Dominance

Contributing editors
Patrick Bock, Kenneth Reinker and David R Little

2018

GETTING THE DEAL THROUGH

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Contributing editors

Patrick Bock, Kenneth Reinker and David R Little
Cleary Gottlieb Steen & Hamilton LLP

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

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CONTENTS

Preface

Dominance 2018

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Dominance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Belgium, Saudia Arabia, Sweden and Taiwan.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Bock, Kenneth Reinker and David R Little of Cleary Gottlieb, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
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Sweden

Fredrik Lindblom, Kristoffer Molin and Sanna Widén
Advokatfirman Cederquist KB

General questions

1 Legal framework

What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

Firms active in Sweden are subject to the Swedish Competition Act (2008:579) (the Act). Only dominant firms, however, are subject to the Act's prohibition against abuse of a dominant position in Chapter 2, article 7. This prohibition mirrors the EU law prohibition of abuse of a dominant position in article 102 of the Treaty of the Functioning of the European Union (TFEU). These provisions are identical save for the trade between EU member states requisite in article 102 of the TFEU. If the allegedly abusive conduct affects trade between member states (ie, has actual or potential cross-border elements) article 102 of the TFEU is applicable, whereas Chapter 2, article 7 is applicable absent such effect (ie, when the abuse is purely national). Chapter 2, article 7 can be applicable in parallel with article 102 of the TFEU when trade between member states is affected.

In terms of substantive assessment, it is of no practical importance whether the Swedish Competition Authority (the SCA) or the Swedish courts apply Chapter 2, article 7 or article 102 of the TFEU, or both in parallel. The substantive assessment as to whether a firm is dominant and whether the behaviour in question amounts to an abuse is the same in Swedish and EU law. The Swedish legislator has stressed that Swedish competition law should closely follow and be interpreted in light of EU competition law. In addition to binding EU law and EU case law, the SCA and Swedish courts also rely heavily on soft EU law, of particular interest here is the European Commission's (the Commission) guidance paper, 'Guidance on the Commission's enforcement priorities in applying article [102 TFEU] to abusive exclusionary conduct by dominant undertakings'.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Dominance is not defined in the legislation, but follows from EU case law. In *United Brands* (C-27/76) the European Court of Justice (ECJ) defined dominance as:

> *[A] position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.*

This definition has been applied on several occasions by Swedish courts, and the Swedish legislator has made explicit reference to it.

The concept of dominance in Swedish and EU law is absolute; either a firm is dominant or not. If a firm is not dominant, it is not subject to the dominance rules (even if it is 'almost dominant'). A different matter is that firms with significant market share or market power may, as a matter of corporate compliance policy, choose to consider the dominance rules, in full or in part, to limit antitrust risk in their business activities.

Establishing dominance is far from clear cut. Several elements should be taken into account, in particular:

- market share, including over time;
- barriers to entry for potential competitors;
- financial strength;
- technological strength and advantage over competitors;
- vertical integration;
- presence on neighbouring markets; and
- to what extent customers exercise countervailing buyer power.

Market share has traditionally been the most important factor, and this is still the case. According to the preparatory works to the previous Swedish competition act, a market share:

- below 30 per cent normally excludes dominance;
- between 30 and 40 per cent is below a level that indicates dominance;
- above 40 per cent is a sign of dominance;
- above 50 per cent is a presumption of dominance; and
- above 65 per cent is strong evidence in favour of dominance.

It is important to stress that the other factors are also important; a dominant position should not be established solely on the basis of market share (save perhaps for a clear-cut monopoly).

In light of the difficulties often involved with establishing dominance, the SCA sometimes skips this part in the assessment and jumps straight to the alleged abuse. If the SCA finds that the practice in any event does not amount to an abuse, it may dismiss the case without concluding, or even commenting in any detail, on whether the defendant is dominant.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The purpose of the Act 'is to eliminate and counteract obstacles to effective competition in the field of production of and trade in goods, services and other products'. The prohibition against abuse of a dominant position is a means to achieve this purpose.

Hence, the sole purpose of the act is the protection of effective competition, the underlying theory being that effective competition leads to economic efficiency, which in turn generates consumer welfare. Neither the Act in general, nor specifically the prohibition against abuse of a dominant position, serves any other interests, such as industrial or labour policy, the protection of small and medium size business, etc.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

The Act does not contain any sector-specific dominance rules. It can be mentioned that certain regulatory regimes contain rules with similarities to the concept of dominance, in particular the concept of 'significant market power' (SMP) in telecom legislation. Firms deemed to have SMP can be ordered to introduce pro-competitive measures (eg, apply certain pricing or grant access to networks).

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The Swedish dominance rules apply to all entities considered to be 'undertakings' under the Act. An 'undertaking' is defined in the Act as 'a natural or legal person engaged in activities of an economic or commercial nature' (ie, in practice an entity that engages in the provision of products or services on a market in return for some kind of economic remuneration). This covers not only profit-maximising corporate entities but also non-profit entities and public entities and authorities, as long as and to the extent that they engage in activities of an economic or commercial nature. In light of this definition, municipalities, public authorities, sport clubs and, for example, unions (when they engage in economic activity on behalf of their members) have been considered undertakings and thus are subject to competition law. The concept of 'undertaking' in the Act is the same as in EU law.

The Act explicitly exempts the exercise of public authority from the definition of undertaking. In other words, if a public entity exercises public authority, it is not necessary to assess whether the activity or practice in question is of an economic or non-economic nature; the public entity will in any event not be subject to competition law.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The Act only applies to the behaviour of undertakings that are already dominant. The Act does not cover conduct of undertakings aspiring to become dominant.

7 Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

The Act prohibits 'any abuse by one or more undertakings', meaning that a dominant position is within the scope of the prohibition.

The ECJ has defined collective dominance as a situation where two or more undertakings 'from an economic point of view present themselves or act together on a particular market as a collective entity' (C-395 and 396/96, *Compagnie Maritime Belge*). Three cumulative conditions must be met to establish collective dominance (T-193/02, *Piau*):

- each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy;
- the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; and
- the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy.

The above is also applicable under Swedish law, although we have seen very few cases in Sweden concerning collective dominance.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

While abuse of dominance in most cases will occur on downstream supply markets, there is nothing preventing the rules from being applied in relation to a dominant firm's upstream sourcing of products and services. It is conceivable that a dominant position is established specifically on the purchasing market (ie, without a need to also establish a dominant position on a relevant supply market).

There is limited case law concerning abuse of a dominant purchasing position. However, the SCA has for example held that a refusal to purchase could be abusive (case No. 1130/93, *Lantmäteriet*).

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The SCA and Swedish courts apply EU principles to define the relevant product and geographic markets. A relevant product market comprises 'all those products or services that are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use', and a relevant geographic market comprises 'the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area' (the Commission's 'Notice on the definition of relevant market for the purposes of Community competition law'). The most important factor in market definition is demand-side substitutability (ie, to what extent customers can substitute a supplier's products or services for other products or services).

The method and principles for market definition are the same in dominance cases as in other competition case (eg, mergers).

As mentioned in question 2, while there are no binding and definite thresholds at which dominance is established, a presumption can be said to exist from a market share of 50 per cent. However, other factors must be taken into account as well.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Chapter 2, article 7 of the Act (which mirrors article 102 of the TFEU) contains a non-exhaustive list of potential abuses. It does not, however, contain a definition of abuse. The concept of abuse encompasses measures by a dominant firm that harm customers or consumers directly, or the structure of the market (in an anticompetitive manner). While certain exploitative exercise of market power (eg, excessive pricing) can concern individual agreements, the prohibition against abuse is more commonly applied to protect the structure of the market, rather than individual firms or consumers.

The concept of abuse is an objective one; the dominant undertaking's subjective intention is not determinative. That said, an anticompetitive or abusive intent is an aggravating circumstance.

It is not necessary under Swedish or EU law to establish an anticompetitive effect; it suffices that the abuse risks are having such effect. At the same time, the SCA is more likely to intervene if concrete effects can be demonstrated. The SCA can be said to adopt an effects-based approach, as set out in the Commission's guidance paper on exclusionary abuse. However, the effect does not necessarily have to be significant, affect a large share of the economy or similar. For example, the SCA has pursued abuse cases concerning taxis at Stockholm Arlanda Airport (case No. 378/2013, *Swedavia*) and refusal to provide access to an electricity network in a small city in northern Sweden (case No. 533/2009, *Ekfors Kraft*).

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

As in EU law, the concept of abuse in the Act is divided into (and covers) exploitative and exclusionary practices, the latter being practices that foreclose competitors from the market and the former where the dominant firm exploits its position to the detriment of competitors, customers, etc. The SCA can be said to focus mainly on exclusionary abuse, but from time to time also investigates exploitative abuses.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

There must be a causal link between the dominant position and the abuse. However, practices where a firm uses its dominant position on one market as leverage to gain an advantage on another (typically adjacent) market, thus distorting competition on the latter market, can be caught. For example, in *Telia* the Market Court considered that Telia had used its dominant position in relation to fixed telephony to strengthen its position on the mobile telephony market (MD 2001:30, *Telia*).

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Objective justification can be invoked as a defence. A conduct for which there is an objective justification cannot be abusive. A refusal to supply is for example likely objectively justified if the customer has a history of not paying invoices, and a price discrimination is likely objectively justified if sales to one customer incur higher costs on the (dominant) supplier compared to sales to another.

Unlike the regime for anticompetitive agreements, the dominance rules do not include an efficiency defence. However, the Commission has introduced a soft law efficiency defence in its article 102 guidance paper concerning exclusionary abuse, which should also be considered applicable under Swedish law. In practice therefore, a dominant company that can demonstrate efficiency gains that outweigh any anticompetitive effects of an alleged abuse may escape the prohibition.

While perhaps not a defence against abuse, a dominant firm's right to compete on the merits should be mentioned. Only the abuse of a market power is prohibited, not legitimate competition on the merits.

Specific forms of abuse

14 Rebate schemes

Rebates are normally pro-competitive and lead to lower prices. However, rebate schemes may be abusive if they are loyalty-enhancing and lead to foreclosure of competitors.

As a main rule, pure volume-based rebates are not abusive, as they normally reflect a cost saving for the (dominant) supplier. If the purpose or effect of a rebate is to enhance customer loyalty or to exclude competing suppliers, the rebate could be abusive. Examples include retroactive and incremental rebate schemes, whereby the customer receives a rebate on the entire volume only if it reaches a certain target. It is particularly problematic to condition a rebate on exclusivity.

In *CityMail v Posten* (MD 2011:14), the incumbent postal operator Posten was accused of operating an abusive rebate scheme aimed at one of its few competitors, CityMail. Posten had a market share of 85 per cent and covered the whole of Sweden and was thus an inevitable trading partner for customers who needed delivery in the entire country. Posten offered incremental rebates triggered at a certain annual purchase volume, which incentivised customers to reach that volume. CityMail covered only certain parts of the country and could hence only compete for delivery in those parts. If customers chose to use CityMail in the areas where there was competition, they risked losing the annual rebate with Posten. Hence, in order to be competitive, CityMail had to compensate customers for the loss of rebate with Posten, which occasionally forced CityMail to price at unsustainable levels. This rebate scheme was found abusive by the Market Court.

15 Tying and bundling

It could be abusive for a dominant supplier to tie or bundle products (or services), that is, to make the purchase of one product conditional on the customer also purchasing another product. This could lead to distortion of competition in relation to the tied product, as customers are not given the choice to choose a different supplier. For tying and bundling to be abusive, the tied or bundled products must be distinct and there should be separate demand for them. If, for reasons of quality, product safety, etc, it is reasonable or even necessary to sell the products bundled, there is no abuse.

16 Exclusive dealing

A dominant firm should exercise caution when entering into exclusive arrangements, as such practices risk leading to abusive foreclosure of competitors. It should be noted that it will likely not be a justification that an exclusivity undertaking was entered into at the request of the other party.

17 Predatory pricing

While competitor regulators generally look favourably on low prices, it may be problematic for a dominant firm to offer too low prices, at least if this risks driving competitors out of the market. If a dominant firm prices below cost, that is, makes a sacrifice, so as to foreclose competitors, which may not have the economic strength to stay in the market at such price levels, it may abuse its dominant position. The SCA applies the same method as the Commission in predation cases, where average avoidable cost is a key cost benchmark (which is typically the same as average variable cost). In predation cases, more so than in most other abuse scenarios, it may be relevant to establish an intent by the dominant firm to price below cost to drive out competitors. If such intent is found, it may be possible to rely on a higher cost benchmark to show predation.

In predation cases, the SCA may employ an 'as efficient competitor' test to establish that the foreclosed competitors are not driven out of the market simply because they are less efficient than the dominant firm.

18 Price or margin squeezes

Margin squeeze, when a dominant supplier charges an upstream (typically wholesale) price for a product or service that does not allow for a sustainable margin for customers on their downstream (typically retail) market, may amount to abuse. These situations typically occur when the upstream supplier is vertically integrated and active downstream, in competition with its own customers. The leading EU case on margin squeeze was a preliminary reference from Sweden, *TeliaSonera* (C-52/09). TeliaSonera was found to have abused its dominant position in relation to ADSL broadband by way of margin squeeze vis-à-vis competing retail suppliers of broadband access (final Swedish Market Court judgment MD 2013:5).

19 Refusals to deal and denied access to essential facilities

As a main rule, a dominant firm, as all other firms under the principle of contractual freedom, is free to choose its trading partners. However, in certain circumstances the dominant firm's refusal to deal or to grant access (eg, to infrastructure) can amount to an abuse. This is the case if the refusal distorts competition (or makes competition impossible) downstream.

In the above-mentioned case *Ekfors Kraft*, the SCA and the Market Court found that an electricity network was an essential facility and that it was abusive for the owner to refuse access. However, the bar for when a dominant firm is under a competition-law based obligation to supply or grant access is quite high. According to the *Bronner* criteria (C-7/97), which are applied by the SCA, three conditions need to be met for such obligation to arise: the refusal eliminates effective competition on the downstream market; the refusal is not objectively justified; and the facility or input product is objectively necessary in order for the customer to be active downstream, meaning that there should be no actual or potential alternative. In particular, the third condition may be difficult to meet for a complainant.

20 Predatory product design or a failure to disclose new technology

We are not aware of any such cases in Sweden, but given that the list of potential abuses is open-ended, predatory product design and failure to disclose new technology are conceivable abuses.

21 Price discrimination

A dominant firm, as all other firms under the principle of contractual freedom, is as a main rule allowed to apply different prices and conditions to customers (eg, as a result of varying success in price negotiations). However, in some occasions, as stated in Chapter 2, article 7, applying 'dissimilar conditions to equivalent transactions' may distort competition on the downstream market where the dominant firm's

Update and trends

The Swedish legislator currently contemplates a major change to the procedural system for public competition law enforcement, namely whether the SCA should be given authority to, in the first instance, impose fines for violation of the prohibitions against anti-competitive agreement (eg, in cartel cases) and abuse of a dominant position. This would change the system from that used today, when only the courts, following a request by the SCA, can impose fines (save for the rarely used sanction fine orders).

The SCA was given authority to block mergers at first instance on 1 January 2018, and it is expected that antitrust fines will follow suit. This would bring the Swedish system more in line with the rest of the EU, including the EU system itself. Still, critique against such reform has been voiced by the legal community (including the courts), mainly for reasons of legal certainty and rights of defence.

customers compete with each other (the text in the Act continues, 'thereby placing them at a competitive disadvantage'). For this to be the case, the dominant supplier would likely have to be an unavoidable trading partner whose products or services represent a significant cost for firms downstream.

For price discrimination to be abusive, it must be established that the contested pricing situations are 'equivalent transactions' and that the conditions are in fact 'dissimilar' (without there being an objective justification for such dissimilar treatment). Moreover, the discrimination should distort competition downstream, which most likely implies that customers who receive dissimilar conditions must be competitors. In *Gävle Hamn* (Stockholm District Court, T 5995-09), the court found that the dominant firm, Gävle harbour, had price discriminated, but that the complainant was not in competition with the customer that had better terms with the harbour. Another leading Swedish case was *Kanal 5 & TV4* from the ECJ (C-52/07) concerning the Swedish Perfoming Rights Society's calculation methods applied vis-à-vis TV stations. The complainants argued that the public service station received better terms than private TV stations, thus distorting competition between them. The ECJ noted that it must be assessed to what extent the firms subject to price discrimination are competitors 'on the same market'.

22 Exploitative prices or terms of supply

A dominant firm exploiting its position by charging excessive prices or applying otherwise unfair terms may abuse its position. Typically, the SCA does not want to come across as a price regulator or otherwise dictate what is fair and what is not. However, occasionally, the SCA may pursue such cases. In *Swedavia*, Arlanda airport is considered to have abused its dominant position by charging a fee of 25 Swedish kronor from taxi companies if they picked up customers who had pre-ordered taxis inside the terminal. Ultimately, however, the court found that the charge was objectively justified given capacity constraints at the airport.

23 Abuse of administrative or government process

The EU case *AstraZeneca* (COMP/37.507) can be mentioned here, where the partly Swedish firm AstraZeneca was found to have abused its dominant position by submitting misleading information to various patent authorities and courts in order to block competing drugs from reaching the market.

24 Mergers and acquisitions as exclusionary practices

Mergers and acquisitions are covered by the merger control regime. Hence, it cannot be abusive for a dominant firm to merge with or acquire another firm. To the extent such merger gives rise to competition concerns, those would have to be dealt with under merger control rules. If a merger or acquisition is not captured by merger control (due to relevant thresholds not being met), the transaction will escape competition law scrutiny altogether. However, the abuse of dominance rules may apply to transactions that are not 'concentrations' under Swedish (or EU) merger control law (eg, acquisitions of non-controlling minority stakes).

25 Other abuses

As mentioned, the list of potential abuses is open-ended and more abuses than the above list may exist.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The SCA is responsible for enforcing the Act. To this end, the SCA can carry out dawn raids, issue requests for information and interview physical persons.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The SCA can order firms to cease with anticompetitive conduct, subject to a fine in case of violation of the order.

The SCA can also bring a firm to court, the Patent and Market Court, and request that a fine for abuse of dominance be imposed. The maximum fine is capped at 10 per cent of the dominant firm's turnover. The highest ever fine for an abuse is 38 million Swedish kronor, although that case is on appeal. The highest final fine is 35 million Swedish kronor imposed on TeliaSonera in the above-mentioned ADSL case (the SCA had however requested a fine of 144 million Swedish kronor). If the defendant acknowledges guilt and wishes to avoid court proceedings, and there are no legal issues that would be subject to judicial review, the SCA can impose a fine order without continued procedure. This is a rarely applied sanction, in particular in larger cases. To our knowledge, a fine order has never been imposed in a dominance case.

The sanction is administrative and not criminal, and individuals cannot be sanctioned.

A case can also be closed by way of a commitment by the defendant to remedy a competition concern identified by the SCA (or the Commission) (eg, opening up an infrastructure, changing certain trading terms, etc). If accepted, the commitment becomes legally binding and subject to a penalty in case of violation. In commitment cases, an infringement is not ultimately established.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

Save for the rarely used fine order, the SCA can currently not itself impose fines (it can, however, impose cease-and-desist orders and accept commitments). A fine can only be imposed by the courts, the Patent and Market Court and, on appeal, the Patent and Market Court of Appeal. This may however change in the future (see 'Update and trends').

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The most recent high-profile dominance cases in Sweden include SCA's cases against Swedish Match (policy for generic labels in snus coolers, pending before the Patent and Market Court of Appeal), Nasdaq (exclusivity in server hall, judgment from the Patent and Market Court 15 January 2018, dismissing the SCA's case) and Assa Abloy (loyalty rebates and margin squeeze in relation to wholesale locksmith services; case dropped absent proof of abuse).

Enforcement of the dominance rules by the SCA is quite rare in terms of number of cases, some one to three per year. Given that abuse cases are very time consuming and resource intense, the SCA would think twice before opening proceedings. An abuse investigation is likely to take one to three years before the SCA. If the case then goes to court, proceedings are likely to drag on another one to three years per instance. Exclusionary abuse cases are more likely to be investigated by the SCA than exploitative cases.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

There is no explicit provision in the Act declaring a contract or a clause amounting to abuse invalid (as opposed to the rules on anticompetitive agreements). However, the Swedish legislator has stated that it should be possible to declare such contracts or clauses invalid under civil law.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Private enforcement of the dominance rules is possible; a claimant that has suffered damage caused by a dominant firm's abuse may claim compensation in a Swedish court. Since 27 December 2016, following implementation of the EU Damages Directive, Sweden has adopted the Competition Damages Act (2016:964) for competition law damages claims.

Private enforcement is not common in Sweden. Reasons for this may be excessively long court proceedings, difficulties in obtaining evidence and a non-litigious culture. However, private enforcement is on the rise; both follow-on (damage claims in the wake of public enforcement by the SCA) and standalone actions. We have, for example, seen major damage cases following the above-mentioned ADSL case against TeliaSonera. Those were, however, dismissed in 2017 (in one case as the claimant had not proven abuse and in the other as the claimant had not proven damage as claimed). We are aware of three standalone privately enforced dominance cases in regular courts (arbitration is also possible): *VPC* (Svea Court of Appeal, T 10012-08), *Gävle Hamn* (Stockholm District Court, T 5995-09) and *Verizon* (Stockholm District Court, T 20621-10).

A private enforcement 'hybrid' in Swedish competition law should also be mentioned, namely the 'secondary standing' available for complainants to the SCA. If the SCA decides to not investigate a complaint, or (following an investigation) to close a case without taking action, the complainant (or rather 'an undertaking that is affected by the infringement') can itself take the case to the Patent and Market Court and request the court to impose a cease-and-desist order. In these cases, damages are not awarded.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Under the Competition Damages Act, a firm that intentionally or negligently violates competition law should compensate for the damage caused. Compensation should cover actual loss and loss of profit. Hence, there are no punitive damages under Swedish law (compare this with treble damages in the US). The Patent and Market Court is the competent court for competition law damages claims.

There is no set method for calculating damages; the idea is that the sufferer should be put in the same position as if the infringement had not occurred (a counterfactual scenario). The complainant bears the burden of proof to prove damage and the amount suffered. The Commission has issued guidance on quantifying antitrust damages ('Communication on quantifying harm in antitrust damages actions'), which can be used. In the end, the court may have to appreciate the damage and set an appropriate amount. The courts are bound by the amount claimed by the claimant (ie, cannot award higher damages).

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Cease-and-desist orders by the SCA may be appealed to the Patent and Market Court (whose decisions or judgment can be appealed to the Patent and Market Court of Appeal), which will conduct a full review of the case. Various procedural decisions by the SCA may also be appealed to the Patent and Market Court (eg, concerning dawn raids).

If the SCA requests the Patent and Market Court to impose a fine, a full court review of the case will follow. The judgment can be appealed to the Patent and Market Court of Appeal.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

The Act, unlike EU competition law, contains a prohibition against anticompetitive public sales activities (Chapter 3, article 27). According to this rule, the SCA may order a public entity (eg, a municipality or a publicly owned firm) to stop engaging in sales activities (somewhat more narrow term than 'economic activity', see question 5), if such activities distort competition with private firms. This prohibition captures unilateral conduct by non-dominant entities (ie, it is not necessary to establish dominance or market power for the prohibition to be applicable). A motive for the introduction of the prohibition (in 2010) was in fact that the regular competition rules were not always applicable to competition concerns in public-private situations (eg, as a dominant position could not be established for the public entity). The fact that an entity is public may itself put it in a situation where it unilaterally can distort competition, without necessarily having high market shares. A public entity may, for example, absent profit aims and the risk of bankruptcy, be able to price at unsustainable levels.

CEDERQUIST

Fredrik Lindblom **fredrik.lindblom@cederquist.se**
Kristoffer Molin **kristoffer.molin@cederquist.se**
Sanna Widén **sanna.widen@cederquist.se**

Hovslagargatan 3
PO Box 1670
111 96 Stockholm
Sweden

Tel: +46 8 522 065 00
Fax: +46 8 522 067 00
www.cederquist.se

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