The new Swedish Competition Damages Act

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The Swedish implementation of the Directive on Antitrust Damages Actions (the "Directive") is in force as of 27 December 2016 with the entering into force of the Swedish Competition Damages Act (Sw. Konkurrensskadelag (2016:964)) (the "Act"). The previous provisions on competition damages in the Swedish Competition Act (Sw. Konkurrenslag (2008:579)) have thereby ceased to apply

Background

Unlike in many other Member States, it has been possible to pursue damage claims against companies that have violated the competition rules since the entering into force of the Swedish Competition Act in 1993. The rules were modified in 2005 to include indirect purchasers and consumers. In conjunction with this change the limitation period for bringing an action for damages was prolonged from five to ten years.

Despite these favorable conditions to pursue damage claims there is, as far as we are aware, only three stand-alone cases where damages have been awarded by a court in Sweden. The first judgment, in the so-called *Euroclear* case, was issued in 2011. Two companies claimed, and were awarded, damages from Euroclear because Euroclear, as the sole supplier of shareholder information in Sweden, had stopped supplying this information, which was considered as an abuse of a dominant position. This judgment was of principal importance but the amount of

damages was however of a minor amount.

Two important judgments were issued by the Stockholm District Court (now the Patent and Market Court) in the spring 2016 as follow-on damages claim as regards the Market Court's judgment regarding margin squeeze by *TeliaSonera* (now Telia Company) (cf the ECJ's judgment in case C-52/09). Yarps was awarded 6,5 MEUR plus interest (case T 15382-06) and Tele 2 was awarded approximately 24 MEUR plus interest (case T 10956-05). Both these judgments have been appealed by both sides and are currently pending in the Patent and Market Appeal Court.

However, there is no judgement regarding cartel damages, not even as a follow-on action since the few initiated cases have been settled, including claims for damages from municipalities affected by the so far largest cartel in Sweden, the so-called *Asphalt cartel* (case MD 2009:11). In several judgments regarding standalone claims, the plaintiffs have failed to demonstrate that there has been a competition law infringement why the claims for damages have been rejected. A number of stand-alone cases (abuse of dominance) are currently also pending in the Patent and Market Court (case no PMT 15443-16, PMT 16599-15 and PMT 10365-14).

So what new features are brought about by the Act?

The main features in the Act

Introductory remarks

It is important to read the Act in conjunction with the Directive in order to get a complete understanding of the rights and obligations of both applicants and defendants since a number of the provisions in the Directive are not mirrored in the Swedish legislation. The legislator considered that several provisions in the Directive s followed from other legal provisions in e.g. the Swedish Code of Judicial Procedure (Sw. Rättegångsbalken (1942:740)) or case law. This follows from the preparatory works to the legislation (Governmental Bill, prop. 2016/17:9, Konkurrensskadelagen).

The main features in the Competition Damages Act are the following:

Compensation

Parties who have suffered economic harm because of a competition law infringement are entitled to damages if they can prove the extent of the harm. The **compensation** for the harm suffered covers compensation for **actual loss** and for **loss of profit,** and payment of **interest** from the time the harm occurred until compensation is paid. The interest until the time of the application for summons is served by the court is the so-called reference rate plus 2 % and from the time of serving the reference rate plus 8 %.

Unlike the Directive it is stated that intent or negligence for the competition law breach is required in order for damages to be awarded. In follow-on cases based on the Swedish Competition Act this is unproblematic since that is also a requirement for imposing fines. However, this might be considered an incorrect implementation of the Directive in e.g. stand-alone claims.

Like in the Directive there is a **rebuttable presumption that cartels cause harm**.

Passing on

The **legal consequences of 'passing on' are clarified**. Direct customers of an infringer sometimes offset the increased price they paid due to the infringement by raising the prices they charge to their own customers, which are indirect customers of the infringer. When this occurs, the infringer can reduce compensation to direct customers by the amount they passed on to indirect customers. Compensation for that amount is in fact owed to indirect customers, who in the end suffered from the price increase. There is a rebuttable presumption that the indirect customers suffered some level of overcharge harm, to be estimated by the court. Unlike the Directive the Swedish legislator has also chosen to introduce passing on in relation to suppliers.

Parental liability

According to the Swedish legislator, it is up to the courts to determine whether parental liability may be determined depending on the circumstances in each case. That has been the case in previous case law.

Statute of limitations

Injured parties will have five years to bring damages claims, starting from the moment when they could reasonably be expected to have knowledge of the infringement, that the infringement caused them harm and the identity of the infringer (which is in line with the minimum amount of time provided for in the Directive). This period will be suspended or interrupted if a competition authority starts infringement proceedings, so that victims can decide to wait until the public proceedings are over. Once a competition authority's infringement decision becomes final, or when it concludes its investigation, victims will have five years to bring damages actions. This shall be compared with the previous Swedish rules that provided that the statute of limitation was ten years from when the damage occurred. Please note that statutes of limitation according to the Directive may vary between Member States.

In line with the Directive there are important rules about breach of the statute of limitation.

In the preparatory works to the Act the legislator notes that the time of making public the investigation may mean at the time when a dawn raid is announced. In my view, such announcement is not enough since the companies involved are mentioned by neither the Commission or the Swedish Competition Authority. Further, it is not clear if an infringement decision is required or a press release regarding a statement of objections.

Proof of infringement

As for a Commission infringement decision, **a final infringement decision of the Swedish Competition Authority or a Swedish court** will constitute **full proof before civil courts** that the infringement occurred. This is a very important provision which will alter the previous situation where no such rule existed in relation to Swedish decisions or judgments and most probably open up for greater interest for follow-on proceedings.

Decisions and judgments from other Member States will constitute **prima facie evidence of the infringement (although this is not stated in the Act but follows from the Directive).**

Access to evidence

Parties will have **easier access to evidence** they need in actions for damages. In

particular, if a party needs documents that are in the hands of other parties or third parties to prove a claim or a defense, it may obtain a court order for the disclosure of those documents. Disclosure of **categories of evidence**, described as precisely and narrowly as possible, will also be possible. However, fishing-expeditions are prohibited according to general procedural rules. The court will have to ensure that disclosure orders are proportionate and that confidential information is duly protected. There are however, limitations regarding the possibility to obtain certain documents from the competition authorities' file and to use these as evidence, in relation to leniency applications and documents in settlements.

The important principle of proportionality provided for in the Directive was considered to follow from case law, thus no such wording was introduced in the Act.

As regards the rules on confidentiality for certain information those are not implemented in the Act but will soon be implemented through upcoming amendments in the Code of Judicial Procedure.

Separately there is a right to request documents from the Competition Authority based on the rules on access to public records but in most cases the rules on confidentiality will apply.

As regards client/attorney legal privilege it may be noted that there are no such provisions in the Act, regulating that such documents may not be disclosed, but this follows from rules in the Code of Judicial Procedure.

The provisions in the Directive regarding prohibitions to invoke certain information as evidence is contrary to the general principles in Swedish law regarding free evidence and free assessment of evidence but a prohibition to invoke certain information as evidence has been invoked in the Act.

Joint and several liability

Any infringer will be responsible towards the victims for the whole harm caused by the infringement (joint and several liability), with the possibility of obtaining a contribution from other infringers for their share of responsibility. However, to safeguard the effectiveness of leniency programs, this will not apply to successful leniency applicants; these immunity recipients will normally be

obliged to compensate only their (direct and indirect) customers. There is also a narrow exception from joint and several liability under restrictive conditions for SMEs that would go bankrupt as a consequence of the Act's rules on joint and several liability.

Right of recourse

The rules on joint and several liability are combined with a right of recourse. The legislator states that the infringing undertaking's share of the damage shall be determined based on the infringers relative responsibility for the damage. There are limitations in the right of recourse from leniency applicants and those that have entered into a settlement outside of court.

Competent court

An action shall be brought before the Patent and Market Court (which replaced the Stockholm District Court as the court of first instance in competition law cases as of 1 September 2016). A Patent and Market Court judgment may be appealed to the Patent and Market Appeal Court.

Legal costs

The issue of legal costs is not regulated in the Directive but since that is of great practical importance it may be noted that the actual court application fee is EUR 280 and that the loser pays principle applies as a main rule according to the Code of Judicial Procedure. In competition damages cases so far none of the claimants have been completely successful with its claim and in the TeliaSonera-cases the court ordered each party to pay its legal costs. In the Euroclear-case the court ordered the defendants to pay 75 % of the costs of litigation in comparison to the normal 50 % when the parties have mixed success.

Possible class actions

It is possible to bring a class action in accordance with the Swedish Act on Class Actions (Sw. lag (2002:599) om grupprättegång), which provides for an opt-in system. It may be noted that class actions so far have been very rare in Sweden, also as regards other areas of law and that so far no class action has been initiated for a competition law claim.

Concluding remarks

The new Act brings about important rules which will probably open up for further competition damage litigation in Sweden. However, in order for more damages cases to take place in Sweden there has to be more cases brought by the Swedish Competition Authority, and such court cases have in the past been quite scarce. There is of course a possibility of stand-alone cases but there are always greater hurdles for bringing such claims since the actual competition law infringement has to be proved as well. However, at least one such case has been successful in the past and several are currently pending. Thus, it will be very interesting to see whether Sweden will be deemed by applicants to be an interesting jurisdiction for future claims. One thing that is for sure is that the exposure for competition law claims will be higher in the future. Most likely there will also be a number of questions for preliminary rulings to the ECJ in the future regarding interpretation of various aspects of the Directive.