

The International Comparative Legal Guide to:

Competition Litigation 2009

A practical insight to cross-border Competition Litigation



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1 General

1.1 Please identify the scope of claims that may be brought in Sweden for breach of competition law.

In general there are three possible scopes of claims for breach of competition law in Sweden.

First, proceedings may be initiated by the Competition Authority before the Stockholm District Court in order to impose a fine where a company, or someone acting on behalf of the company, intentionally or by negligence has infringed the prohibited restrictions of competition. Only the Competition Authority may initiate such proceedings.

Second, a company that infringes the rules on competition may receive a cease and desist order from the Competition Authority. The cease and desist order may be combined with a penalty of a fine. Where the Competition Authority decides not to impose such an order, it may instead be imposed by the Market Court upon request by a company affected by the infringement. Thus, a company affected by the infringement has to first turn to the Competition Authority with a complaint of the infringement, and await that the Competition Authority decides not to handle the case before it may address the Market Court.

Third, a company or a private person suffering from an infringement of the competition rules may also claim damages for losses suffered from a company that intentionally or by negligence has infringed the prohibited restrictions of competition. Such claims may be brought before a district court. It is also possible to bring a case regarding damages together with a case where the Competition Authority claims a fine.

1.2 What is the legal basis for bringing an action for breach of competition law?

The Swedish Competition Act regulates the restrictive agreements prohibition under Chapter 2 sections 1, 2 and 6 which correspond to Article 81 EC and abuse of dominant position under Chapter 2 section 7 which correspond to Article 82 EC. (Until 2008-10-31 the relevant sections in the Swedish Competition Act was sections 6-8 corresponding to Article 81 EC and section 19 corresponding to Article 82 EC).

Also Articles 81 and 82 EC are applicable in Sweden.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

A claim of breach of the competition rules in Sweden can be based on

applicable sections in the Swedish Competition Act (national law) as well as on Articles 81 and 82 EC (international law).

1.4 Are there specialist courts in Sweden to which competition law cases are assigned?

There are no specialist courts which handle competition law cases exclusively. There are, however, special forum rules applicable to certain competition law cases. Proceedings initiated by the Competition Authority shall be brought before the Stockholm District Court. A decision by the Stockholm District Court may be appealed to the Market Court. Furthermore, certain decisions by the Competition Authority, for example cease and desist orders, may be appealed to the Market Court.

Proceedings for damages follow the general processing rules in Sweden (different district courts), however, the Stockholm District Court is always competent to process such cases. A decision of a district court is appealed to a court of appeal. Only where a damages case is brought together with a case regarding imposition of fines, the decision of the court (Stockholm District Court) is appealed to the Market Court.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Only the Competition Authority has standing to bring an action before the Stockholm District Court to ask for an imposition of a fine on a company infringing competition law.

Should the Competition Authority in a case decide not to impose an obligation to terminate an infringement of any of the prohibitions laid down in Chapter 2 sections 1 and 2 and Chapter 2 section 7 in the Swedish Competition Act, or Article 81 or 82 EC, an undertaking affected by the infringement may bring an action before the Market Court in order to obtain a cease and desist order from the court.

Collective claims and class actions are possible in Sweden. However, the Competition Authority may not plead damages for someone else, e.g., a group of consumers or anyone else that has incurred loss. The person or persons that have incurred loss due to the infringement have to bring actions for damages themselves, either alone, together or by arranging a class action.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

If an infringement has effects on Swedish territory, a court can impose fines on the company concerned and issue a cease and desist order.

In principle, for a Swedish court to have competence in a case regarding damages the board of directors of the infringing company must have its domicile in Sweden or the infringement occurred or the damage arise in Sweden.

1.7 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, interim remedies are available in competition cases.

2.2 What interim remedies are available and under what conditions will a court grant them?

A court may issue a cease and desist order as an interim remedy. Such an interim remedy will be granted under the conditions that:

- a prima facie infringement of the competition rules is established;
- it is proven that a party may suffer serious and irreparable damage; and
- the cease and desist order is proportionate.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

An infringing company may, upon request of the Competition Authority, be ordered by the Stockholm District Court (or by the Market Court after appeal) to pay a fine where the company, or someone acting on the behalf of the company, intentionally or negligently has infringed the prohibited restrictions of competition. Such a fine is paid to the state. The size of the fine may however not exceed ten per cent of the annual turnover of the company concerned in the preceding financial year. The tests applied by the court are that the Competition Authority has succeeded in proving that the company concerned indeed infringed the prohibited restriction of competition and furthermore that the Competition Authority successfully presented evidence and arguments justifying the size of the fine sought.

The Market Court may also in a case issue a cease and desist order to bring an infringement to an end. Such a decision may be combined with a penalty of a fine. The tests applied by the court is whether the plaintiff has succeeded in proving that an infringement of the competition rules indeed has occurred and still is ongoing.

Where a company has intentionally or negligently infringed the prohibited restrictions of competition, the court may decide to award damages to a suffering party. The tests again is whether the infringement of the competition rules has been proved and whether the suffering party successfully has been able to prove damage and a causal link between the infringement and the damage suffered.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?

The purpose of the damages is to compensate for the actual loss caused by the infringement. The basis for a court decision will therefore mainly be evidence brought forward to show such losses and an assessment thereof. Exemplary damages are not available.

3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

No, the court will not take into account any fines imposed by competition authorities when calculating the award. The calculation of the award is only based on the actual damage caused.

4 Evidence

4.1 What is the standard of proof?

In cases regarding imposition of fines, the standard of proof is rather high. The Competition Authority must clearly show that the infringement has taken place in the way described by it and must also present an investigation and arguments in support of the size of the fine sought.

In cases regarding cease and desist orders the standard of proof is in principle the same as in cases regarding imposition of fines, i.e., the plaintiff must clearly show that the infringement has taken place in the way described by the plaintiff.

In cases regarding damages, the standard of proof with respect to the infringement is a little bit lower than described above. With respect to calculating the award, a court may estimate the award to a reasonable amount if there are difficulties of fully proving the damages.

4.2 Who bears the evidential burden of proof?

The plaintiff bears the evidential burden of proof, i.e., in proceedings regarding imposition of fines it is the Competition Authority and in proceedings regarding cease and desist orders it is the company concerned or the Competition Authority (as the case may be). In cases regarding damages it is the party which has incurred the loss and brought the action that bears the burden of proof.

4.3 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

There are no limitations on the forms of evidence that may be put forward. Expert evidence is accepted by the courts and is frequently used in Swedish competition cases.

4.4 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

In general, no documents can be obtained before proceedings have begun. During proceedings in court a party may ask the court to order the other party or any third party the disclosure of such documents that can be assumed to be of importance as evidence in the proceedings (Sw: editionsföreläggande). Such an order may also be directed to the Competition Authority or any other

regulatory authority. Neither the other party, other parties nor the Competition Authority are however obliged to disclose business secrets unless there is a particular reason for their disclosure.

4.5 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Witnesses may be forced to appear in court and a full cross-examination is possible.

4.6 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Infringement decisions by national or international competition authorities or an authority from another country have probative value in Sweden. However, there is always a possibility that the findings of the authority may be rejected.

4.7 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As a general principle, information or data is comprised by commercial confidentiality in cases concerning infringements of competition law when it can be presumed that the party concerned would suffer damage if the information/data is disclosed. However, in cases concerning damages information/data is comprised by confidentiality only if it can be presumed that the party would suffer considerable damage if it is disclosed.

Information/data comprised by commercial confidentiality will in such cases be presented in court behind closed doors. Such information/data must however be disclosed to the other party unless it is particularly important that it is not disclosed. In such a situation, however, the other party has an unconditional right to be informed of all the circumstances which are relied upon by the court when it decides the case.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

There is no prohibition in the Swedish jurisprudence in using the defence of justification/public interest.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

There is no prohibition in the Swedish jurisprudence in using the "passing on defence". The general principle when calculating the size of damage suffered is that damages can be awarded only for the "real damage" suffered.

Indirect purchasers always have legal standing to bring a claim for damages but they must be able to show identifiable losses and a causality between the loss and the infringement of competition law in order to be successful.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Yes. A fine may only be imposed where a summons application has been served on the party concerned within five years of termination of the infringement. However, should the company concerned be notified of a decision of inspection of the company's premises or a statement of objection within this time period, the limitation period is interrupted and a new 5-year period will run.

The right to claim damages has a 10-year statutory limit from the date when the damage was caused.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Normally a period of 2-3 years must be expected for the courts to hear a case (sometimes even longer). It is not possible to expedite the proceedings. The investigation by the Competition Authority preceding a claim for fines normally takes around one year.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

If a plaintiff withdraws the claim, for example if a settlement is reached, the court is obliged to cease the proceedings and remove the case from the case list.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Yes, in cases regarding damages and normally when private parties seek a cease and desist order at the Market Court.

In cases regarding imposition of fines, a defendant is compensated for legal costs if the Competition Authority's claims are rejected by the court (only legal costs arisen after the statement of objection). The same applies for legal costs in the court proceedings when a cease and desist order issued by the Competition Authority has been appealed and the Market Court rescinds the order. Normally, the Competition Authority can not recover its legal costs if the Authority's claims are approved by a court.

8.2 Are lawyers permitted to act on a contingency fee basis?

No, members of the Swedish Bar Association are not permitted to act on a contingency fee basis.

8.3 Is third party funding of competition law claims permitted?

Yes, third party funding of competition law claims is permitted.

9 Appeal

9.1 Can decisions of the court be appealed?

Decisions of the Stockholm District Court in cases regarding imposition of fines can be appealed to the Market Court. Decisions of the Market Court in competition cases can not be appealed.

Decisions of district courts in cases regarding damages can be appealed to a court of appeal and then further, after being given leave to appeal, to the Supreme Court.

10 Leniency

10.1 Is leniency offered by a national competition authority in Sweden? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Leniency may be offered by the Competition Authority to a participant in a cartel agreement. Neither a successful nor an

unsuccessful applicant for leniency is however given immunity from civil claims.

10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Yes. However, at the instance of a plaintiff a court may order a defendant to disclose such documents that can be assumed to be of importance as evidence in the proceedings. Furthermore, a court may also order the Competition Authority to disclose documents that can be assumed to be of importance as evidence, for example information disclosed to the Authority by the leniency applicant. However, neither the defendant nor the Competition Authority is obliged to disclose business secrets unless there are a particular reason for its disclosure.

It should be noted that any individual can be summoned as a witness in the proceedings. The obligation to testify corresponds to the obligation to disclose documents.



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Gernandt & Danielsson

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