but was unable to do so during a period of approximately five years when VPC's price quotes were substantially higher than what the plaintiff had previously paid. Eventually, the plaintiff purchased the requested information for a price that VPC said corresponded to its costs for supplying it. The main issue was whether VPC's conduct should be classified as a competition law violation. The court characterized VPC's behavior in its entirety as a refusal to supply and concluded that VPC had no objective justifications for its 'constructive' refusal.

With respect to the alleged damages, the court found that it was shown that the plaintiff had suffered losses as several of its customers had refrained from using its services due to the gradual decrease in quality resulting from unavailability of the address information. As the court considered VPC's behavior abusive, the plaintiff was also deemed to have suffered damage indemnifiable under the Competition Act (although the size of this loss was disputed). The measure of damages in the case will be commented on further below.

Another interesting abuse of dominance case is *Scandinavian Airlines System v. Staten genom Luftfartsverket*.[23] This case did not involve damages under the Competition Act,

---

[21] Chapter 42 §§4–5 of the Code of Judicial Procedure.

[22] Stockholm City Court, joined cases T 32799-05 and T 34227-05, *Europe Investor Direct AB et al. v. VPC AB*, November 20, 2008.

[23] Norrköping District Court, T 2746-96, *Scandinavian Airlines System v. Staten genom Luftfartsverket*, December 22, 1999, and Svea Court of Appeal, T 33-00, *Staten genom*

but repayment of discriminatory charges as a matter of contract law. The plaintiff, the airline operator SAS, brought an action against LFV (the state-owned airport operator) requesting that certain clauses in two agreements between SAS and LFV regulating airport fees at Arlanda airport be declared null and void on the ground that the clauses breached the competition law abuse prohibition. On this basis, SAS additionally sought repayment, as a matter of contract law, of the excess airport fees it considered that it had paid during the contract period (in other words, a performance claim connected to the declaratory claim). Svea Court of Appeal found for the plaintiff, concluding that the 1993 Competition Act was applicable to the agreements and that LFV had abused its dominant position by charging higher airport fees to SAS than other airlines (which amounted to illegal price discrimination). As the clauses were held invalid, SAS was entitled to repayment of parts of the airport fees it had paid during the period covered by the contracts in question. The repayment amounted to approximately SEK 400 million plus interest as well as compensation for litigation costs. The repayment constituted the difference between what SAS had in fact paid and what it would have had to pay had LFV charged SAS the same fees that were applied to other airlines. As other airlines were charged according to a tariff schedule (which LFV had implemented a few years after the disputed agreements with SAS were entered into), the sum was fairly easily calculated and not disputed as such.

b. Follow-on actions

A prior or simultaneous public action by the SCA can have tremendous evidentiary value in a private action. The SCA has extensive powers to investigate potential infringements and may require undertakings or other parties to disclose documents or other materials (Chapter 5 §1).[24] The SCA may also require persons who can give relevant testimony to appear at hearings and, subject to prior authorization by Stockholm City Court, it may inspect the premises of an undertaking or the private premises of a board member or employee of an undertaking (Chapter 5 §§3–5). Such requests and orders may also, in most cases, be made subject to a conditional fine (Chapter 6 §1).[25] Materials compiled or

---

Luftfartsverket v. Scandinavian Airlines System, April 27, 2001. On appeal, the Supreme Court did not issue a writ of *certiorari*.

[24] This does not include documents with content protected by legal privilege (Chapter 5 §11). See also Stockholm City Court, Ä 10773-03, *Konkurrensverket v. Nynäs AB et al.*, July 14, 2003, where the court concluded that a letter drafted by a foreign lawyer working as a solicitor in Scotland (and being a member of the Law Society of Scotland) was protected by legal privilege. The solicitor who had drafted the document was deemed comparable to a Swedish attorney.

[25] In addition, under a broadly worded statute from 1956 (the Act on obligation to supply information concerning prices and competition conditions (1956:245)), the SCA may, subject to a conditional fine, require any business proprietor to submit information relating to conditions of competition. Most recently, the SCA issued such a request against Apoteket AB (the state-owned retail pharmacy operator) after the company had refused to voluntarily supply information concerning its business which the SCA had requested during a general market survey of the conditions for the distribution and sale of pharmaceuticals triggered by the then imminent deregulation of the Swedish pharmacy market. See SCA, dnr 340/2007, *Apoteket AB*, September 24, 2007. The SCA eventually withdrew its formal request after the company supplied the requested information (decision in the same case, April 24, 2008).

prepared by the SCA in the course of an investigation can serve as evidence in a private follow-on action concerning the same conduct.

Furthermore, despite the fact that previous court decisions are not binding in subsequent proceedings, and each court under Swedish procedural principles is entirely at liberty to evaluate all evidence in order to determine what has been proven at the case at hand,[26] as a practical matter the outcome of the public action is highly relevant to the question of whether an alleged competition law infringement in fact occurred. In practice a final judgment by the Stockholm City Court or the Market Court regarding the same matter will be guiding in subsequent private follow-on actions.

Follow-on actions were recently initiated in the wake of the SCA's *Asphalt cartel* case. After conducting multiple dawn raids in 2001, the SCA brought an action against several defendant construction companies accused of distorting competition in the asphalt market through market sharing, price-fixing and other illegal practices. In parallel with the SCA's action, nine Swedish municipalities have reportedly[27] commenced damages actions against the construction companies in various district courts. The follow-on actions were initiated before the SCA's public action had been finally settled, but were stayed pending the final judgment of the Market Court.[28] The actions are now expected to continue.

General procedural rules allow for courts to order a stay of proceedings where private plaintiffs initiate a damages action before the final outcome of a prior or simultaneous action by the SCA is clear (*e.g.* due to limitation periods). A court may stay a proceeding if it is of 'extraordinary importance for the adjudication of a case that an issue sub justice in another court proceeding, or in a proceeding of another kind, be determined first.'[29] Due to reasons of judicial economy, a stay of proceedings in these instances is often in the interests both of the plaintiff and the court (and possibly also the defendant).

c. Joined public/private actions

Since the implementation of the 1993 Competition Act, private parties have been able to bolster a contemplated damages action by intervening in a public enforcement action. Under general procedural rules, anyone who can show probable cause that the matter at issue will bear on its legal rights or obligations may intervene in litigation, whether on

---

[26] For example, nothing prevents the Market Court, subsequent to a public enforcement action brought by the SCA, from finding that an undertaking has abused its dominant position through a refusal to supply while a district court, deciding on a private follow-on action for damages based on the same refusal, may find that no such abuse has occurred. This may relate not only to points of facts, but also to points of law.

[27] SCA background note on the *Asphalt cartel* case published in connection with the Market Court's judgment (see SCA press release, May 28, 2009).

[28] Market Court, MD 2009:11, *NCC AB et al. v. Konkurrensverket*, May 28, 2009. The court imposed record-level administrative fines of approximately SEK 277 million on five of the defendant companies. In addition, administrative fines of SEK 222.5 million were awarded against three defendant companies that did not appeal the judgment of the court at first instance. See Stockholm City Court, T 5467-03, *Konkurrensverket v. Kvalitetsasfalt i Mellansverige AB et al.*, July 10, 2007.

[29] Chapter 32 §5 of the Code of Judicial Procedure.

the side of the plaintiff or the defendant.[30] This may be the case, for example, where the judgment will have evidentiary value in another case in which the intervening party has an interest. A typical example would be when the intervening party has initiated a private damages claim with respect to an agreement and/or practice that is being examined in a SCA public action for administrative fines.[31] In such cases, the intervener may provide evidence and make submissions in the public proceedings.[32]

For example, in *BK Tåg AB v. Statens Järnvägar*,[33] an abuse of dominance case, the private action was settled out of court after the SCA had successfully obtained administrative fines of SEK 8 million from the state-owned rail operator with the private action plaintiff having intervened on the SCA's side in the public proceedings.[34]

In addition, the 2008 Competition Act introduced a new procedural path that allows private parties to litigate with the SCA in the same proceedings. If the SCA brings an action for administrative fines before Stockholm City Court, the court may decide, if appropriate, that a private damages action shall be joined with a public action for administrative fines (Chapter 8 §7). When making its decision, the court shall consider whether a joinder of actions would achieve an efficient and expeditious resolution of the proceedings. In the event the continuous joint handling of the cases gives rise to significant inconveniences, the court may subsequently order the cases to be separated. Final judgments by the Stockholm City Court in joined cases may be appealed to the Market Court.

The main purpose of allowing private damages claims to be joined with public actions is to enhance the efficiency of the sanction system laid down in the Competition Act.[35] The SCA may benefit from being assisted by a company that has incurred losses due to the challenged behavior. For a private plaintiff, a joint action may reduce the time and cost of bringing a damages action. In addition, such cooperation with the SCA would give the plaintiff access to useful information.

d. Actions for equitable remedies

While any damages claim will have a declaratory element, it is also possible for a private party to bring an action solely seeking a declaratory judgment.[36] For example, a plaintiff

---

[30] Chapter 14 §§9-13 of the Code of Judicial Procedure. See also *e.g.* Market Court, MD 1997:16, *City Mail Sweden AB*, October 13, 1997, where the court took an expansive view of the procedural rules governing intervention in cases brought by the SCA.

[31] Intervention has been allowed in several cases for administrative fines brought by the SCA. See *e.g.* Stockholm City Court, T 8-1264-94 *Konkurrensverket v. Posten Sverige AB*, December 23, 1997; Market Court, MD 2000:2, *Statens Järnvägar v. Konkurrensverket*, February 1, 2000; and Stockholm City Court, T 31862-04, *Konkurrensverket v. TeliaSonera Sverige AB* (pending). See also Market Court, MD 2001:4, *Konsortiet Scandinavian Airlines System v. Konkurrensverket*, February 27, 2001, where intervention was allowed in a case where the SCA sought an injunction.

[32] See Wetter (note 7 above), pp. 965–967.

[33] Stockholm City Court, T 8-1093-98, *BK Tåg AB v. Statens Järnvägar*.

[34] For the public actions brought by the SCA, see Stockholm City Court, T 8-103-96, *Konkurrensverket v. Statens Järnvägar*, December 8, 1998, and Market Court, MD 2000:2, *Statens Järnvägar v. Konkurrensverket*, February 1, 2000.

[35] See Government Bill 2007/08:135, pp. 98–100 and 283.

[36] Chapter 13 §2 of the Code of Judicial Procedure.

may request a court to declare that the defendant is liable to pay damages due to a competition law infringement but leave the quantum of damages to be dealt with in a subsequent proceeding.[37]

In addition to such general equitable remedies, the Competition Act provides for a specific, subsidiary right for private parties to bring an action before the Market Court requesting an injunction against a competition law infringer (Chapter 3 §2). Such an injunction would require the infringement to end, either by forcing the infringer to terminate or correct improper behavior *(e.g.* to cease applying a particular contract term) or by imposing a positive obligation (*e.g.* establishing an obligation to supply). The injunction can also be made subject to a conditional fine (Chapter 6 §1).

The scope for such injunctive relief under the Competition Act is nevertheless limited. It is a subsidiary right reserved for undertakings (not private individuals) and it can be exercised only after a party has filed a complaint with the SCA and the SCA has decided not to take action.[38] Because the Market Court is the exclusive forum for these actions, they cannot be handled together with a private action for damages, which has to be brought before a district court or Stockholm City Court.

In *Skyways Express AB v. Marknadsföringsbolaget Nya Norrköping AB et al.*,[39] the airline Skyways Express sought, among other things, an injunction prohibiting Norrköping municipality from granting any further economic aid to the competing airline Cimber Air. The basis for the request was that the aid violated Article 81 or 82 of the EC Treaty and/or the corresponding provisions in the Competition Act. The district court and, on appeal, the appellate court both dismissed the request, holding that the courts were not authorized to order such an injunction as the 1993 Competition Act specifically named the SCA and the Market Court as the appropriate fora. In this respect, no material legislative changes have been made in the current Competition Act. As a consequence, private damages and private injunctions must be pursued through separate actions.

5. Several parties and group proceedings

a. Several parties

Under general procedural law, several plaintiffs' tort claims against the same defendant(s) may be joined in one proceeding if the claims are based essentially on the same grounds.[40]

---

[37] See *e.g.* Stockholm City Court, T 8122-00, *Weba Kemi AB v. Arla ekonomisk förening*, October 9, 2002, where the plaintiff only requested that the court should declare that the defendant was liable to pay damages for infringing §§6 and 19 of the 1993 Competition Act (corresponding to Chapter 2 §§1 and 7 of the current Competition Act).

[38] Injunctions are also barred where the SCA has applied Article 13 of Council Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1) and rejected the complaint because the Commission or the competent authority of another EU Member State has received a complaint regarding the same practice and has already dealt with it.

[39] Norrköping District Court, T 2522-06, *Skyways Express AB v. Marknadsföringsbolaget Nya Norrköping AB et al.*, February 15, 2007, and Göta Court of Appeal, Ö 638-07, *Skyways Express AB v. Marknadsföringsbolaget Nya Norrköping AB et al.*, May 22, 2007. On appeal, the Supreme Court did not issue a writ of *certiorari*.

[40] See Chapter 14 of the Code of Judicial Procedure.

If an action for damages is brought against several defendants, damages shall be claimed from, and determined individually for, each of the defending parties.

With respect to the responsibility of the defendants, two or more companies that are liable for the same injury are generally held jointly and severally liable.[41] A company that has paid damages to an injured party has a right of recourse against other liable parties to the extent that it has paid more than the damages that have been individually determined.

b. Group proceedings

Group actions (a similar, but not identical, concept to US class actions) are governed by the Group Proceedings Act which entered into force on January 1, 2003. This Act is not limited to particular types of cases, and a group action can thus be brought for any claim that is eligible for consideration by a district court, including private competition law cases.

According to a recent report by the Swedish Justice Department[42] only ten group actions have been initiated since the enactment of the Group Proceedings Act, none of which concerned competition law infringement claims. Despite the low number, the report concluded that the Act helped promote individuals' access to courts, because several of the initiated actions would probably not have otherwise been pursued. In practice it is consumer claims – typically low-value claims spread among a large number of individuals – that are most frequently pursued as group actions.

Under the Group Proceedings Act, a group action may be instituted in three different ways: (i) as a *private group action*, which may be brought by a natural person or legal entity; (ii) as an *organization action*, which may be brought by a non-profit association that, in accordance with its rules, protects consumers' or wage-earners' interests; or (iii) as a *public group action*, which may be brought by an authority expressly permitted by the government to institute public group actions.[43] Notably, the SCA has not been granted the authority to institute public group actions.[44]

Irrespective of the type of group action, five cumulative conditions must be fulfilled. A group action will only be heard if: (i) the action is founded on circumstances that are common or similar among group members; (ii) a group proceeding would not be inappropriate due to distinctions or differences among various group members' claims; (iii) the majority of group members' claims cannot be pursued equally well through personal actions; (iv) the group, taking into consideration its size, ambit and otherwise, is appropriately defined; and (v) the plaintiff is appropriate to represent the members

---

41 See Chapter 6 of the Tort Liability Act (1972:207).

42 Ds 2008:74, October 28, 2008.

43 See §§1 and 4–6 of the Group Proceedings Act.

44 It was discussed however, in connection with the amendments made in 2005 to the 1993 Competition Act, whether or not the SCA should be granted the authority to institute public group actions. Such authority was not granted, *inter alia* because it was thought that the SCA's resources should be focused on public competition law enforcement and not be spent on assisting individual parties seeking restitutionary damages for competition law infringements. No other public authority was authorized to institute public group actions for competition law infringements. See Government Bill 2004/05:117, pp. 30–33.

of the group in the proceedings.[45] In its report, the Justice Department concluded that courts have had difficulty applying the prerequisites, resulting in a somewhat less efficient outcome than initially hoped.

Under the Group Proceedings Act, a group action is defined as an action brought by a plaintiff as the representative of several persons (without a power of attorney for the lawsuit). The outcome has legal effects for group members although they are not parties to the case.[46]

The court hearing the case will nevertheless rule on the individual group members' claims and right to damages. Normally, this is unproblematic due to the five prerequisites for instituting a group proceeding accounted for above. Generally, the individual claims are identical, easily ascertainable or could be estimated to a reasonable amount. However, the claims of the individual group members do not necessarily have to be identical and individual members may have to provide individual evidence to support their claim and/or the size of the losses suffered. The court hearing the case may split a group action into one or more sub-groups in order to conduct an action on a particular issue or a part of the substantive matter that only applies to the rights of particular members of the group.[47]

The final judgment (or court sanctioned settlement) is legally enforceable by or against all individuals that are members of the group (as comprised at the time of the judgment).[48] As the Group Proceedings Act is based on an opt-in system, the group will comprise only those members that declare themselves willing to join. Technically, anyone who does not make such a declaration before a deadline set by the court is deemed to have stepped out of the group.[49] Failure or refusal to opt into a group does not lead to any negative legal consequences as the group action will not create any form of estoppel against a subsequent individual claim.

6. Standard of proof and evidence

a. Standard of proof

The general rules on standard of proof applicable in tort cases apply to cases concerning private enforcement of competition law. The plaintiff bears the burden of proof with respect to all elements of the claim. In particular, it must show that: (i) an infringement has occurred (through the intent or negligence of the infringing party); (ii) indemnifiable damage has occurred; and (iii) a causal link exists between the infringement and the damage.[50] The standard of proof here requires that the relevant facts be 'proven' or 'shown'. This is a lesser standard than 'beyond a reasonable doubt' but does not involve a 'balance of probabilities' exercise. Under general procedural principles, once the plaintiff has discharged its burden of proof, the burden shifts to the defendant.

---

45 Section 8 of the Group Proceedings Act.
46 Section 1 of the Group Proceedings Act.
47 Section 20 of the Group Proceedings Act.
48 Sections 26 and 29 of the Group Proceedings Act.
49 Section 14 of the Group Proceedings Act.
50 See Wetter (note 7 above), p. 865.

Further, a private party bringing a Competition Act claim has the same burden of proof as the SCA in bringing a public enforcement action.[51] Thus, the principles that have evolved on the burden and standard of proof applicable to the Swedish and EC primary competition law prohibitions apply.

b. The use of evidence in Swedish proceedings

The general rules of evidence apply to private actions for competition law infringements. As a private damages claim is a case amenable to settlement, it is the parties' responsibility to provide the evidence that they wish the court to consider. A party may, in principle, rely on any documents, statements or testimony it wishes to present. Expert testimony from economic and legal scholars is regularly used in Swedish competition law proceedings. In addition, physical inspections can be undertaken during the course of trial with the judges and parties' representatives being present. A court will only reject evidence if it finds that a circumstance that a party offers to prove is without importance in the case, or that an item of evidence offered is unnecessary or evidently should be of no effect. Live testimony is preferred over written statements as written statements will be allowed only in exceptional circumstances.[52]

Further, Swedish courts have a wide margin of appreciation to evaluate any evidence in determining whether a party has discharged its burden of proof. The general rule on evidence provides that '[a]fter evaluating everything that has occurred in accordance with the dictates of its conscience, the court shall determine what has been proved in the case.'[53] This rule is supplemented with specific provisions such as that no proof is required regarding legal standards (*jura novit curia*). Other specific provisions apply as to the effect of certain kinds of evidence, such as witnesses, documentary evidence, physical inspections, and experts. These supplemental and specific rules are, however, relatively straightforward and rarely limits the ability of private parties to present evidence, or the courts' ability to take the evidence presented into account when determining what has or has not been proved in the case at hand.

Courts also have the option to occasionally appoint their own expert(s) in order to determine an issue the appraisal of which requires special professional knowledge. In those instances, if the court finds it necessary to call upon an expert, the court may either obtain an opinion on the issue from a public authority or officer or commission any other expert(s) 'known for their integrity and their knowledge of the subject' to deliver an opinion.[54]

c. Order to produce evidence

Broad pre-trial discovery is not available under Swedish procedural law. However, a Swedish court may issue an order, subject to a conditional fine, requiring anybody

---

[51] See *e.g.* Market Court, MD 2007:26, *Övertorneå kommun et al. v. Ekfors Kraft AB et al.*, November 15, 2007, where two Swedish municipalities sought an injunction against a local electricity provider (*i.e.* it was a subsidiary action brought in the Market Court after the SCA decided not to take any action regarding the municipalities' complaint).

[52] See Chapter 35 of the Code of Judicial Procedure.

[53] Chapter 35 §1 of the Code of Judicial Procedure.

[54] Chapter 40 §1 of the Code of Judicial Procedure.

(including a third party) to produce any potentially relevant documentary material in its possession.[55]

In practice, plaintiffs have difficulties making use of this possibility. First, the requesting party must specify what written document it seeks and what the document is intended to prove. In other words, the applicant must know exactly which documents to request and be able to identify them. Such requests cannot therefore be used for more general requests or 'fishing expeditions' for evidence. Second, trade secrets[56] do not have to be disclosed unless extraordinary reasons justify disclosure. Third, a court may not order the production of a document subject to legal privilege.[57] Finally, the intended recipient of the order must be afforded an opportunity to respond to the request. Further, if it is feared that evidence may be destroyed or otherwise distorted, the applicant may petition the court for suitable interim measures to protect the material.[58]

Konkurrensverket v. Posten Sverige AB[59] may be mentioned as an example of the practical difficulties of securing such an order. In the case, the private postal operator CityMail (which had intervened on the SCA's side in a public proceeding) requested that the state-owned postal operator should be ordered to produce a cost estimate that had been reported in a newspaper article. However, in view of the defendant's denial that it possessed the cost estimate in question, the Market Court considered that it lacked a sufficient basis to grant the request.

d. Access to the SCA's case file

In follow-on actions, a private party may potentially rely on documents in the SCA's case file. As mentioned above, the SCA has extensive powers to investigate potential competition law infringements, but during an SCA investigation, documents and information in the case file are generally subject to absolute secrecy.[60]

Once the investigation has ended (*e.g.* through a decision by the SCA to close the investigation or to bring an action for administrative fines), this absolute protection ends. Any individual (including foreigners) may then, under the constitutional principles guaranteeing public access to information, request material gathered, created, received or held by the SCA. This includes information provided to the SCA by a leniency applicant. Access shall be granted unless the information is subject to confidentiality protection under the Publicity and Secrecy Act.[61] While business secrets (typically competitively

---

[55] See Chapter 38 of the Code of Judicial Procedure.

[56] A 'trade secret' is generally defined as information concerning the business or industrial activities of a business proprietor that is being kept secret and the disclosure of which is likely to cause competitive harm. See §1 of the Act on the Protection of Trade Secrets (1990:409).

[57] Only independent lawyers can be members of the Swedish Bar and as such be covered by the rules of legal privilege. It follows that any documents or correspondence drawn up by in-house counsel are not covered by legal privilege. Cf. note 24 above concerning the extension of legal privilege to foreign (independent) lawyers deemed comparable with Swedish independent lawyers and the Court of First Instance's judgment in joined cases T–125/03 and T–253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission of the European Communities* [2007] ECR II–03523.

[58] Chapter 15 §3 of the Code of Judicial Procedure.

[59] Market Court, dnr A 3/98, *Konkurrensverket v. Posten Sverige AB*, June 30, 1998.

[60] Chapter 17 §3 of the Publicity and Secrecy Act (2009:400).

[61] Chapter 2 §§1–2 of the Freedom of the Press Act (1949:105).

sensitive information or other sensitive information such as business structures, etc.) are covered under the Publicity and Secrecy Act,[62] the SCA's file will nonetheless contain other information that may prove useful to a private party. The SCA could refuse access to applications or statements by an individual or a company, if it can be assumed that the individual or company would suffer considerable harm or significant injury if the information is made public.[63]

Understandably these relatively wide constitutional principles guaranteeing public access to information could potentially cause leniency applicants to be hesitant about providing information to the SCA. Further, as court proceedings are generally necessary in order for the SCA to seek administrative fines (with the exception of accepted such fines) and the information submitted in those proceedings is governed by the same legislative framework as described above, a leniency applicant will always enter the process knowing that potential private plaintiffs may be able to access sensitive information concerning the infringing actions or behavior.

The Swedish leniency system was first implemented on August 1, 2002 through an amendment to the 1993 Competition Act (and revised through the implementation of the current Competition Act). Since then, only two leniency applications have been submitted that have resulted in an active cartel being disclosed and successfully charged by the SCA.[64] Whether or not the seemingly poor result that the Swedish leniency program so far has yielded can be partly attributed to potential leniency applicants' hesitance to provide information is a matter for discussion.

7. Damages and litigation costs

a. Single damages

As discussed above, an undertaking that intentionally or negligently commits a competition law infringement is obliged to compensate the damage that is caused thereby (Chapter 3 §25). This accords with Swedish tort law principles, which afford plaintiffs compensatory relief in the form of single damages.

For the same reasons, and because no express legislation suggests otherwise, it seems clear that a defendant can rely on a passing-on defense under Swedish law. Because damages are considered restitutionary, an infringing undertaking is only liable for damages *actually* caused.[65]

---

[62] Chapter 30 §1 of the Publicity and Secrecy Act. Cf. note 56 above regarding the general definition of trade secrets.

[63] Chapter 30 Section 3 of the Publicity and Secrecy Act.

[64] See Stockholm City Court, T 11660-03, *Konkurrensverket v. Keyvent AB et al.*, March 14, 2005, and SCA, dnr 237/2007, *Rundvirke Poles AB*, June 30, 2009 and the SCA's press release thereto (July 8, 2009). Further, in the *Asphalt cartel* case, the SCA did not bring an action against one of the participating companies (as a way to grant the company a full reduction of its fines) due to its cooperation with the authority during the investigation (see SCA press release, March 21, 2003). The actual disclosure of the *Asphalt cartel* was, however, made by whistleblowers in the infringing companies (see SCA press release, October 24, 2001).

[65] See Wahl, Nils (2000), Konkurrensskada, Elanders Gotab, p. 312, and Wetter (note 7 above), p. 866 note 251.

b. Measuring damages

Compensation is assumed to cover 'pure economic losses' such as loss of profits due to reduced revenues or increased costs, and other losses due to the distortions caused by infringement. The compensation should, in theory, restore the injured party to the position it would have occupied had the infringement not occurred. Courts must therefore consider the injured party's actual economic status compared to a hypothetical scenario in which the infringement did not occur.[66]

Naturally, calculating such losses is often difficult. Various methods have been developed such as a 'before-and-after approach', benchmarking, cost-based models, statistical analyses and simulation models.

General procedural rules permit a court to determine damages by estimating a reasonable amount where either full proof cannot be presented at all, or only with difficulty, or where the costs or inconvenience of fully proving the damages would be disproportionately high considering the scope of the harm and the amount of compensation sought.[67] Given the difficulties involved in proving the extent of the injury, commentators have suggested that the incentive for private competition law enforcement would be low without this kind of relaxation of the burden of proof.[68]

In *Europe Investor Direct AB et al. v. VPC*[69] (described above), the plaintiff used the 'before-and-after approach' to calculate the lost profit caused by the alleged infringement. Stockholm City Court noted that this method may be appropriate where it is not possible to draw direct comparisons with a competing business in attempting to estimate losses. According to the court, the plaintiff had nevertheless failed to prove its claimed losses. The court therefore resorted to its own generalized estimation of the appropriate compensation to be awarded. This estimation was based, among other things, on the plaintiff's revenues, costs and potential cost savings from the challenged business practices.

A successful plaintiff has the right to full compensation interest under the Interest Act. The interest will amount to the Swedish Central Bank's reference rate plus eight percentage points and accrue on the amounts due from the 30th day following the day on which a damages claim has been submitted in writing to the liable party, or at the latest from the date a summons application is served on the defendant.[70]

c. Litigation costs

The general rule in tort cases is that the losing party shall reimburse the winning party's litigation costs. 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. Where there is a split outcome and the costs attributable to each component of the case are distinguishable, liability for costs will be allocated accordingly.[71]

---

66 See Government Bill 1992/1993:56, pp. 96–97. See also Wetter (note 7 above), pp. 870–872.

67 Chapter 35 §5 of the Code of Judicial Procedure.

68 See Wahl (note 62 above), p. 385.

69 Stockholm City Court, joined cases T 32799-05 and T 34227-05, *Europe Investor Direct AB et al. v. VPC AB*, November 20, 2008.

70 Sections 4 and 6 of the Interest Act (1975:635).

71 See Chapter 18 of the Code of Judicial Procedure.

Compensation for litigation costs shall cover the expenses, including attorney fees, which have been reasonably incurred for preparing the trial and presenting the action. Compensation will also be awarded for the time and effort expended by the party due to the litigation. A court shall *ex officio* consider to what extent the claimed costs have been reasonably incurred to safeguard the party's interests and may order a downward adjustment where appropriate.[72]

The Group Proceedings Act contains additional rules that apply in the context of group actions.[73] For example, if the defendant has been ordered to compensate the plaintiff (*i.e.* the representative of the group members) for litigation costs but is unable to pay, the group members are liable to pay these costs. The same applies to certain costs that the plaintiff incurs in connection with risk sharing agreements.

8. Extraterritoriality

The Competition Act's two primary prohibitions are broadly worded. For example, the prohibition against anticompetitive agreements or concerted practices is applicable to any agreement that to an appreciable extent distorts competition in the whole or a part of the Swedish market, even if the agreement or the parties to the agreement do not otherwise have any connection to Sweden.[74]

The Competition Act itself does not limit its extraterritorial application. Consequently, a private enforcement action could arguably be initiated and/or defended by foreign parties in Sweden solely because an agreement or practice breaches the two primary Swedish prohibitions and affects the Swedish market.[75] However, according to the preparatory works for the 1993 Competition Act, it was noted that practical considerations and international law rules limit the applicability of national law and, more specifically, it was asserted that the extraterritorial application of the Competition Act should be assessed in light of the efficiency principle.[76] As for the forum issue, Stockholm City Court is always deemed competent to deal with actions for damages due to the special forum provision in the Competition Act (Chapter 3 §26).

Case law on this extraterritoriality is sparse, but the issue was touched upon in connection with a private damages claim against ABB following the European *Pre-Insulated Pipe Cartel* case.[77] ABB initially requested that the case be dismissed for lack of

---

[72] Chapter 18 §8 of the Code of Judicial Procedure.

[73] Sections 33–36 of the Group Proceedings Act.

[74] See Wetter (note 7 above), p. 100.

[75] Cf. Wetter (note 7 above), pp. 101–102, where the authors argue, possibly *de lege ferenda* and with a reference to the *Wood Pulp* case (see note 75 below), that a condition for the application of the Competition Act, apart from at least a *prima facie* distortion on competition in Sweden, should be that a prohibited measure at least partly shall have been *implemented* in Sweden.

[76] See Government Bill 1992/1993:56, p. 73, Government Bill 1999/2000:140, p. 181 and Swedish Governmental Official Reports 2000:4, pp. 106, 171–172. Cf. the *Wood Pulp* case where the territorial principle was referred to as the jurisdictional basis for applying EC competition law to concerted practices between undertakings established in non-member countries. See European Court of Justice, joined cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and others v. Commission of the European Communities* [1988] ECR 05193.

[77] See the Commission's decision in Case No IV/35.691/E-4: – Pre-Insulated Pipe Cartel (OJ L 24, 30.1.1999, p. 1).

jurisdiction. Stockholm City Court applied Article 5.3 of the Lugano Convention[78] and held that it was authorized to consider the part of the claim concerning damages that had arisen in Sweden, but not those that had occurred outside Sweden. On appeal, the Svea Court of Appeal upheld the lower court's decision, noting that it was apparent from the Commission's previous decision in the cartel case that harmful effects of the cartel had encompassed the entire European market and thus had also affected competition in the Swedish market.[79]

Conclusion

As elsewhere in Europe, Sweden has experienced few cases involving private claims for damages resulting from competition law violations. There are several possible explanations.

Damages claims for competition law violations are a relatively new phenomenon, and it will take time to create awareness among potential claimants. In the corporate context, there also seems to be a lingering resistance in the business community to pursuing such claims against its fellow members, particularly following public enforcement actions. However, indications suggest that such notions are fading, and many are instead equating this type of harm with more traditional forms of damages. This development is likely to continue, if the number of successful claims increases going forward. Moreover and potentially more importantly, significant legal, economic and practical impediments to private enforcement remain. In particular, the high costs incurred by the losing party in combination with the difficulty of amassing evidence are likely to discourage prospective claimants.

The European Commission's initiative to propose a Council directive on private damages no doubt would have gone in the direction of facilitating private action. Judging from an internal draft,[80] the reforms that the Commission had in mind would require significant changes to the Swedish and other national legal systems. From that perspective it is not surprising that the Commission initiative was received with skepticism. It now seems the Commission's plan has come to a halt and the initiative will have to come from the European Parliament. Although it is uncertain what the outcome, if any, will eventually be, it seems useful to consider some of the key aspects of what the Commission had in mind.

First, making the finding of an infringement of Article 81 or 82 by any national competition authority or review court in the EU binding on Swedish courts would create a significant exception to the principle that Swedish courts are entirely at liberty to evaluate all evidence in order to determine what has been proven. However, the practical impact

---

[78] Convention on jurisdiction and the enforcements of judgments in civil and commercial matters, done at Lugano on September 16, 1988. Article 5.3 provides that '(a) person domiciled in a Contracting State may, in another Contracting State, be sued . . . in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.'

[79] Stockholm City Court, T 17228-99, *Powerpipe Holding AB v. ABB Asea Brown Boveri Ltd*, May 3, 2000, and Svea Court of Appeal, Ö 3787-00, *ABB Asea Brown Boveri Ltd v. Powerpipe Holding AB*, January 22, 2001.

[80] Internal draft Proposal for a Council Directive on rules governing damages actions for infringements of Articles 81 and 82 of the Treaty (not dated).

could be less dramatic, given the high evidentiary significance that Swedish courts normally would give to such decisions today. The impact would also depend on the extent to which claimants would find it attractive to bring claims in Sweden based only on those infringements that were subject to foreign national procedures.

Secondly, implementation of an opt-out system for certain authorized organizations in place of the opt-in regime currently employed by the Swedish Group Proceedings Act would potentially facilitate the ease and effectiveness with which such organizations can bring damages actions. However, to the extent an opt-in regime would remain for groups of private claimants, it is unlikely that such changes would significantly affect the scope for corporate group actions.

Thirdly, the Commission's intention was to extend the means through which private plaintiffs could access relevant evidence. In 2004, the Swedish government considered measures that were similar to those now being called for by the Commission. A public inquiry resulted in a proposal for a system that mirrors Sweden's intellectual property regime.[81] The Swedish government did not endorse that proposal. If accepted, the Commission's model could achieve a similar result through different means, ultimately resulting in a far-reaching deviation from traditional Swedish procedure.

[81] Under various Swedish intellectual property statutes, a court can order an investigation at the premises of the defendant, executed by the Swedish Enforcement Authority (*i.e.* the bailiff), to seek evidence that could verify or disprove the alleged infringement. See Swedish Official Reports 2004:10, pp. 103–125 and Government Bill 2004/05:117, pp. 39–45.