SWEDEN

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I. Introduction

Sweden joined the European Economic Area (EEA) on 1 January 1994, and became a member of the European Union on 1 January 1995. In connection with the EEA accession, a new Swedish Competition Act was enacted which replaced previous competition legislation. The Competition Act (*konkurrenslagen (1993:20)*) introduced a competition law regime similar to the European Community (EC) competition rules, with prohibitions against anti-competitive agreements (in Section 6) and abuse of a dominant market position (in Section 19) modelled on Articles 81 and 82 of the EC Treaty. The Competition Act also introduced (in Section 33) a right to damages for parties injured as a consequence of infringements of two prohibitions in the Competition Act.

In view of the EC law principle that actions based on EC law may not be less favourably treated than similar actions based on domestic law[1], Section 33 of the Competition Act is in general deemed to apply by analogy to infringements of EC competition law. Whilst there have been a handful of court cases on damages for infringements of the Competition Act (with as yet no actual judgments, because the cases have either been settled out of court or are still pending), we are not aware of any court cases on damages for infringements of EC competition law.

The Swedish Competition Authority (Konkurrensverket), an independent government authority working under the Ministry of Industry, Employment and Communications, was established on 1 July 1992. The Authority's main tasks include applying the Competition Act by *inter alia* taking actions against infringements of the competition law prohibitions and submitting proposals for changes in the rules. Appeals against decisions by the Authority (as well as actions regarding fines, et cetera) are brought before the Stockholm District Court and the Market Court.

II. Actions for damages – status quo

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there a distinction between EC and national law in this regard?

The statutory basis, Section 33 of the Competition Act, is phrased as follows:

1 Case 33/76 *Rewe v Landwirtschaftkammer Saarland* (1976) ECR 1989; case 199/82 *San Giorgio* (1983) ECR 3595.

"An undertaking which intentionally or negligently infringes the prohibitions contained in section 6 or 19 shall pay damages in respect of the damage that is caused thereby to another undertaking or to a party to an agreement.

The right to such damages shall lapse if no claim is brought within five years from the date on which the damage was caused.

The Stockholm District Court shall at all times be competent to hear cases relating to damages pursuant to this section."

The fundamental "difference" between the competition law provision on liability and general Swedish tort law principles relates to the extent of the liability. Under Swedish law, non-contractual liability does not normally cover pure financial loss, except in case of criminal behaviour. As the Swedish law stands, competition law is not criminalized and therefore, in this respect, non-contractual liability for competition law infringements is one of a few exceptions, since it does cover pure financial loss.

The provision explicitly envisages only damages actions based on infringements of the Competition Act. However, Section 33 is generally deemed to apply by analogy to infringements of EC competition law.

It should also be noted that a Government Committee has recently proposed to explicitly include infringements of EC law within the scope of Section 33; see also Section III(i) below as well as Annex 1.

This study does not analyse whether or not EC law may require more generous remedies for infringements of EC competition law than the remedies offered by the Swedish procedural rules.

Following the principle of *lex specialis,* a claim for damages under competition law would have to be brought under this provision and not under any other provision in the civil or commercial codes. However, several general principles of tort will of course have implications for such competition law based actions, this will be dealt with under each section where it is relevant.

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

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

In addition, under Section 33, paragraph 3 of the Competition Act, the Stockholm District Court is always competent to hear cases relating to damages pursuant to the Competition Act.

The forum rules do not provide for a different forum, depending on the value of the claim, although the rules state that the district court should consist of a single judge if the value of the claim obviously does not exceed half of the base amount according to the National Insurance Act (approximately 2200 EUR). The forum rules do not provide for a different forum depending on the basis of the claim (national law or EC law, contractual or tort) or whether or not the parties are undertakings, individuals or public authorities.

Appeal against a district court decision is available in these matters and should be made in writing within three weeks from the pronouncement of the judgment. The Realm's courts of appeal are: the Svea Court of Appeal, the Göta Court of Appeal, the Scania and Blekinge Court of Appeal, the Court of Appeal for Western Sweden,

the Court of Appeal for Southern Norrland and the Court of Appeal for Northern Norrland.

Leave to appeal is required for the Supreme Court to review a court of appeal judgment in these matters. Leave to appeal is granted only if it is of importance for the guidance of the application of law that the Supreme Court considers the appeal or if there are other extraordinary reasons for granting such a leave.

There are no issues of the claim that must be referred to another court or the competition authority.

Under the Arbitration Act (*lagen (1999:116) om skiljeförfarande*), Section 1, the civil law consequences of competition law may be the subject of arbitration. The main civil law consequences of competition law are dealt with in Section 7 of the Competition Act, stipulating that any agreement that is prohibited pursuant to the rules on anti-competitive agreements between undertakings is automatically void, and in Section 33, which lays down the specific rules on damages.

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

There are no specialised courts for private enforcement of competition rules. Although it is not a legal requirement, the Stockholm District Court refers as a rule all competition cases (including actions for damages) to department 4. The law requires that the Stockholm District Court has a special composition (with economic experts) in cases regarding *inter alia* fines for competition law infringements, concentrations between undertakings and investigation orders, this is however not the case in damages cases.

C. Who can bring an action for damages?

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?

Standing

Under Section 33 of the Competition Act, both companies and private persons have standing. However, pursuant to the wording of the provision, the right to claim damages is limited to (i) undertakings and (ii) parties to agreements with the infringing party.

This limitation means that private persons (consumers) have standing only where they have a contractual relationship with the infringing party. On the other hand, *undertakings* that are affected by an infringement, for instance due to a competitive relationship with the infringing party, have standing even in the absence of a contractual relationship. There may be situations where a public authority that has suffered injury due to an infringement has no right to damages because it does not qualify as either an undertaking or a party to an agreement with the infringing party.

This limitation of standing is currently being reviewed, and the Government Committee on the effect of the modernisation of Articles 81 and 82 EC has proposed to delete the limitation, with the effect *inter alia* that consumer groups and other private individuals affected by a competition law infringement would have a right to compensation even in the absence of any contractual relationship with the infringing party.

The preparatory works of the Competition Act refer to general principles of tort law under which only parties covered by the protected subject-matter of the law in question are entitled to compensation. It is further stated that damages claims based on infringements of competition law can be brought by parties to the breaching agreement, as well as competitors and other undertakings that are "directly" injured by the anti-competitive behaviour in question, but not by

"undefined groups of consumers" who are only indirectly affected by the behaviour. It is unclear (and subject to discussion) whether these statements are intended as a further limitation of the circle of those entitled to damages, in addition to the limitation inherent in the wording of Section 33 itself (undertakings and parties to an agreement with the infringing party). In any event, for a private individual to be entitled to damages, a contractual relationship with the infringing undertaking must exist.

The plaintiff does not need to – in any depth – address questions of substance for standing to be granted, as long it can be drawn from the application that the claim is not "obviously unfounded".

Jurisdiction

As for questions of external jurisdiction, the Brussels Regulation 44/2001 applies in Sweden. As for jurisdiction issues between Sweden and non-Member States, in these matters there is no general rule determining whether or not Sweden has jurisdiction or not, this would be a case-to-case evaluation. Simply put, a Swedish court would probably consider itself as having jurisdiction in a case where a Swedish rule on forum would be applicable, i.e. where the defendant resides or has its seat in Sweden, as the case may be, or alternatively, if the infringement took place or the injury occurred in Sweden.

(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

On 1 January 2003, the new Class Action Act (*lag (2002:599) om grupprättegång*) entered into force. The purpose of the Act is to complement the ordinary trial procedure and to improve the effect of existing substantive law. A class action is defined as an action where someone litigates for the members of a group (class), with legal effect for each of these members although the members are not parties to the trial and do not have to participate actively. The Act is based on a so-called "opt in" solution. This means that a class member must choose whether or not he wishes to be included as a member of the class. Only class members who have given written notice to the Court and thus chosen to "opt in", will be allowed to participate in the proceedings as passive members of the class. Individuals, legal persons, organisations and authorities (with a special authorisation from the Government) may initiate a class action.

Three forms of class actions are allowed under Swedish law. Any person or entity may initiate a **Private Class Action** provided that such person or entity has a claim of its own and is a member of the class. In Competition law based claims, this means that an undertaking (i), as well as others in a contractual relationship with the infringing party (ii) may take action. As it has been mentioned above, the above-mentioned Government Committee has proposed to delete the limitation, with the effect *inter alia* that consumer groups and other private individuals affected by a competition law infringement would have a right to compensation even in the absence of any contractual relationship with the infringing party. Further, the law provides for **Organisational Class Actions,** meaning that certain organisations may bring class actions without having a claim of their own. Such actions may be initiated by consumer- and labour organisations and must, as a general rule, concern disputes between consumers and providers of goods or services. Moreover, the law provides for **Public Class Actions** whereby an authority appointed by the Government may act as plaintiff and litigate on behalf of a group of class members. This form of action is intended to permit authorities to pursue claims where the public interest, in a broad sense, suggests that action should be taken.

The above-mentioned Government Committee addressed the question whether the Competition Authority should be given the right to initiate class actions. However, the Committee has proposed not to give the Competition Authority such a right.

D. What are the procedural and substantive conditions to obtain damages?

(i) What forms of compensation are available?

Under Section 33 of the Competition Act, compensation shall cover damages caused by the infringement to another undertaking or to a party to an agreement. The preparatory works of the Competition Act state that such compensation shall cover pure financial loss (*Sw: ren förmögenhetsskada*), in particular loss of income and loss of or damage to property.

Pursuant to Chapter 1, Section 2 of the Tort Liability Act (*skadeståndslagen (1972:207)*), pure financial loss means economic injury arising without any person having concurrently sustained loss of life, personal injury, or loss of or damage to property.

The object of damages for infringement of competition law is to restore the plaintiff's financial situation as if the infringement had never occurred. Therefore, the courts will compare the plaintiff's actual financial situation with the hypothetical financial situation in the absence of the infringement (the so-called "differential" method; see also Section II.G(a)(iii) below. Compensation for *loss of income* shall equal the difference between on the one hand the income which the plaintiff would have earned in the absence of the infringement, and on the other hand the income actually earned (Chapter 5, Section 1, paragraph 2 of the Tort Liability Act).

Compensation for *loss of or damage to property* shall include compensation for the value of the property or for the repair expenses together with compensation for diminished value and other expenses incurred as a result of the loss or damage (Chapter 5, Section 7 of the Tort Liability Act).

Compensation shall also reflect other detrimental effects on the plaintiff's business, even of a more long-term and/or difficult-to-quantify nature (such as loss of goodwill or detrimental impact on an intellectual property right), under the heading *intrång i näringsverksamhet* (sometimes translated as "infringement on a business activity").

When two or more undertakings are liable for the same injury caused by an infringement of competition law, they are – according to general principles of Swedish tort law – jointly and severally liable. A party who has paid compensation to an injured party has a right of recourse against other liable parties.

(ii) Other forms of civil liability (e.g. disqualification of directors)?

Another form of civil law liability that may be relevant in the context of competition law infringements is liability under company law. Pursuant to Chapter 15, Section 1 of the Companies Act (*aktiebolagslagen (1975:1385*)), an incorporator, a member of a board of directors or a managing director may be liable for damages that he causes the company (or a shareholder) intentionally or negligently in the performance of his duties.

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

Pursuant to Section 33 of the Competition Act, liability for damages arises only when an undertaking intentionally or negligently infringes any of the prohibitions in the Competition Act. In other words, intent or negligence is required. The same would probably apply for a claim based on an EC competition law infringement. It is made clear in the preparatory works that the intent or negligence is to be assessed in relation to the (actual or potential) *anti-competitive effects* of the infringement. Thus, there need not be intent or negligence in relation to the fact that the conduct is *prohibited*. On the other hand, it is not sufficient that the infringing party intentionally took the *actions* constituting the infringement.

The preparatory works also state the following. When a physical person (deemed to be an undertaking) has infringed competition law, it must be shown that this person has acted with intent or negligence. When a legal person has committed the infringement, it must be shown that a person in a *leading position* (with management responsibilities) within the company in question has acted with intent or negligence.

The underlying logic or appropriateness of the latter criterion could be questioned. First, it is to be noted that there is a difference between the prerequisites for liability for damages under Section 33 on the one hand and for fines under Section 26 on the other hand. In both cases there must be intent or negligence, but whereas for damages the intent or negligence must be attributable to a person in a leading position this is not necessary for fines to be imposed (under Section 26, there must be intent or negligence on the part of the undertaking *or anyone acting on its behalf*, e.g. an employee). Second, to require intent or negligence on the part of a person in a leading position appears inconsistent with the general principle of tort law that an employer is liable to compensate injury caused by an employee in the course of his employment (Chapter 3, Section 1 of the Tort Liability Act).

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests (covering issues such as rebuttable presumptions and shifting of burden to other party etc.)

The general rules on evidence for civil law cases are applicable to cases concerning damages for infringements of the Competition Act.

Four basic methods of presenting evidence are foreseen under Swedish law, namely:

1. production of documents;
2. hearing of witnesses;
3. hearing of experts; and
4. inspection on site of the subject-matter of the dispute.

The plaintiff has the burden of proof in relation to (i) the infringement (see Section II.E(b) below), (ii) the intent or negligence (see Section II.D(iii) above), (iii) the injury suffered (see Section II.E(c) below) and (iv) the causal link between the infringement and the injury (see Section 2.E(d) below).

Under general principles of procedural law, once a party has discharged its burden of proof in a given respect, the burden shifts to the other party.

(ii) Standard of proof

The standard of proof is that the relevant fact must be "proven" or "shown" (*Sw: "visat"* or *"styrkt"*). This is below the "beyond a reasonable doubt" level, but does not as such involve a "balance of probabilities" exercise.

As for the standard of proof required for interim measures, the law says that "probable cause" (*Sw: "sannolika skäl"*) must be shown as to the claim.

As a general rule, there are no formal differences between the standard of proof requirements in civil matters and criminal trials. However, it is difficult to make any general statements as to whether or not the requirements in practise are indeed stricter for criminal trials than in civil matters. In any case, it can be noted that Swedish competition law is not criminalized.

(iii) Limitations concerning form of evidence (e.g. does evidence have to be documentary to be admissible. Which witnesses can be called, e.g. the CEO of a company? Can evidence/witnesses from other jurisdictions be admitted/summoned?)

Parties may rely on virtually all kinds of documents, statements and occurrences in attempting to prove their case. The court in its discretion may freely evaluate the evidence presented by the parties. In other words, virtually all kinds of evidence are admissible and the parties cannot rely on any technical rules regarding admissibility of certain forms of evidence. Evidence obtained through discovery in other countries would be recognised by Swedish courts. Most likely, even evidence that have been illegally obtained would be admissible in Swedish courts. One exception is, however, that written witness statements are normally not allowed.

Witnesses subject to professional secrecy may not testify concerning matters covered by secrecy.

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis:

- **Defendants**
- **Third parties**
- **Competition authorities (national, foreign, Commission)**

Discovery in the generally accepted meaning of the word[2] does not exist in Swedish law. However, there is a general obligation on any party (whether a party to the proceedings or a third party) holding a written document that can be assumed to be of importance as evidence to produce that document. Upon the request of one of the parties to the proceedings, the court may issue an order to that effect. Such an order should identify the document as well as the place and manner of production. The party obliged to produce the document may be compelled to do so under threat of a fine. The above-mentioned Government Committee has proposed to introduce a discovery-like procedure (called "investigation of evidence") whereby the court may, at the plaintiff's request, order an investigation concerning evidence held by the defendant in a case concerning damages under the Competition Act. This proposition is currently circulating for comments and – among other things – has not yet been reviewed by the Parliament's judicial committee (lagutskottet). Since it is a fairly innovative proposition that already has met some criticism, it is not possible to state in any detail if and how this system will actually take form. For more details of the proposal, see Annex 1.

As a general principle, documents received or drawn up by a *public body* (including the Competition Authority and the courts) are public. This principle is, however, made subject to a number of exceptions in the Secrecy Act (*sekretesslagen (1980:100)*), which lists a number of situations where documents are confidential. In the Competition Authority's case files, information on an undertaking's business, operation, inventions and research results must be treated as confidential if the undertaking in question may be expected to suffer injury if the information is disclosed. In cases under the Competition Act before the courts, similar rules apply. A party that wishes certain information to be treated as confidential should always make such a request to the court or authority, in order to make sure that the sensitive information is identified as such.

As a general rule, confidentiality is only respected vis-à-vis third parties and not vis-à-vis a party to the relevant proceedings. However, a party may request confidentiality to be respected regarding certain information, even vis-à-vis a party to the relevant proceedings (where there are particularly strong reasons for doing so).

2 The term "discovery" has been understood as a description of the mechanism available in some legal systems – usually with a common law tradition – whereby parties can obtain the production of documents and/or other evidence from their opponent or from third parties.

It is possible to appeal against a decision not to disclose a document but not against a decision to disclose a document.

Given the above principles, the importance in practice of the possibility of a court order for production of documents is smaller in relation to public authorities than in relation to private parties. However, a court may order a public authority (for example the Swedish Competition Authority) to produce specified documents even if covered by secrecy under the Secrecy Act (with a few exceptions), which are not accessible under the general principles on public access to documents held by public authorities.

(b) Proving the infringement

(i) Is expert evidence admissible?

As stated above, under Swedish procedural law parties may rely on virtually all kinds of documents, statements and occurrences in attempting to prove their case. The courts may in their discretion freely evaluate the evidence presented by the parties. Consequently, all kinds of evidence (including expert evidence) are in principle admissible. An expert may be appointed to assess any type of issue, including of course the amount of damages.

If it is found necessary, the court may appoint an expert, for instance to assess the amount of damages. Before doing so, the court should let the parties state their views thereon. The law does not give such an expert a higher evidential value that an opinion of an expert appointed by a party. Obviously, in practise an expert appointed by the court perhaps might be viewed upon as more reliable and more "independent". That would however, depend on a case-to-case appreciation.

(ii) To what extent, if any, is cross-examination permissible?

At a main hearing, a party may ask questions to all witnesses, including those called by other parties. Leading questions may not be put unless it is required in order to investigate whether or not a witness invoked by the other party is telling the truth. Moreover, the court shall reject questions that are manifestly irrelevant, confusing or otherwise inappropriate.

(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?

Typically, decisions by other courts and authorities are given considerable weight by Swedish courts.

(c) Proving damage

(i) Are there any specific rules for evidence of damage?

The basic principle is that the extent of injury must be proven (as is the case for the infringement and the causal link). However, if proof regarding the extent of injury cannot be adduced (or can only be adduced with difficulty), the court may estimate the injury at a reasonable amount. This may also be done where the production of the relevant evidence can be expected to entail costs or inconveniences out of reasonable proportion to the extent of the injury and the amount of the claimed damages is minor (Chapter 35, Section 5 of the CJP).

(d) Proving causation

(i) Which level of causation must be proven: direct or indirect?

Direct causation must be proven. In addition, under general principles of Swedish tort law the causal link must be "adequate" (this corresponds approximately to the concept of foreseeability in English law or "reasonable" causation).

F. Grounds of justification

(i) Are there grounds of justification?

As long as the plaintiff (who has the burden of proof) has been able to prove the existence of an intentional or negligent infringement, actual injury and the causal link between the two, there are no special grounds of justification as regards the liability as such, only as regards the amount of the damages ("net" loss) (see below).

(ii) Are the "passing on" defence and "indirect purchaser" issues taken into account?

When quantifying the damages, the "passing-on" defence is in principle available. Such a defence would be successful if it has a bearing on the injury suffered by the plaintiff, since the defendant is only liable to compensate injury *actually sustained*. Since the plaintiff has the burden of proof as to the extent of injury (subject to the possibility for the court to estimate the injury; see Section II.E(c) above) the plaintiff would in principle have to prove that a higher price has not been passed on (although a court may decide that the burden of proof switches to the defendant at some point).

As regards the question whether or not indirect purchasers may claim damages, it should be noted that the preparatory works of the Competition Act state that only parties whose interests are intended to be protected by the Competition Act are entitled to compensation. It is further stated that damages claims based on infringements of competition law can be brought by parties to the breaching agreement, as well as competitors and others that are "directly" affected by the anti-competitive behaviour, but not by "undefined groups of consumers" who are only indirectly affected by the behaviour.

It is unclear (and subject to discussion) whether these statements in the preparatory works should be understood as a further limitation of the circle of those entitled to damages, in addition to the limitation inherent in the wording of Section 33 itself (undertakings and parties to an agreement with the infringing party). In our view, there is no reason why an indirect purchaser should be prevented from claiming damages under the Competition Act as long as it is an undertaking and not a private individual/consumer. In any event, such a purchaser would bear the burden of proof of causation as well as injury (as described above), and would indeed have to prove that the higher price had been passed on to him.

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

It is a general principle of Swedish tort law that damages can be reduced if the plaintiff has contributed, by fault or negligence, to the injury sustained (Chapter 6, Section 1, paragraph 2 of the Tort Liability Act). This principle is also applicable to damages claims based on infringements of competition law.

If the plaintiff has benefited from the infringement, this will have an impact on the calculation of the amount of the damages. In other words, the amount of the damages is reduced to reflect any gains for the plaintiff caused by the infringement (calculating a "net" loss).

G. Damages

(a) Calculation of damages

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

Damages are assessed on the basis of the injury suffered by the plaintiff.

(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?

As long as the plaintiff can show actual injury and causality, there are no formal limitations as to territory.

(iii) What economic or other models are used by courts to calculate damage?

The court is in principle free to use any method for calculating damages. The object of damages is to restore the plaintiff to the financial position it would have been in had the infringement not taken place. Therefore, to the extent that courts use any economic model to calculate damages, it is a comparison between the plaintiff's actual financial situation and the hypothetical situation in which no infringement had taken place.

When establishing this hypothetical scenario, the court must take into account all factors prevailing in that scenario, whether to the plaintiff's advantage or disadvantage. For example, it may be that in the absence of the infringement, added sales would have increased the plaintiff's cost of production, investment etc. This must be taken into account and may reduce the level of damages. Also, when quantifying the amount of the damages to be awarded, the court will take into account whether or not the plaintiff has done what can be reasonably expected of him in order to limit the injury. As mentioned above, if proof regarding the extent of injury cannot be adduced (or can only be adduced with difficulty), the court may estimate the injury at a reasonable amount.

(iv) Are ex-ante (time of injury) or ex-post (time of trial) estimates used?

The courts freely calculate the injury sustained, and there are no principles governing whether ex-ante or ex-post estimates should be used. As mentioned above, the plaintiff must show actual injury as well as causality. The additional requirement that the causality must be "adequate" may limit the extent to which developments after the time of injury are taken into account.

(v) Are there maximum limits to damages?

Damages are awarded only for injury *actually sustained*. However, there are no formal limitations as to the level of damages.

(vi) Are punitive or exemplary damages available*?*

No, punitive or exemplary damages are not available under Swedish law.

(vii) Are fines imposed by competition authorities taken into account when setting damages?

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

(b) Interest

(i) Is interest awarded from the date

- **the infringement occurred; or**
- **of the judgment?; or**
- **of a decision by a competition authority?**

Provided that the plaintiff so requests, interest on damages is awarded from the 30th day following the day on which the plaintiff addressed a written claim for damages to the defendant, together with the basis for the claim and the calculations which, under the circumstances, can be reasonably required. In any event, interest may be awarded from the date of service of the summons application. These rules are found in the Interest Act (*räntelagen (1975:635)*).

Compensation for litigation costs includes interest from the date of the court's ruling until the day of payment.

(ii) What are the criteria to determine the levels of interest?

Pursuant to the Interest Act, the interest is calculated *per annum* and is eight percentage points above the reference rate decided by the Central Bank of Sweden, as applicable from time to time.

(iii) Is compound interest included?

No, compound interest is not awarded.

H. Timing

(i) What is the time limit in which to institute proceedings?

Section 33, paragraph 2 of the Competition Act stipulates that the right to damages for breaches of the Competition Act lapses if no claim is brought within five years from the date on which the injury was sustained (irrespective of whether the injured party had knowledge about the injury and/or its cause). Other events, such as initiation of an investigation by the Swedish Competition Authority, do not "stop the clock". As with other aspects of Section 33, this limitation period is deemed applicable by analogy to claims for damages based on infringements of EC competition law. The above-mentioned Government Committee has, however, proposed to increase the limitation period from five to ten years.

(ii) On average, how long do proceedings take?

It is difficult to state on a general basis how long proceedings will take, as it will depend on the circumstances of each case. Depending on the complexity of the case and the number of instances, a case can take roughly from one year for a "simple" case with no appeal to perhaps five years (or more) for a complex case in three instances.

(iii) Is it possible to accelerate proceedings?

No, there are no formal procedural possibilities to accelerate proceedings. However, the court may in some circumstances order security measures (*Sw: kvarstad*) if it is reasonable to suspect that the defendant is trying to evade payment.

It could be noted that it is possible to have partial judgment under Swedish law, for instance whereby the existence of the damage is determined and let the court order a stay of the proceedings on the remaining issues of the case, for instance the assessment of quantum, until the separate judgment enters into force (cf. Chapter 17, Section 4 and 5).

(iv) How many judges sit in actions for damages cases?

The *district court* normally consists of three legally qualified judges. Four legally qualified judges normally sit in the *court of appeal*. Five justices constitute a quorum in the *Supreme Court*. Unlike in cases regarding *inter alia* fines for competition law infringements, concentrations between undertakings and investigation orders, there are no procedural provisions stipulating a special composition of the Stockholm District Court (with economic experts) in damages cases. However, within the Stockholm District Court, department 4 deals specifically with competition cases.

(v) How transparent is the procedure?

Documents in the file (including the parties' briefs) are as a rule public and everyone, party or not, has access to the file. However, a party may ask the court that information relating to its business operations be treated as confidential if its

business can be expected to suffer injury if the information is disclosed. Oral hearings are in principle open to the public, although the court can order otherwise when confidential information is being presented.

There are no specific legal provisions prohibiting the publication of a judgment. However, the collections of judgments that are published regularly by the Swedish Judiciary (SW: Domstolsverket) are protected under the Copyright Act (Chapter 1, Section 9, para 2). Moreover, the Personal Data Act (based on Directive 95/46/EC which aims to prevent the violation of personal integrity in the processing of personal data) sets up some restrictions as to the possibility to publish personal data included in a judgment.

I. Costs

(i) Are Court fees paid up front?

The plaintiff must, when filing a summons application, pay an application fee of 450 SEK (approximately 50 EUR). If this fee is not paid at the time of submission, the court must order the plaintiff to pay. If the plaintiff still fails to do so, the application must be dismissed. Other than this minor application fee, the parties are not obliged to pay any fees to the court.

(ii) Who bears the legal costs?

In relation to the parties' costs, the general rule is that the unsuccessful party shall reimburse the winning party for litigation costs. The costs may also be apportioned between the parties depending on the degree of success of each party.

Under Swedish law, a foreign national not resident in Sweden or a foreign legal person bringing an action before a Swedish court against a Swedish national or a Swedish legal person must, at the defendant's request, furnish security to guarantee payment of the costs for the judicial proceedings which the person or company may be ordered to pay. This law was amended following the ECJ judgment in case C-43/95 *Data Delecta* ([1996] ECR I-4661) and no longer applies to residents of the EEA.

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

Generally, the Swedish Bar Association does not accept that its members charge contingency fees, since these would be regarded upon as un-proportionate. However, within the framework of a class action, a court may upon application accept that contingency fees are set.

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

The winning party can recover all reasonable litigation costs from the losing party.

(v) What are the different types of litigation costs*?*

Compensation for litigation costs in cases exceeding a certain value threshold[3] shall fully cover the costs for preparation and presentation of the case including counsel's fees, to the extent that the costs have been reasonably incurred to safeguard the party's interests. Compensation shall also cover the time and effort expended by the party itself for the litigation. Settlement negotiations are deemed to be measures for the preparation of the case. Compensation shall also include interest (see Section II.G(b) above).

(vi) Are there national rules for taxation of costs?

As noted above, costs are recoverable by the successful party to the extent they have been "reasonably incurred to safeguard the party's interests". It is for the

3 Half the base amount pursuant to the National Insurance Act, approximately 20,000 SEK or 2,200 EUR.

court to assess whether all or part of the costs claimed by that party fulfil this criterion, and set the amount of recoverable costs in consequence. No rules are set down, e.g. on ceilings for costs, directing the court in this exercise.

(vii) Is any form of legal aid insurance available?

Apart from private legal aid insurance, the possibility of receiving legal aid is very limited. In general, public legal aid for legal persons is not available.

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

The cost for a court case concerning damages for breach of competition law can be expected to vary widely, depending on the complexity of the case (particularly the amount of evidence) and the number of instances: from quite little (perhaps around 100,000 SEK) in a straightforward case with no appeal to millions of SEK in a complex case through all three instances.

J. General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

As stated above, the Competition Act contains a specific provision (Section 33) on liability for damages due to infringements of the competition rules. Nevertheless, most answers above largely apply to tort actions in general. The most important difference relates to the extent of the liability. Under Swedish law, non-contractual liability does not normally cover pure financial loss, except in case of criminal behaviour. In this respect, liability for competition law infringements is one of a few exceptions.

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

No, not according to any provision of Swedish law. However, it should be stressed that this study does not analyse the question whether or not EC law may require more generous remedies for infringements of EC competition law than the remedies offered by current Swedish procedural rules.

(iii) Are there any differences according to whether the defendant is a public authority or a natural or legal person?

Actions for damages under the Competition Act brought against public authorities and publicly owned companies follow the same rules as actions brought against private companies.

For a damages claim based on the fact that a state measure violates Article 81 or 82 of the EC Treaty, the criteria set out by the ECJ in the *Francovich* case law (as amended) are applicable. Such a claim would be heard by the Chancellor of Justice (*Justitiekanslern*)[4] in accordance with the rules set out in the Swedish Regulation on the Hearing of Liability Claims against the State.

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

No, these aspects are independent of each other.

4 *Justitiekanslern* corresponds approximately to the Lord Justice in Great Britain.

(v) Are there any differences from region to region within the Member State as regards damages actions for breach of national or EC competition rules?

Legally, there are no such differences. In terms of practice, it is not possible to identify any differences since there is no case law.

(vi) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction.

To our knowledge, there is as yet no Swedish case law on damages for breach of competition law, either based on the Competition Act or on EC competition rules.

It may be of interest to note in this context that there has been one case where the courts ordered *repayment* of already paid amounts under an agreement, due to invalidity under competition law. The courts (Göta Court of Appeal; the Supreme Court denied leave to appeal) found that a state authority (the Swedish Civil Aviation Administration, *Luftfartsverket*) had abused its dominant position in violation of both Section 19 of the Competition Act and Article 82 of the EC Treaty. The abuse consisted of discrimination of the airline company SAS. The relevant agreements were found to be invalid and the Civil Aviation Administration was ordered to repay approximately SEK 600 million to SAS.

(vii) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon.

No such statistics are available. As mentioned above, we are not aware of any cases where these issues have been decided upon.

III. Facilitating private enforcement of Articles 81 and 82 EC

(i) Which of the above elements of claims for damages (under sections II) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

Recently, the above-mentioned Government Committee made a number of proposals in this area, some of which are mentioned above (a summary in English of the proposals is attached as Annex 1). First of all, the Committee proposes to explicitly include infringements of EC law within the scope of Section 33 of the Competition Act. Further, the Committee proposes to allow damages claims for competition law violations to be brought by parties other than undertakings and parties to an agreement with the infringing party. The Committee finds that the possibility for consumer groups and indirectly affected market actors to claim damages, especially in combination with the possibility of class action, should facilitate the private enforcement of competition law, particularly in relation to infringements affecting private consumers where the individual injury has a low economic value. The Committee's proposals also include prolonging the current five-year limitation period to ten years as well as introducing a discovery-like procedure allowing the plaintiff to get access to evidence held by the defendant.

Punitive damages or treble damages do not exist under Swedish law – only actual injury is compensated. The Committee notes that it may be discussed if the possibility (or the threat) of such damages could work preventively and facilitate private enforcement of competition law. However, the Committee strongly rejects the idea of presenting any suggestions to that effect, since it would constitute a drastic change of the fundaments of the Swedish tort law to introduce such a legal instrument in Sweden.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

Section 1 of the Arbitration Act stipulates that arbitrators may rule on the civil law effects of competition law as between the parties. Parties may also freely decide to settle disputes out of court.

No public figures or studies on these issues are available. It is interesting to note in this respect that to our knowledge, there is as yet no Swedish case law from the courts on damages for breach of competition law, either based on the Competition Act or on EC competition rules (although there have been a few cases on damages for breach of the Competition Act which have been settled out of court, and there are a few pending cases as well). This lack of case law suggests that alternative means of dispute resolution are sometimes used.

IV. Bibliography

1. Carlsson, K. et al, *Konkurrenslagen – En kommentar* (Norstedts 1999)
2. Wahl, N., *Konkurrensskada – Skadeståndsansvar vid överträdelse av EG:s konkurrensregler och den svenska konkurrenslagen* (Jure 2000)
3. Wetter, C. et al, *Konkurrenslagen – en handbok* (Thomson Fakta 2002)

V. National case law summaries

As explained above, there have been no relevant cases decided so far.