

# Summary

## Terms of reference

The Committee has previously submitted the interim report "Reformerad konkurrensövervakning" – Reformed monitoring of competition – (SOU 2003:73)

Under the terms of reference the Committee shall make a comprehensive examination as to whether the circle of parties entitled to damages as defined by the Swedish Competition Act should be extended and, if deemed appropriate, propose amendments to the regulations. Where the Committee finds that the group of those entitled to damages should be extended as regards consumers, the Committee shall also consider whether it is appropriate to enable the Swedish Competition Authority to conduct class actions in accordance with the Class Actions Act.

The Committee shall furthermore review the method of calculation of fines in combinations of undertakings. The Committee may, in addition, submit proposals for amendments in other respects, should it prove that there are differences between Community law and national law.

Under the terms of reference the Committee shall submit a report on these matters by 31 January 2004 at the latest.

In supplementary terms of reference, dir. 2003:175, the Committee has been instructed to prepare a concrete legislation model for making it a criminal offence to infringe the prohibitions in the Competition Act against restrictive agreements and abuse of a dominant position and to make an in-depth legal analysis. A report covering the matters specified in the supplementary terms of reference shall be submitted by 31 December 2004 at the latest.

In this interim report the Committee reports on the second stage of its assignment.

## Outline of the report

In *chapters 2–3* a general description is given of the Community competition rules and Swedish competition legislation.

*Chapter 4* contains a list of what characterises federal American anti-trust legislation, concentrating on damages.

In *chapters 5–9* an account is given of the Committee's deliberations on the various issues arising from the terms of reference.

In *chapter 5* the Committee deals with matters concerning damages in connection with infringements of the competition rules.

*Chapter 6* deals with a new institution within competition legislation – investigation of evidence in actions for damages.

In *chapter 7* the Committee discusses the significance of the differences in substance between the Competition Act and Community law.

In *chapter 8* the Committee discusses the ceiling for the administrative fine in combinations of undertakings and the calculation of the fine in such cases.

*Chapter 9* addresses the Swedish Competition Authority's possibilities of carrying out investigations in private places.

In *chapter 10* the Committee describes the consequences of its proposals.

*Chapter 11*, finally, contains explanatory notes.

## Considerations of the Committee

### *Extension of the circle of parties entitled to damages*

The Swedish Competition Act was modelled on Community competition law. Both the substantive prohibitions and the procedure and sanctions follow Community law closely. If an undertaking wilfully or negligently infringes any of the prohibitions, the company shall compensate the losses arising thereby for *another undertaking or a contracting party*.

The Committee has found that the limitation of the circle of parties entitled to damages following from the term "contracting party" in the wording of the Act has had questionable consequences for public tenders and should be withdrawn.

Consumers who are contracting parties with the company liable to pay damages are entitled to damages under the wording of the legal provision. However, the Act's preparatory work states that

unspecified circles of consumers who are indirectly affected by prohibited restrictions are not entitled to damages. Differences in consumers' rights to receive compensation for loss depending on whether or not a contractual obligation exists between them and the company in question appear unwarranted. Hence the restriction to contracting parties should also be removed as regards consumers.

The provision concerning damages in the Competition Act should therefore be amended to make it clear that people other than companies or contracting parties are entitled to compensation in the situations here described for losses suffered through an infringement of the prohibitions in the Competition Act.

For the reasons now given the Committee proposes that the circle of those entitled to receive damages under the Competition Act be extended so that it is no longer restricted – apart from companies – to contracting parties.

### *Public class action*

Under the new Class Actions Act (2002:599) the government may designate authorities to bring public class actions. A further public interest shall be served – other than that the individual's claims are met – in order for a public class action to be justified. In the area of competition law this public interest is satisfied through the public law system of sanctions in the Competition Act. The possibility for the Competition Authority to pursue a class action would probably not contribute anything in this respect; instead the Authority's resources should be used to maintain the regulatory system under public law. At present the Committee does not see sufficiently strong reasons for proposing that the Competition Authority or any other authority be designated to bring public class actions for damages based on infringements of competition law. There may, however, be reason for the question to be reconsidered when experience has been gained as regards public class actions in other areas.

*The rules on damages in the Competition Act are also applicable to infringements against Articles 81 and 82 of the EC Treaty*

When the government in previous legislation contexts<sup>1</sup> refrained from expressly regulating the right to damages for infringements of Articles 81 and 82 the important case for setting a precedent on preliminary rulings – *Courage v. Crehan* – was pending before the European Court of Justice. The case has now been decided and certain matters of Community law on damages in competitive situations have been made clear through the judgement. The Committee proposes that the Competition Act's rules on damages now be made applicable to infringements of Articles 81 and 82 of the EC Treaty.

*Period of limitation for a claim for damages*

Under the present system the right to damages under the Competition Act lapses unless action is brought within five years of the date when the damage arose.

In the opinion of the Committee an extension of the five-year period of limitation is justified. The Committee calls attention to the fact that the period of limitation is rather short in such cases where the action for damages follows in the wake of the Competition Authority's investigations and procedures. In addition, doubts have been expressed concerning the compatibility of the rule with Community law. The Committee proposes that the period of limitation be changed to ten years, which is the general period of limitation under the Act on Limitation (1981:130).

*Investigation of evidence in actions for damages*

In order to enable the rules on damages to be applied in practice the injured party's gathering of evidence must be facilitated or assisted. In this way the deficiencies that exist within competition legislation as regards incentives and opportunities for initiative on the part of individuals can to some extent be redressed. In the opinion of the Committee more effective means are required for

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<sup>1</sup> Bill 1999/2000:140 p 201 f.

securing evidence in civil actions concerning damages due to infringement of competition rules.

The Committee therefore proposes that a new institution for civil proceedings be introduced within competition law on the model of the institution of infringement investigation in intellectual property law. The new institution is called investigation of evidence. It is proposed that the main features of the institution be as follows. In an action at law concerning a claim for damages pursuant to the Competition Act, at the request of the claimant the court may decide on an investigation of the defendant to search for and secure evidence concerning the claimant's claim for damages. The evidence shall be able to cover all aspects of the liability to pay damages, both the infringement on which the claim for damages is based and the causal link and amount of the damages. The investigation of evidence shall be carried out by the enforcement service. A special procedure is proposed for the purposes of protecting trade secrets.

#### *Differences in substance between the Competition Act and Community law*

The Committee has analysed the differences in substance that exist between the Competition Act and Community law. The Committee has concluded that in view of the so-called modernisation reform (see the Committee's interim report on Reformed Monitoring of Competition, SOU 2003:73) it is hardly required that all differences between the Competition Act and Community law be removed. The separate Swedish solutions that exist in various areas of Swedish competition legislation are the result of exhaustive political considerations and choices. Even though the Committee regards it as its task to work in general towards removing the differences between the legal systems, the Committee has therefore not considered that strong enough reasons exist for making any proposals in this respect.

*Administrative fines and combinations of undertakings*

The point of departure of the terms of reference is that differences between Community law and Swedish law as regards the method of calculating fines and administrative fines in combinations of undertakings should be eliminated if possible. However, the Committee has not been able to find any evidence that there is any difference between Community law and the Competition Act as regards the method of calculating the ceiling for fines or administrative fines in combinations of undertakings.

The Committee has therefore found that the Competition Act does not need to be changed as regards determining the ceiling for administrative fines for combinations of undertakings.

*Calculation of administrative fines*

The method for calculating fines and administrative fines is separate from the method for calculating the ceiling on the amount and not necessarily linked to the turnover of the undertakings. In the opinion of the Committee the current rules can be applied when determining the administrative fine so that the financial strength of the undertaking or combination of undertakings can be taken into account, so that the fine will have a sufficiently deterrent effect.

The Committee proposes, however, a minor adjustment to the effect that when determining the administrative fine it can also be taken into account as an aggravating circumstance that the undertaking has previously infringed Articles 81 and 82 of the EC Treaty.

*The Competition Authority's investigation in private places*

The Competition Authority is entitled, after being granted authorisation by the Stockholm City Court, to conduct investigations at a company's business premises or other premises. The Committee proposes that the Competition Authority be given express powers, after authorisation by a court, to carry out investigations in homes and other places used by board members and employees of the company that is the subject of inquiry concerning infringement of the prohibitions in the Competition Act or Articles 81 and 82 of the EC Treaty.

*The obligation of the Competition Authority to await legal counsel*

When the Competition Authority is to carry out an investigation the subject of the investigation is entitled to summon legal counsel. Pending the arrival of such legal counsel the investigation may not start. This is not applicable, however, if the investigation is thereby unnecessarily delayed, or if the investigation has been decided on without communication with the subject of the investigation. The Competition Act deviates here from Community law. The Commission should in normal cases defer the start of the investigation if the legal counsel may be expected to arrive within one hour.

In the opinion of the Committee this difference is not warranted. The Committee therefore proposes that the provision in the Competition Act be amended so that it more closely agrees with Community law on this point. The Committee proposes that this shall also apply to investigation of evidence.

*Date of coming into force*

It is proposed that the new rules come into force on 1 April 2005. The Committee further proposes two transitional provisions. The first transitional provision implies that the new regulation concerning aggravating circumstances when determining an administrative fine is to be applied to infringements after the date of coming into force. The second transitional provision implies that the new period of limitation of ten years shall also be applied to claims arising before the date of coming into force and which have not become statute barred before that date under older regulations.