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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Sweden --

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-- Sweden --

1. Overview of private enforcement in Sweden

1.1 Legal background and influences

1. Since the very beginning of the European integration, competition policy was regarded as an important instrument in the creation of the single market (formerly referred to as the common market). The competition law regime of the European Union (the "EU") is, therefore, an integral part of the EU legal system and shares the same main objectives as the regulatory system in general. It is not surprising, therefore, that the EU competition regime has largely stood as a model for the national competition legislation of a number of Member States. Sweden is no exception in this regard and the Swedish Competition Act[1] is in many aspects modeled on and has evolved in close unity with the competition law regime of the EU. Its substantive prohibitions and its rules on procedure and sanctions, therefore, closely follow, and to some degree even mirror, the EU system.

2. Although many Member States of the EU have modeled their national competition legislations to confirm with the central competition regime of the EU, one has to keep in mind that our legal traditions differ, in some ways significantly. This is particularly true when comparing the experiences which Member States may have in terms of private actions in general and private actions for damages due to infringements of competition law in particular. In Sweden there is not much practical experience regarding private enforcement in the field of competition law and many debated questions in this field, such as evidentiary issues, remain unanswered in the Swedish courts' jurisprudence.[2]

1.2 The substantive prohibitions in the Swedish Competition Act and rules for public enforcement

3. It follows from the above that Swedish competition law is to a large extent based on the same principles that apply within the EU. The Swedish Competition Act contains two main provisions: the prohibition of anti-competitive co-operation between undertakings[3] and the prohibition of abuse of a dominant position[4]. The first two provisions mirror the prohibitions laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") respectively.

4. The division of competences to take decisions and impose fines between the Swedish Competition Authority (the "SCA") and Swedish courts can briefly be described as follows. The SCA may require an undertaking to terminate an infringement of the prohibitions against anti-competitive co-operation between undertakings or abuse of a dominant position in the Competition Act or TFEU. The obligation imposed may be that the undertaking must stop applying certain agreements, terms of agreement or some other prohibited practice. The order may also relate to an obligation concerning sales, rectification or prices. Such obligations take effect immediately unless other provisions are made, and are normally subject to the penalty of a fine. If particular grounds exist, the SCA may impose such an obligation for the period until a final decision is taken.[5]

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1 Sw. Konkurrenslagen (2008:579).

2 Although there have been a few private damages cases brought before the Swedish courts, one has to bear in mind that some of these claims have subsequently been subject to settlement out of court. A few examples of private damages cases are provided in section 1.3 below.

3 Chapter 2, Article 1, the Swedish Competition Act.

4 Ibid., Chapter 2, Article 7.

5 Ibid., Chapter 3, Articles 1 and 3, and Chapter 6, Article 1.

5. The SCA is generally not entitled to decide on financial penalties for infringements of the Competition Act. If an undertaking has, intentionally or negligently, infringed the prohibition against anti-competitive cooperation between undertakings or the prohibition against abuse of a dominant position, the SCA may request the Stockholm District Court to impose a fine on that undertaking in a summons application.[6] However, if the SCA considers that the material circumstances regarding an infringement are clear, it may issue a fine order in cases that are not contested. If an undertaking consents to a fine order within a specified time, the SCA may not instigate proceedings against that undertaking. It falls on the SCA to decide whether a fine order is considered appropriate in an individual case. A fine order that has been accepted is regarded to be a legally binding judgment, but it can under specific conditions be set aside upon appeal to the Stockholm District Court.[7]

6. Appeals against judgments and decisions of the Stockholm District Court and the SCA relating to competition law issues may be lodged with the Market Court, which is a specialized court and the court of final instance in relation to cases regarding competition and marketing law. A leave to appeal is always required for the Market Court to review the Stockholm District Court's rulings.[8] The Market Court has so far only refused leave to appeal regarding various procedural matters. A leave to appeal is not required for the Market Court to review the SCA's decisions.

7. A decision whereby the SCA decides not to give priority to a case (and thus decides to close it), cannot be appealed. However, if the SCA has decided not to intervene against an alleged infringement, affected undertakings are entitled to institute proceedings before the Market Court.[9] Such a subsidiary right to legal actions does not exist if the SCA's decision to close a case is based on Article 13 of the Council regulation (EC) No 1/2003.[10]

8. For a more detailed description of the rules pertaining to public enforcement, see Sweden's contribution to the WP3 roundtable on institutional and procedural aspects of the relationship between competition authorities and courts.[11]

1.3 Public enforcement

9. During an investigation, the SCA may require undertakings or other parties to supply necessary information, documents or other material and persons to appear at a hearing. Such obligations may ultimately be imposed under penalty of a fine.[12] The SCA may conduct inspections at the premises of undertakings to establish whether they have infringed the prohibitions of anti-competitive co-operation between undertakings and abuse of a dominant position.[13] Such inspections may under certain conditions

6 Ibid., Chapter 3, Article 5.

7 Ibid., Chapter 3, Articles 16-19.

8 Ibid., Chapter 8, Article 3

9 With regard to infringements of the prohibition against anti-competitive sales activities by public entities such actions are brought before the Stockholm City Court, see Chapter 3, Article 32, the Swedish Competition Act.

10 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

11 DAF/COMP/WP3/WD(2011)85.

12 Chapter 5, Articles 1-2, and Chapter 6, Article 1, the Swedish Competition Act.

13 Chapter 2, Articles 1 and 7, the Swedish Competition Act, and Articles 101 and 102 TFEU.

also refer to homes and other premises of the board and employees of the undertaking which is subject to investigation. Permission must always be granted by the Stockholm District Court.[14]

10. Public enforcement cases, i.e. cases where the SCA is a party, are not amenable to out of court settlement. However, as mentioned above, undertakings can make commitments. Discussions regarding commitments normally take place before a case is taken to court. Undertakings can also accept fine orders issued by the SCA. It is quite common that cases are settled in this way. The parties' incentive to make commitments or accept fine orders may be to avoid the costs, the uncertainty and the presumptive negative publicity of a procedure before court. It is always up to the SCA to decide in each individual case whether it considers it appropriate to accept a commitment or a fine order. Under certain conditions undertakings that acknowledge their involvement in an illicit cartel may also be granted leniency or a fine reduction[15]

11. Parties in public enforcement cases have more extensive rights to invoke new evidence – both documentary and oral – and new circumstances, than in most other civil cases. The SCA always has the option to close a case before it is taken to court and thereafter to withdraw its action. If the SCA decides to withdraw its action or loses a case, the defendant may have its litigation costs reimbursed. The SCA on the other hand may only have its litigation costs reimbursed if a party has intentionally or negligently occasioned unnecessary litigation.[16]

1.4 Private enforcement

12. If an undertaking intentionally or negligently infringes any of the prohibitions of anti-competitive co-operation between undertakings or abuse of a dominant position, the undertaking shall compensate the damage that is caused thereby. A party that has been adversely affected by such an infringement may instigate an action for damages before a competent district court. The Stockholm District Court is always competent to examine cases relating to such damages.[17]

13. Nullity and damages cases are amenable to out of court settlement. Appeals in such cases may be lodged with a competent Court of Appeal where a leave to appeal is required. There are limited possibilities to invoke new evidence and circumstances before the Court of Appeal. The Court of Appeal's ruling may be appealed to the Supreme Court, where the terms for leave to appeal are very strict. However, if an action for damages is dealt with alongside an action regarding an administrative fine[18], appeals against the judgment of the Stockholm District Court are lodged with the Market Court. Otherwise the Market Court does not have competence over competition law damages cases. According to the Arbitration Act, arbitrators may also rule on the civil law effects of competition law as between the parties, e.g. damages relating to infringements of the Competition Act or the nullity of anti-competitive agreements.[19]

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[14] Chapter 5, Articles 3-13, the Swedish Competition Act.

[15] Ibid., Chapter 3, Articles 12-15.

[16] Ibid., Chapter 8, Articles 15-17.

[17] Ibid., Chapter 3, Articles 25-26.

[18] Ibid., Chapter 8, Article 7.. A case concerning damages has to date never been joined with a case concerning administrative fine, see Section 1.2.3 below.

[19] Article 1, the Arbitration Act (1999:116) (Sw. Lag om skiljeförfarande).

1.5 Different court hierarchies

14. As described above, competition cases are generally handled by the Stockholm District Court as the first instance. Cases regarding administrative fines are handled by the Market Court as the second and final instance whereas cases regarding nullity and damages are handled by a Court of Appeal in the second instance, and then ultimately by the Supreme Court. Theoretically, these different court hierarchies could lead to conflicting case law regarding certain aspects of competition cases and it has been of some debate whether the current court hierarchy is optimal. There are pending court cases where it is possible that this issue may be highlighted.[20]

15. However, the risk for conflicting case law is reduced by the fact that Swedish competition law is based on EU law and follows the same principles that apply within the EU. Furthermore, the Supreme Court has so far only tried a few cases relating to competition law, mainly concerning the nullity of anti-competitive agreements and what constitutes a dominant position on a relevant market.[21]

2. Instruments to faster private enforcement

2.1 An explicit right to damages

16. In comparison to many other Member States of the EU, Sweden was early to adopt an explicit right to damages for victims of competition law violations. Originally, this right only applied in relation to violations of the substantive prohibitions under national law but was subsequently amended to also cover violations of their EU equivalents, currently Articles 101 and 102 TFEU.[22] The present Competition Act's provision on damages is, therefore, also applicable in relation to infringements of Articles 101 and 102 TFEU and the same principles apply in both cases.

17. It follows from Chapter 3, Article 25 of the Swedish Competition Act, that if an undertaking intentionally or negligently infringes any of the prohibitions contained in Chapter 2, Article 1 or 7 of the Competition Act, or in Article 101 or 102 TFEU, the undertaking shall compensate any damage that is caused thereby.[23] The provision thus provides victims of competition law violations with a right to full compensation for any harm suffered due to the illicit conduct in question. Full compensation is this regard entails that the victim is not only to be compensated for actual loss suffered but also for any loss of profits resulting from the infringement, including interest from the time the harm occurred until compensation is paid. This remedy has as its objective the complementary goals of deterrence and compensation. It does not, however, allow for punitive damages.

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20 The two private damages cases brought by Tele2 and Yarps (formerly Spray) before the Stockholm District Court against TeliaSonera: T 10956-05, Tele2 ./. TeliaSonera and T 15382-06, Yarps Network Services AB ./. TeliaSonera. These two cases are follow-on actions lodged in the wake of the SCA's public enforcement case against TeliaSonera in 2004, which was finally settled by the Market Court in 2013 (Stockholm District Court T 31862-04 and Market Court A 8/11). These cases are described further in Section 1.3 below.

21 See e.g. case T 2808-05, judgment of 19 February 2008 (NJA 2008 s. 120) and case T 2280-02, judgment of 23 December 2004 (NJA 2004 s. 804).

22 The prohibitions in Article 101 (agreements or concerted practices between undertakings) and Article 102 (abuse of a dominant position) correspond to Chapter 2, Article 1 and 7 of the Swedish Competition Act.

23 Standard tort law principles apply.

18. A claim for damages in accordance with Chapter 3, Article 25 of the Competition Act, must be brought within ten years calculated from the date when the loss was first suffered. As previously discussed, the Stockholm District Court is generally competent in relation to private damages cases based on this provision.

19. The current Competition Act was adopted in 2008. However, it should be observed that an explicit provision on damages was already introduced in the former Competition Act (1993:20), adopted in 1993. In 2005, the Competition Act of 1993 underwent an overhaul with aim of modernizing the legislation and to address certain issues in the field of private enforcement.[24] Changes that were brought about by this reform were, amongst others, an extension of the circle of parties entitled to damages and changes to the period of limitation applicable in relation private damages actions.[25] The Committee that was entrusted with the task of presenting necessary amendments in the context of this reform also suggested measures in order to facilitate private enforcement by introducing a right to a discovery-like dawn raid that could be initiated by a private party, although it would need a court approval. In the end, however, this proposal never passed to legislation. The most critical question was how legal certainty could be guaranteed.

2.2 Quantification of harm

20. An injured party that has successfully proved having suffered harm as a result of a competition law infringement will still need to prove the extent of the harm in order to obtain damages. In this context it is observed that the quantification of harm in competition law cases can constitute a substantial barrier preventing effective claims for compensation.

21. To this end, the Swedish Code of Judicial Procedure[26] contains an explicit provision[27] empowering the Swedish courts to estimate the extent of the damages claimed by an injured party. This is a general mandate and is in no way restricted to the field of competition law. This provision has been applied in various damages cases where it has proven excessively difficult for the claimant to fully substantiate the extent of the harm suffered on the basis of the evidence available. A somewhat recent example of the application of this provision in the field of competition law is the case Euroclear Sweden AB (formerly VPC) ./. Europe Investor Direct AB. In this case it was claimed that Euroclear Sweden AB had abused its dominant position by refusing to deal.[28] The Stockholm District Court found that Euroclear Sweden AB had abused its dominant position and ordered it to pay damages to the claimant, Europe Investor Direct AB.[29] The District Court's judgment was subsequently unsuccessfully appealed by Euroclear Sweden AB

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24 This reform of the competition legislation was in many ways triggered by the so-called modernization reform which the EU was simultaneously conducting in relation to its competition regime. The right to damages for victims of competition law infringements was confirmed by the European Court of Justice (the "ECJ") in its judgment in case C-453/99, Courage and Crehan [2001], paras 25-26, and case C-295-298/04, Manfredi [2004], paras 60-63.

25 See SOU 2004:10 and prop. 2004/05:117 for a more detailed description of the changes that were introduced in this context.

26 Sw. Rättegångsbalken (1942:740).

27 Chapter 35, Article 5, the Code of Judicial Procedure (1942:740).

28 Whether the refusal to supply, or supply at an unreasonably high price, by a company holding a dominant position on the market for the provision of shareholder's ledgers constituted an abuse of a dominant position, contrary to Section 19 of the 1993 Swedish Competition Act (now Chapter 2, Section 7 of the 2008 Competition Act) as regards address information and identification numbers to shareholders.

29 Stockholm District Court's judgment in cases T 32799-05 and T 34227-05, Europe Investor Direct AB et. al. ./. VPC AB.

to the Svea Court of Appeal[30]. In assessing the loss suffered by the claimant, the Svea Court of Appeal applied this provision, thus estimating the loss suffered.[31]

22. Swedish courts are also provided with the possibility to obtain opinions from public authorities regarding determination of an issue whose appraisal requires special professional knowledge.[32] Based on this provision, the SCA may be called upon in the context of a private damages case to assist on the determination of the quantification of damages (if deemed appropriate by the SCA). The SCA has thus far not been asked to deliver such an opinion.[33] Although having the mandate to do so, it is more likely that the SCA, if called upon to provide an opinion, would provide guidance regarding the relevant methods which may be used for the assessment than actually calculating the exact amount.

2.3 Joinder of public and private court proceedings

23. Even though it has never been utilized, the present Competition Act includes a provision[34] that makes it possible for the Stockholm District Court to join a public case, brought about by the SCA, with a private damages case which is brought before the same court and which relates to the same illicit conduct.

2.4 Collective redress

24. Collective redress was introduced in the Swedish legal system in 2003, making Sweden one of the first countries outside the Anglo-American legal sphere to introduce legislation in the field of collective redress. This may be regarded as somewhat peculiar, especially when considering that the legislation was not in response to any need that had materialized in any special court cases. As a legal instrument, the Swedish system for collective redress is not restricted to any particular area of Swedish law, but rather can apply to all types of claims heard in a public court. It is made available to a natural person or a legal entity (private group action), an association of consumers or wage-earners (organisational group action), or a designated public authority (public group action).

25. With regard to consumer disputes, the Swedish Consumer Agency[35] has been designated as the appropriate public authority, granting it the power to bring actions on collective redress. To date the system of collective redress has not been utilized in the field of competition law. The possibility of doing so was discussed in the context of the case Scandorama/Ölvemarks, a case where two bus travel companies were fined by the SCA for cartel-like behavior (price fixing).[36] Following its decision, the SCA subsequently discussed with the Swedish Consumer Agency the possibility of running a type of follow-on group action. In the end, however, no actions were brought by the Swedish Consumer Agency. A problem that was emphasized in this regard was that not many travelers were heard from.

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[30] Svea Court of Appeal, case T 10012/08.

[31] This provision was also applied by the Stockholm District Court.

[32] Chapter 40, Article 1, the Swedish Code of Judicial Procedure.

[33] Likewise, the SCA has so far never submitted any written observations to Swedish courts regarding quantification of harm according to Article 15.3 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[34] Chapter 8, Article 7, the Competition Act. As briefly mentioned in Section 1.2.1 above, the Stockholm District Court acts as the court of first instance in relation to private damages actions.

[35] Sw. Konsumentverket.

[36] The fines were set to SEK 11 million by the court.

3. Examples of private damages cases in Sweden

3.1 Follow-on cases

26. The term "follow-on" refers to the fact that these actions are presumed to follow in the wake of a public enforcement case brought by the EU Commission or the SCA against the same undertaking. In these cases the victims can take advantage of the result of a public enforcement initiative. This can be a great advantage since the SCA has extensive powers to obtain information from parties and third parties during its investigations, both written and oral, and can also conduct investigations on the premises of the undertaking under scrutiny.

27. An example in this respect is the SCA's enforcement case against the Swedish Asphalt cartel. The cartel members, who included large companies like *Skanska* and *NCC,* were fined after several years of investigation and court proceedings. The fines amounted to approximately EUR 50 million in total.[37]

28. Several municipalities that were customers to the cartel members initiated court proceedings seeking damages. All of these cases were, however, finally settled out of court and the nine municipalities received damages that amounted to SEK 35 million in total (approximately EUR 4 million).

3.2 Stand-alone cases

29. A number of stand-alone cases have been brought before Swedish courts or have been subject to arbitration in Sweden. Surprisingly, all of these cases are abuse-cases.

30. The cases Europe Investor Direct AB et al. ./. VPC AB and the following appeal before the Market Court are discussed in section 1.2.2. above.[38] This was a stand-alone case and was not triggered by any investigation on the part of the SCA.

31. The case Preem AB./. Gävle Hamn AB[39] is another example of a stand-alone case. This case concerned harbor services and the claimant, Preem AB, claimed that Gävle Hamn AB had abused its dominant position in determining the conditions for the provision of jet fuel. The claimant was, however, not successful and there are indications that this case was finally settled out of court.

32. In the case Verizon Sweden AB ./.Tele2 AB[40], another stand-alone case, the claimant, Verizon Sweden AB, claimed that Tele2 AB had abused its dominant position by discriminating against the claimant in the provision of telecom services. The claim was unsuccessful and the judgment of the Stockholm District Court was appealed before the Svea Court of Appeal. The appeal was, however, subsequently withdrawn by the claimant

[37] E.g. Market Court's judgment in case A 2/07 (appeal of Stockholm District Court's judgment in case T 5467-03).

[38] Stockholm District Court, cases T 32799-05 and T 34227-05, Europe Investor Direct AB et. al. ./. VPC AB, and Svea Court of Appeal, case T 10012/08.

[39] Stockholm District Court, case T 5995-09.

[40] Stockholm District Court, case T 20621-10.

33. There is also an example of a stand-alone case which was subject to arbitration i Sweden. In the case Vin & Sprit AB ./. Systembolaget AB, the claimant, Vin & Sprit, claimed that Systembolaget AB, the Swedish alcohol monopoly, had abused its dominant position and sought damages. The case, which was successful, was later unsuccessfully challenged before the Svea Court of Appeal.[41] The case has been appealed to the Supreme Court.

3.3 Intervention in public enforcement cases by private parties

34. Private parties that may be contemplating initiating, or which have already initiated, damages actions against a company that is also the target of a public enforcement case, may request that the court allows it to intervene in the public enforcement case. This tool has been utilized by companies before lodging follow-actions and by companies that are running parallel damages actions against the company in question.

35. In the case CityMail Sweden AB ./. Posten Sverige AB, the claimant, CityMail AB, claimed that Posten Sverige AB had abused its dominant position (selective pricing within the postal sector) and sought damages. Prior to initiating proceedings, however, the claimant, CityMail Sweden AB, chose to intervene in the SCA's public enforcement case against Posten Sverige AB. The SCA was successful in its case and the court issued an injunctive order against Posten Sverige AB. Following the court's judgment in this case, CityMail AB lodged its own damages actions against Posten Sverige AB, claiming compensation to an amount of approximately SEK 67 million. The case was later settled out of court.

36. Other examples are the two pending private damages cases brought by Tele2 and Yarps (formerly Spray) before the Stockholm District Court against TeliaSonera (abuse of dominant position through margin squeeze in the telecom sector).[42] These two cases are follow-on actions lodged in the wake of the SCA's public enforcement case against TeliaSonera in 2004, which was finally settled by the Market Court in 2013[43], after nearly 8 years of proceedings (covering also a preliminary ruling from the European Court of Justice ("ECJ")). TeliaSonera was fined SEK 35 million and now risks being held liable to pay damages to Tele2 and Yarps to the total amount of approximately SEK 1 billion (approximately EUR 100 million).

37. Tele2 intervened in the public enforcement case, while Yarps did not. The difference here was that Tele2 had requested the court to stay its own proceedings against TeliaSonera while it was intervening in the public enforcement case. A comment that was voiced in this regard, and which may explain why Yarps did not intervene, was that on the one hand, the potential benefits of intervening in the public enforcement case did not outweigh the cost of running two parallel proceedings, while on the other hand, the option of staying the damages case a second time while intervening in the public enforcement case would mean that the damages case, which was filed in 2006, would have been delayed even further.

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41 Svea Court of Appeal, case T 4487-12, Systembolaget AB ./. The Absolut Company AB (the subsequent owner of Vin och Sprit AB).

42 Stockholm District Court, cases T 10956-05, Tele2 ./. TeliaSonera and T 15382-06, Yarps Network Services AB ./. TeliaSonera. The legal grounds in these two follow-on margin squeeze cases differ. Yarps has claimed that TeliaSonera abused its dominant position not only through margin squeeze but also by refusing to supply and by discriminating Yarps in relation to its competitors (and in relation to TeliaSonera's own end user business). Tele2, on the other hand, has followed the same route as the SCA and formulated the legal ground to cover only margin squeeze. It remains to be seen whether this may have any effect on the outcome and lead to any differences in the two parallel damages proceedings.

43 Stockholm District Court, case T 31862-04 and Market Court, case A 8/11.

4. Balancing public and private enforcement

4.1 Disclosure of information and private parties' right of access to documents

38. The general Swedish legislation on public access to official documents provides an extensive right of access to documents for the public at large, and an even more extensive right of access to file for parties in, for example, competition cases. However, access to official documents is not unlimited. Firstly, there is no right of access to documents that are internal memorandums, in a preparatory stage etc.[44] Secondly, there is no right of access to information which is secret according to the Public Access to Information and Secrecy Act (2009:400)[45].

39. It follows from the Administrative Act (1986:223)[46] that a party in a case before the SCA is in principle entitled to see all information in the case.[47] It is only under extraordinary circumstances that the SCA can keep information in a case secret from a party, and such information cannot then be invoked as evidence before a court.[48] However, during the early stages of an investigation the SCA has a rather wide margin for keeping information secret from parties.[49] If information that is subject to secrecy, for example business secrets, is provided to a party, the SCA may make a reservation when the information is provided.[50] Such reservations normally include provisions regarding which persons may receive the information and for what purpose (normally to defend the party's rights in the case) and about how the documents shall be kept and that they must be destroyed when a case is finally settled. When the SCA sends a statement of objections to a party, all relevant material from the file is generally enclosed.

40. EU law (Donau Chemie et al.)[51] has been invoked in two recent requests for access to documents by complainants who had stated that their intentions were to bring actions for damages against the undertakings which were under investigation by the SCA: (i) Net at Once, which had filed a complaint with the SCA regarding the alleged illicit conduct of Gothnet and TeliaSonera, and (ii) taxi companies that reported Swedavia and Europark for abuse of dominant position at Arlanda Airport. The questions the SCA was forced to determine were, firstly, in what circumstances EU law could be invoked in this regard and, second, whether EU law implied a right to full access to the SCA's file when the undertaking seeking access has the intention of lodging private damages actions against the undertaking under investigation. The view expressed by the SCA in this regard is that EU law can only be invoked when Articles 101 or 102 TFEU are applicable.

41. According to Swedish court practice the complainant is not regarded as a party to the investigation whose rights are regulated in the Administrative Act. The SCA therefore denied access to the documents asked for or part of them in both cases mentioned above since the information was regarded as confidential. The Administrative Court of Appeal shared the SCA's opinion in the Net at One-case but opened the possibility to make an assessment based on EU law if there is enough evidence for the conclusion that the complainant intends to pursue action for damages. The High Court of Administration

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44 Chapter 2, Article 9, the Freedom of the Press Act.

45 Sw. Offentlighets- och sekretesslag (2009:400).

46 Sw. Förvaltningslag (1986:223).

47 Article 16.

48 Chapter 10, Article 3, the Public Access to Information and Secrecy Act.

49 Ibid., Chapter 17, Article 3, and Chapter 30, Articles 1-3..

50 Ibid., Chapter 10, Article 4..

51 Case C-536/11, Bundeswettbewerbsbehörde ./. Donau Chemie et al. [2013].

did not grant leave to appeal the case. In its judgment in the Taxi-case (against Swedavia and Europark), the Administrative Court of Appeal found (i) that Article 102 is applicable; (ii) that the claimant has the intention of pursuing action for damages; and (iii) that a balancing of interests-exercise has to be conducted according to the principles laid down by the ECJ in its case law[52]. After assessing the circumstances of the case in light of these principles, the Administrative Court of Appeal came to the conclusion that the documents and information in question should be kept confidential, thus sharing the SCA's view. The judgment of the Administrative Court of Appeal has been appealed to the High Court of Administration and the case is still pending.

42. For a more detailed description of the rules pertaining to e.g. disclosure and parties' access to file, see Sweden's contribution to the WP3 roundtable on institutional and procedural aspects of the relationship between competition authorities and courts.[53]

4.2 EU incentives in the field of private enforcement

One of the main objectives of the EU Directive (2014/104/EU) on antitrust damages actions[54] is to remove practical obstacles to compensation for all victims of infringements of EU antitrust law and to enhance the interplay between private damages actions and public enforcement of the EU antitrust rules by the EU Commission and national competition authorities. To achieve these objectives, the Directive contains a broad spectrum of legal instruments in the field of private enforcement. These instruments are not all novel, and several already exist as an integral part of the competition regimes of some Member States. In this context, it is therefore important to bear in mind that the Directive also has as its objective the creation of a level playing field between the Member States in the context of private enforcement.

It is clear that the Directive will bring about various changes to the competition legislation of the different Member States of the EU. At the present time it is, however, difficult to predict whether these changes to the legal framework will have any practical effects in the field of private enforcement in Sweden, and if so, to what extent.

5. Ways in which public enforcement can help to promote private enforcement

5.1 Effect of national decisions of authorities/courts

43. The EU Directive on antitrust damages actions, referred to in the previous section, contains a provision whereby the Member States will be required to allow for a final infringement decision of a national competition authority or national court to constitute full proof before civil courts in the same Member State that the infringement has occurred (similar to Commission infringement decisions). Before courts of other Member States, it will constitute at least prima facie evidence of the infringement.

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[52] Case C-536/11, Bundeswettbewerbsbehörde ./. Donau Chemie et al. [2013] and Case C- 360/09, Pfleiderer AG ./. Bundeskartellamt [2009].

[53] DAF/COMP/WP3/WD(2011)85.

[54] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. The Directive was signed into law on 26 November 2014 and published in the Official Journal of the EU on 5 December 2014. Member States, including Sweden, must implement the Directive in their legal systems by 27 December 2016

44. This provision has been subject to extensive debate. According to the original proposal all final decisions by national competition authorities and national courts in antitrust cases would be binding for all national courts throughout the EU. However, as it stands, such national decisions will only be binding within the same Member State. National decisions from other Member States will not bind the courts but serve as at least prima facie evidence that an infringement of competition law has occurred.

45. In Sweden, final decisions of the SCA and Swedish courts only have a probative effect in relation to private damages cases. Thus, the findings of the SCA or courts in a public enforcement case are not binding in private cases.

46. This issue is highlighted in the context of the two pending follow-on cases against TeliaSonera, discussed in section 1.3 above. The SCA's investigation was initiated after receiving written complaints from several of TeliaSonera's competitors, including Tele2 and Yarps. These companies claimed that TeliaSonera's wholesale and end-user prices were such that they resulted in a margin squeeze. In 2004 the SCA ended its investigation and initiated proceedings against TeliaSonera at the Stockholm District Court. This, and the risk of the claims being barred, triggered Tele2 and Yarps to file their own damages claims against TeliaSonera at the same District Court in 2005 and 2006 respectively. Both parties requested the court to have their damages cases stayed while awaiting the outcome of the public enforcement case.

47. In 2009 the District Court also stayed the SCA's case and sent a request for a preliminary ruling to the ECJ. After the ECJ had issued its judgment in February 2011, providing the District Court with important guidance for its assessment of the alleged margin squeeze, the court resumed all three proceedings and later that year issued a judgment in the SCA's case. This judgment was however challenged by TeliaSonera before the Market Court, which, as discussed in section 1.1.5 above, serves as the court of final instance with respect to proceedings brought by the SCA.

48. The Market Court's issued its judgment in the spring of 2013, thus ending the public enforcement case. TeliaSonera was fined approximately SEK 35 million. Many expected the Market Court's judgment to significantly speed up the two damages proceedings against TeliaSonera, which after 7-8 years still remained at the District Court that had issued the first judgment in the public enforcement case. However, the Market Court's decision, albeit being final, is not binding for the District Court that is trying the two damages cases. Although the judgment of the former will most likely have a strong probative effect in relation to the two damages cases, the non-binding effect of the judgment means the parties, and thus ultimately the District Court, will have to cover and review all the facts of the two damages cases, notwithstanding that these facts are in essence covered by the Market Court's final judgment in the SCA's case.

49. The two damages cases still remain at the District Court and it remains to be seen when a judgment may be issued in these cases. In this context, it should also be considered that because the two damages cases are private proceedings, the District Court's judgment may still be challenged before the Svea Court of Appeal, whose judgment in turn may ultimately be challenged before the Supreme Court.