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Article 17(3) of the Damages Directive and the Interaction Between the Swedish Competition Authority and Swedish Courts

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I. INTRODUCTION

One of the explicit aims of the Directive on competition damages actions (the Directive)[1] is to make the quantification of harm resulting from violations of European Union (EU) competition rules easier for damages claimants.[2] One of the several ways envisioned by the Directive to achieve that aim is Article 17(3), according to which national competition authorities (NCAs) may assist national courts in quantifying the harm caused by anticompetitive conduct.

In this chapter, I focus on the transposition of Article 17(3) of the Directive in Sweden and make the argument that Sweden has not correctly implemented the Article in Swedish law. The topic is admittedly rather limited at first glance, but a discussion on the (non-)transposition of Article 17(3) of the Directive in Swedish law offers three significant insights which make pursuing it worthwhile.

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[1] 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 [2014] OJ L349/1.

[2] Directive 2014/104 (n 1) Recitals 14 and 46.

Firstly, it informs us about the nature and degree of interaction of the Swedish Competition Authority (SCA) with Swedish courts and tells us something about the relationship between the two. Secondly, it reveals some important procedural differences between private and public enforcement of EU competition rules in Sweden and exposes a certain tension between national rules of procedure, on the one hand, and the effective application of EU competition rules in Sweden, on the other. 'Effectiveness' is a requirement that follows both from well-established case-law of the Court of Justice of the EU (ECJ)[3] and from the Directive itself.[4] As a result, the second insight inevitably leads to a discussion on whether certain aspects of Swedish procedural law may be impeding the effective application of EU competition law. Thirdly, it explores different courses of action for Swedish courts and claimants that may find, like this author, that Article 17(3) has not been implemented correctly in Swedish law.

The rest of this chapter is organised as follows. Section II briefly presents the legislative history of Article 17(3) and offers a quick look into some of the *travaux préparatoires*. Section III discusses the aim of Article 17(3) as revealed by its broader context and soft law. Section IV offers some background on certain aspects of Swedish procedural law that are relevant for the chapter. Section V deals with the choice of the Swedish legislator not to introduce any specific provisions in order to transpose Article 17(3) into the Swedish legal order and puts forward this chapter's main thesis, namely that Article 17(3) of the Directive has not been correctly transposed into Swedish law. Section VI concludes.

II. THE LEGISLATIVE HISTORY OF ARTICLE 17(3)

In order to be able to assess whether Article 17(3) has been correctly transposed in the Swedish legal order, the purpose of the Article needs to be understood. To do that, we first need to embark on a short excursus through the Article's legislative history and *travaux préparatoires*.

The Directive has as its legal basis the combination of Articles 103 and 114 TFEU. Adopting a Directive under those Articles is done under Article 289 TFEU, the ordinary legislative procedure, and in accordance with the procedures provided for under Article 294 TFEU. The legislative initiative rests with the European Commission (Commission).[5] A consultation process, in the form of Green and White Papers, usually precedes a Commission proposal for secondary

[3] See eg Case C-453/99 *Courage v Crehan* EU:C:2001:465, para 29; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* EU:C:2006:461, para 62; and Case C-360/09 *Pfleiderer AG v Bundeskartellamt* EU:C:2011:389, para 30.

[4] Directive 2014/104 (n 1) Art 4.

[5] TFEU, Art 289(1).

legislation and the process that led up to the drafting of the Damages Directive was no exception in that regard. Nothing resembling Article 17(3) can be found in the 2005 Green Paper[6] or the 2008 White Paper.[7]

The earliest trace of the provision is contained in the external impact assessment study entitled 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios' (impact assessment study) which accompanied the White Paper.[8] The impact assessment study contains a suggestion to create a cooperation mechanism between NCAs and national courts, whereby 'if the defendant's conduct appears as a serious infringement of competition laws, conducive to substantial harm to society, then judges might wish to activate a [NCA] as *amicus curiae* to quantify the harm caused by the defendant'.[9]

The impact assessment study identified problems with the proposal, predominantly because of the cost associated with involving the NCAs in proceedings for antitrust damages. As pointed out in the study, a public antitrust investigation does not typically involve quantifying the damage suffered by individuals. What NCAs look for is evidence that the allegedly anticompetitive conduct has harmed competition, or that it at least has the capacity or is capable of doing so. What qualifies as harm to competition in EU competition law, even following the onset of the 'more economic approach',[10] may be much broader than 'consumer welfare' and, in fact, may even be different from direct harm to customers or consumers as a group, let alone to individual customers or consumers. Therefore, the study suggested that intervention from NCAs with the purpose of assisting national courts in quantifying the harm caused to individuals would be economically viable only if the threshold for activating the procedure were very high. Therefore, the study suggested that such intervention should be reserved for cases with very high stakes.[11]

[6] European Commission, 'Green Paper on Damages Actions for Breach of the EC Antitrust Rules', COM(2005) 672 final (Brussels, 19 December 2005).

[7] European Commission, 'White Paper on Damage Actions for Breach of the EC Antitrust Rules', COM(2008) 165 final (Brussels, 2 April 2008).

[8] Report for the European Commission, Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios (Brussels, Rome and Rotterdam, 21 December 2007), available at: ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf#page=441.

[9] Impact assessment study, ibid, p 200.

[10] The term 'more economic approach' is often used as shorthand for the modernisation of EU competition law that came about in the mid-90s through the integration of economic thinking and evidence in the Commission's enforcement of the rules. See MC Iacovides, *A 'More Economic Approach' to WTO Law's Relevant Market Definition, Trade Harm, and Quantification of Trade Effects and Countermeasures – A Normative Law and Economics Comparison with EU Competition Law* (Uppsala, Uppsala University, 2016) 44–45 and White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty [1999] OJ C 132/1. See also B Bishop, 'The Modernisation of DGIV' (1997) 18 *European Competition Law Review* 481.

[11] Impact assessment study (n 8) 201.

The impact assessment study's suggestion for a cooperation mechanism between NCAs and national courts on the issue of the quantification of damages in difficult high stakes cases does not seem to have won favour with the Commission at the time. The Commission presented its legislative proposal (the Draft Directive) in June 2013.[12] The original Article in the Commission's proposal corresponding to Article 17 was at the time Article 16. That Article did not include any provisions regarding the possibility for NCAs to assist national courts in quantifying the harm. Neither was any such provision contained in any other part of the Draft Directive.

The Draft Directive was subsequently scrutinised and debated in the European Parliament and the Council. Readings by the Parliament and the Council form part of the ordinary legislative procedure and both co-legislators have the right to propose amendments to the Commission's proposal. The Council's 'general approach' did not propose an amendment to what was then Article 16 of the Draft Directive.[13] However, the Parliament proposed such amendments. Following the first reading, the Parliament suggested an amendment whereby a new sentence to (then) Article 16(2) appeared. The wording in the relevant part was as follows:

> Where requested, competition authorities shall provide guidance on quantifying the harm.

The Article was further reorganised during the so-called trilogues between the European Parliament, the Council and the Commission. The trilogues resulted in further amendments to the Parliament's proposed addition and the proposed amendment was given its own paragraph in the Article, resulting in the adopted version's Article 17(3). The compromise text was worded as follows:

> Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority shall be able, if it deems it appropriate, to assist on the determination of the quantum of damages upon request of a national court.

Following linguistic adjustments, the Directive was adopted by the Council with the following final wording of Article 17(3):

> Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.

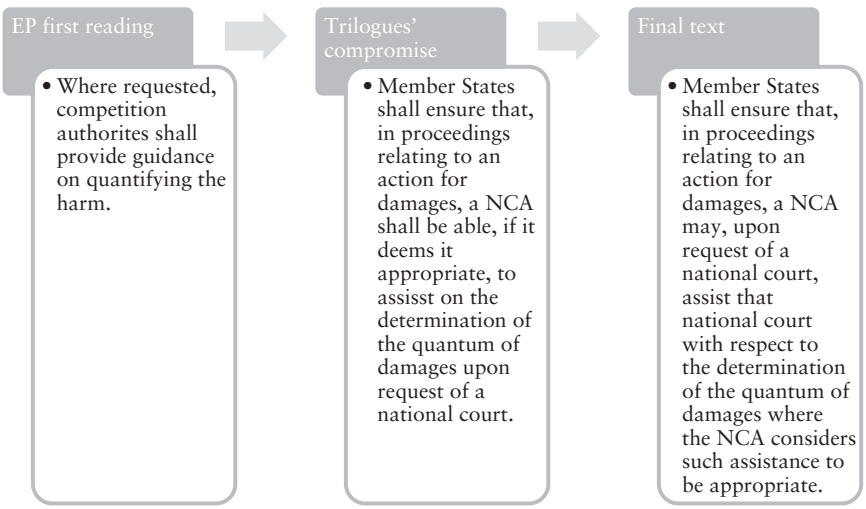
[12] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM(2013) 404 final.

[13] EU Council, Proposal for a Directive of the European Parliament and of the Council 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 – Adoption of the general approach, RC 43/JUSTCIV 261/CODEC 2515 (15983/13), Brussels 27 November 2013, 44.

Following the conclusion of the trilogues, COREPER endorsed the final text. In its analysis of the final compromise text, the Council observed that Article 17(3) 'enables a NCA, at its discretion if it considers it appropriate, to assist on the determination of the quantum of damages upon request of a national court'.[14]

For reasons that will become apparent further on in this chapter, it is useful to ponder on the wording of the amendment proposed by the European Parliament and the two later formulations of Article 17(3) of the Directive during the legislative process. A graphic illustration of the wording is provided in Figure 1, for ease of comparison.

Figure 1 Article 17(3)'s legislative history



The comparison allows us to draw a few important conclusions. Firstly, the EU legislature chose explicitly to reformulate a vaguely worded 'where requested' with no indication of who the initiator of the request would have been, in order to put the initiative on making a request to the NCAs on the national courts. Secondly, the EU legislature chose to amend the originally proposed imperative 'shall' to make involvement of the NCAs simply possible ('shall be able') and finally only discretionary on the NCAs ('may […] where [it] considers such assistance to be appropriate'). Thirdly, possibly as a way of balancing the reduction in imperativeness, the EU legislature chose to change the nature of the NCAs' involvement, from providing 'guidance in quantifying the harm' to

[14] EU Council, Proposal for a Directive of the European Parliament and of the Council 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 – Analysis of the final compromise text with a view to agreement, RC 6/JUSTCIV 76/CODEC 885 (8088/14), Brussels 24 March 2014, p 12.

'assist[ing] […] with respect to the determination of the quantum of damages'. Fourthly, the final text made it clear that the said assistance is not to be provided to any of the parties, but to the national court that will have initiated the NCAs' involvement. Moreover, the EU legislature chose not to limit such requests in any way, for instance as the impact assessment study had suggested, to hard high stakes cases.

III. THE AIM OF ARTICLE 17(3)

Beyond its legislative history, further clues as to the purpose of Article 17(3) can be discerned by looking at the whole of Article 17, and by viewing the Article in the broader context of the whole Directive and the soft law that accompanies it, as well as, naturally, the Preamble to the Directive.

Article 17(3) appears in Chapter V of the Directive, which is the chapter in the Directive that deals with the quantification of harm. Chapter V only contains one article, Article 17, consisting of three paragraphs. According to Article 17(1), Member States shall ensure that national courts can estimate the harm when it is excessively difficult or practically impossible for the applicant to do so. Member States must also make sure that the burden and standard of proof with regard to quantifying damages from violations of EU competition law shall not be such that exercising the right to damages becomes practically impossible or excessively difficult. Article 17(2) introduces a rebuttable presumption of harm in cartels. Seen in the context of the entirety of Article 17, it becomes clear that the purpose of Article 17(3) is to assist claimants further in quantifying the harm.[15]

As seen above, the goal of Article 17 of the Directive is to assist claimants in quantifying the harm they have suffered because of a violation of EU competition rules. That goal is, of course, compatible with the goal of the whole Directive, which is – broadly speaking – to encourage claims of damages and to facilitate private enforcement of EU competition law.

That said, other provisions of the Directive offer clarifications as to the extent of the goal. An important provision in this regard is Article 3 of the Directive. According to Article 3, Member States must ensure that claimants are able to obtain full compensation.[16] Full compensation for the purposes of the Directive is understood as the position in which the claimant would have been had the infringement of competition law not been committed and covers actual

[15] For a more detailed account of Directive 2014/104 (n 1) Art 17, see MC Iacovides, 'The Presumption and Quantification of Harm in the Directive and the Practical Guide' in M Bergström, MC Iacovides and M Strand (eds), *Harmonising EU Competition Litigation – The New Directive and Beyond* (Oxford, Hart Publishing, 2016).

[16] Directive 2014/104 (n 1) Art 3(1).

loss, loss of profit, plus the payment of interest.[17] However, full compensation under the Directive should not lead to overcompensation.[18] One way to avoid overcompensation according to the Directive is to account for passing-on, by putting in place appropriate procedural rules to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level.[19] In turn, this is linked to the full effectiveness of the right to full compensation.

National courts – as Member State bodies entrusted with the effective application of EU law in their respective jurisdictions, including the Directive – must bear in mind the Directive's aversion to overcompensation. Hence, when they hear claims for damages from a claimant in a market with more than two levels, they must ensure that they do not award damages for harm that has been passed-on downstream, where the claimant is an intermediary buyer, or for harm that has been absorbed by the intermediary buyer, where the claimant is the final customer. Consequently, the caution not to overcompensate acts as a check on the goal of assisting claimants in the ways envisioned by Article 17 of the Directive.

The result is that, in certain situations, the interests of the Directive, EU competition law at large, and the national courts entrusted with applying the rules, will be independent from the interests of both parties in proceedings for damages. For instance, if the claimant inflates its claims in order to seek damages that are higher than the harm actually suffered, the goal of the national court to avoid overcompensation will not be aligned with the claimant's interests. In that situation, it is not entirely clear whether the court's interests will be aligned with the defendant's, as the latter's strategy will be to overestimate the amount of passing-on (for a direct purchaser) or to underestimate it (for a final customer) in order to avoid compensating the claimant fully. This is significant for the purposes of the chapter's thesis, as it suggests that a national court, in certain circumstances, might wish to activate the NCAs' assistance on its own motion rather than upon request from any of the parties. We will return to this point below, in section V.

In conjunction with the issuing of the Draft Directive, the Commission adopted a Communication on quantifying harm in damages actions (the Communication)[20] and issued a Practical Guide on quantifying harm in

[17] ibid, Art 3(2).

[18] ibid, Art 3(3).

[19] ibid, Art 12(2). For comprehensive coverage of the issue of passing-on in EU competition law, see M Strand, *The Passing-On Problem in Damages and Restitution under EU Law* (Cheltenham, Edward Elgar Publishing, 2017).

[20] Commission, 'Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' [2013] OJ C167/19.

damages actions (the Practical Guide).[21] Further assistance on quantifying the passing-on, including a practical checklist with 39 steps for judges at national courts, is provided by the Study on the Passing-on of overcharges which was prepared for the Commission and made available in 2016.[22] These soft-law instruments reinforce the idea that the aim of Article 17(3) is to facilitate the quantification of damages by claimants, by making sure that national courts can instigate the assistance of the NCAs on the matter.

Recitals 45 to 47 in the Directive's Preamble provide further indications as to the purpose of Article 17 in general, but contain nothing expressly on the aim of Article 17(3). Recital 45 recalls that quantification of harm in competition law cases may constitute a substantial barrier to effectively claiming compensation from infringers, since quantifying harm is fact-intensive and costly and may require the application of complex economic models that would need to rely on data that are not easily accessible to claimants. The first part of Recital 46 continues with the rationale behind Article 17. It clarifies that the twin principles of equivalence and effectiveness place certain limits on the national procedural autonomy of Member States as to the quantification of harm. Those limits hinge on the intrinsic information asymmetries that exist between claimants and defendants, and the fact that quantifying the harm means assessing hypothetically how the market would have evolved but for the infringement, something that – like all counterfactuals – is inherently inaccurate. Based on those considerations, the latter part of Recital 46 and Recital 47 draw the conclusion that it is appropriate to introduce rules at the EU level to ensure that national courts have the power to estimate the quantum of damages, to enable NCAs to provide guidance on quantum where requested and to create a presumption that cartels result in harm, in particular via an effect on prices.

To conclude, the Article's broader context, the soft law that accompanies the Directive, and the relevant recitals in the Directive, show that Article 17(3) of the Directive is clearly intended to assist claimants in the quantification of damages stemming from violations of EU competition rules. The assistance that NCAs may provide to national courts regarding the quantum of damages is thought of as a further way of remedying the information asymmetry between claimants and defendants and the difficulties in collecting the necessary data and finding the evidence to substantiate the claim for damages.[23] Ultimately

[21] Commission, 'Staff Working Document, Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' SWD(2013) 205. See further, Iacovides, 'The Presumption and Quantification of Harm' (n 15).

[22] Final Report, 'Study on the Passing-on of Overcharges', available at: ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf. According to Directive 2014/104 (n 1) Art 16, the Commission shall issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser.

[23] On the difficulties associated with discovery in such cases, see H Andersson, 'The Quest for Evidence – Still an Uphill Battle for Cartel Victims', ch 9 in this edited volume.

then, Article 17(3) was enacted to further ensure the effectiveness of claims for damages and to make quantification of antitrust damages easier for claimants. However, that interest has to be balanced with the EU legislator's specific desire to avoid overcompensation and thereby the unjust enrichment of claimants to the detriment of claimants at a different level of the supply chain, as well as the desire not to subject the defendant to damages that go beyond full compensation, understood as actual loss, loss of profit, plus interest. The latter point is, admittedly, rather counterintuitive, as higher damages have a stronger deterrent effect. The intricacy lies of course in the fact that, at least in this author's opinion, enforcement of EU competition law – as the collective sum of private and public enforcement – ought to be *optimal*.[24] This requires reaching a delicate equilibrium between deterrence and punishment of anticompetitive practices, to which higher damages are conducive, with no excessive punishment that might result in defendants becoming incapacitated from competing further following an infringement, or the stifling of innovation.

IV. SOME RELEVANT SWEDISH CONTEXT

The aim of this chapter is to examine whether Article 17(3) of the Directive needed to be specifically transposed into Swedish law by new provisions because the existing rules were insufficient. In order to do that, we not only need to understand Article 17(3) of the Directive, we also need to have an understanding of the relevant Swedish legal rules.

Before the transposition of the Directive into Swedish law, Chapter 3, section 25 of the Swedish Competition Act was the legal basis for private damages actions stemming from violations of the Swedish competition rules. The Directive was transposed into Swedish law by way of the Act on Competition Damages Actions (2016:964) (Konkurrensskadelagen, KSL). Following the enactment of the KSL, Chapter 3, section 25 of the Swedish Competition Act has been amended to make reference to the new Act.

Chapter 2, section 1 of the KSL establishes the right to damages for competition law infringements. The Patent and Market Court (PMD), a specialised chamber of the Stockholm District Court that inter alia hears competition law cases, is the exclusive forum in which to bring an action for damages based on that law.[25] Normally, in these cases, the PMD is quorate with two legally trained judges and two expert economist judges.[26]

[24] As pointed out to me by M Strand, *private* enforcement of EU competition law contains few traces of the American 'optimal deterrence' tradition. In that sense, my argument here can be understood as normative.

[25] c 5, s 1 of the Act on Competition Damages Actions (2016:964). Note, however, that damages actions, even those that stem from a competition law infringement, based on other laws (eg a breach of contract) can still be brought in other courts than the PMD. The composition of such courts does not include expert economist judges.

[26] c 4, s 4 of the Act on Patent and Market Courts (2016:188).

Swedish rules about procedure and evidence can be found in Rättegångsbalk (1942:740), the Swedish Code of Civil Procedure (the RB). While it is beyond the scope of this chapter to give a comprehensive overview of those rules, two provisions are particularly interesting for the purposes of the chapter's thesis, namely Chapter 35, section 6 (35:6 RB) and Chapter 40, section 1 of the RB (40:1 RB).

According to 35:6 RB, the '[p]resentation of evidence is the responsibility of the parties' and '[t]he court may on its own motion gather evidence only in cases which are not amenable to out-of-court settlement'.[27] The restriction on the courts' ability to gather evidence in cases that are amenable to an out-of-court settlement came about through the amendment of the RB in 2005. Private damages actions based on the new KSL are cases that are amenable to out-of-court settlement, meaning that in those cases the national courts are restricted by way of 35:6 RB from gathering evidence on their own motion.

At the same time, according to 40:1 RB, Swedish courts may request an expert opinion from public authorities, including of course the SCA. According to the provision '[i]f, for the determination of an issue the appraisal of which requires special professional knowledge, it is found necessary to call upon an expert, the court may obtain an opinion on the issue from a public authority'.[28] As a rule, expert opinions from public authorities, such as the SCA, do not entail an obligation to appear before the court to testify on the content of the expert opinion, in contrast to an expert opinion by individuals.[29] Therefore, as a rule, a written opinion from a public authority will be introduced into the case file and will be relied on as part of the body of written evidence in the case.

In the author's opinion, based on the principle that *lex posterior derogat priori*, the earlier drafted 40:1 RB will have to be interpreted in light of the more recently amended 35:6 RB. The implication is that in cases of private enforcement based on the new KSL, which are amenable to out-of-court settlement, the competent Swedish courts will be precluded from introducing evidence *on their own motion*, including expert opinions from the SCA, to the extent such opinions constitute evidence for the purposes of Swedish law. Such expert opinions may only be requested by the court if one of the parties initiates the procedures following from 40:1 RB.[30]

V. THE NON-TRANSPOSITION OF ARTICLE 17(3) IN SWEDISH LAW

The Swedish Government deemed that Article 17(3) of the Directive did not require specific transposition into Swedish law, as it considered the existing

[27] Author's translation.
[28] Author's translation.
[29] c 40, s 8 of the Swedish Code of Civil Procedure.
[30] R Nordh, *Praktisk Process VI, Bevisrätt A – Allmänna bevisfrågor. Om ansvaret för bevisning, vittne, syn, sakkunnig m.m.* (Uppsala, Iustus Förlag, 2009) 91.

rules sufficient to achieve the Article's aim. Therefore, it did not introduce any provisions transposing the Article into the new KSL, nor did it propose any amendments to existing acts to that effect.

According to the Government's reasoning, which is set out in Government Bill 2016/17:9, the aim of Article 17(3) is to ensure that national courts have the necessary capacity and competences to quantify the harm. That capacity is already accomplished through the PMD's quorum rules, more specifically the inclusion of two expert economist judges on the bench. The Government added that, to the extent the court would consider that further assistance was required, the court could call on the SCA to provide assistance in accordance with 40:1 RB, if so requested by a party.[31]

It is submitted that the choice not to introduce a new rule in order to transpose Article 17(3) of the Directive into Swedish law was misguided for three reasons. Firstly, because the quorum rules are insufficient, secondly because Swedish courts are precluded from initiating the assistance on their own motion, and finally because it is unclear what criteria the SCA will apply to decide on the appropriateness of assisting the national courts. These are explored in the rest of this section.

A. The Quorum Rules are Insufficient

As seen above, one of the Government's arguments in denying the necessity to transpose Article 17(3) of the Directive by introducing new provisions in Swedish law was that the specialised PMD court's quorum rules already provided the court with the necessary capacity to estimate the quorum of damages.

In this author's opinion, that argument is both irrelevant and superficial. It is irrelevant because the issue of the court's competence is entirely separate from the issue of what evidence and facts the court has before it. Clearly, the quorum rules cover the first, but do not necessarily solve the latter. The court can estimate the harm when it is impossible or excessively difficult for the claimant to do so, as follows from Chapter 35, section 5 of the RB. The court's competence in economics is, of course, an asset in that respect. Yet, the competence in economics is of no avail when the evidence before the court is such that it does not allow the court, despite its expert knowledge, to quantify the damages. Recall here that, as explained above, pursuant to 35:6 RB, the court is precluded from introducing evidence to the case file on its own motion.[32] Put simply, there is only so much that the expert economist judges will be able to do to estimate the harm if the evidence is thin or inadequate.

[31] Proposition 2016/17:9, 50–51.
[32] See further on this issue, s V.B. below.

Moreover, the argument is superficial, for two reasons. Firstly, it rests on the unrealistic assumption that in the majority of cases the two expert economist judges' competence would suffice to estimate the harm. In reality, it will depend a great deal on the type of knowledge of economics the expert judges hold. Good knowledge of macroeconomics and economic theory may not be sufficient or even relevant if the evidence in the case file is econometric, and it is not entirely clear that an economist has any advantage in that regard compared to a legally trained judge. Secondly, it disregards the fact that Swedish procedural rules allow for an action for competition damages to be brought in other courts than the specialised PMD court, where the action is based on other laws than the newly enacted KSL, even though this does not happen often. Those courts do not have expert judges sitting on the bench.

In contrast, NCAs, typically, and the SCA, in particular, employ a large number of economists, some specialised in macroeconomics, others in microeconomics, statistics, econometrics, or empirics. Moreover, NCAs have good expert knowledge of a variety of markets, gained through working on many cases that never reach the courts or become public knowledge, such as mergers that are cleared and investigations of complaints that do not result in prohibitions. As noted by the Swedish Bar Association, which used the opportunity offered to it during the legislative consultation phase to submit observations on the implementation of Article 17(3) of the Directive, the SCA's expert opinion on damages would add value because of its expertise and resources.[33] The expertise and resources are not always present at the national court, despite the PMD bench including two economists as judges. Even less so in courts whose bench is not comprised of a combination of judges and economists.

B. Swedish Courts are Precluded from Initiating the Assistance on their own Motion

The argument about the insufficiency of the quorum rules and the internal capacity of courts – specialised or not – would have been less relevant if courts were able to call on the SCA on their own motion to assist them in the quantification of antitrust damages. Yet, as explained above, 35:6 RB precludes Swedish courts from doing so.

As we saw in section II, the original text proposed by the European Parliament for Article 17(3) simply used the passive voice 'where requested', without specifying by whom the requesting is done. This was later modified to clarify the point. Article 17(3) of the Directive states that the NCA becomes involved

[33] Sveriges advokatsamfunds yttrande R-2015/2089 av den 2 februari 2016 (N2015/04860/KSR), available at: www.advokatsamfundet.se/globalassets/advokatsamfundet_sv/remissvar/539931_20160203162626.pdf (in Swedish) 4.

in the quantification of damages 'upon request of a national court'. Clearly, the intention of the EU legislature was for the request to be made by the national court.

However, the Article is agnostic as to who *initiates* the national court's request and as to *how* the initiation is set in motion, arguably to avoid having to peek behind the veil of national procedural autonomy. Yet, one could assume that if the EU legislature had wanted to *limit* the possibilities of the national courts initiating the request on their own motion, it would have done so expressly in the Directive for the avoidance of doubt. Hence, since the Directive does not specify that assistance is to be provided only when the parties initiate the request, it is reasonable to deduce that it envisages that the request may be initiated by the national court on its own motion and not only at the request of the parties. As we saw above in section III, this possibility is significant, because under certain circumstances, both parties' interests may be different from the interests of EU competition policy and, hence, neither the claimant nor the defendant may have any incentive to make a request for the NCA's assistance. In other words, in certain cases, safeguarding the interests of EU competition law may depend on the national court requesting the assistance of the NCA in quantifying the damages.

Consequently, there is a difference between, on the one hand, what Article 17(3) of the Directive prescribes, and, on the other, the existing Swedish rules of procedure regarding who has the initiative to request the SCA's assistance. The situation created by not transposing Article 17(3) correctly puts the national courts in a difficult position. The predicament is that the national court would either have to find a way to reconcile applicable national law with the Directive's requirements and aim, or else disregard national law in order to give the Directive effect. Alternatively, it could choose to do nothing. In what follows, we elaborate on these three possibilities.

It is rather difficult to envisage that a Swedish court would go down the road of the first alternative. This alternative, which gives rise to what is known as the indirect effect of Directives, entails that in applying national law, whether the provisions in question were adopted before or after a Directive, national courts called upon to interpret it are required to do so, as far as possible, in the light of the wording and the purpose of the Directive, in order to achieve the result pursued by the latter and thereby comply with their obligations under EU law, including Article 288(3) TFEU. The duty is far-reaching and involves taking all appropriate measures, whether general or particular, to ensure the fulfilment of the Directive's aim. This duty stems from the secondary legislation itself, combined with the duty of sincere cooperation found in Article 4(3) TEU.[34] Nevertheless, the duty to interpret national law in conformity

[34] Case C-106/89 *Marleasing v La Comercial Internacional de Alimentacion* EU:C:1990:395, para 8 and Joined Cases C-397/01 to C-403/01 *Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Wanshut eV* EU:C:2004:584, paras 109–18.

with EU law does not stretch as far as to require the national court to interpret the law *contra legem*.[35] 35:6 RB is explicit in that in cases that are amenable to an out-of-court settlement, the court cannot introduce evidence on its own motion. The wording is clear and unambiguous, meaning that is not open to an interpretation that is in conformity with Article 17(3) of the Directive.[36] Moreover, it is in line with general principles of Swedish procedural law that all but eliminate the possibility for Swedish courts to *ex officio* raise issues or introduce evidence. Thus, to interpret 35:6 RB as allowing the court to initiate the involvement of the SCA and, thereby, to introduce evidence in the case on its own motion would clearly be *contra legem*. Therefore, it is not required by EU law.

The second option is for the Swedish court to set aside the national procedural rule that is contrary to Article 17(3) of the Directive.[37] Is that course of action conceivable? At first glance, it might be. EU law has supremacy over national law, irrespective of the status of the latter within the Member State.[38] Generally, the ECJ's case-law requires setting aside a national rule that is contrary to an EU rule and applying the latter instead, with no need for the national court to wait for the competent Member State court or authority to declare the national rule inapplicable, ineffective, unconstitutional and so on.[39] The requirement entails an obligation to set aside provisions of national law precluding national courts from pursuing an available procedure, in order to guarantee the effective application of EU law in their jurisdiction.[40] Alternatively, the requirement entails a possibility for national courts to 'create' procedures that are otherwise not available in the Member State, but only in situations where the party does not have recourse to any other available effective legal means.[41]

Along those lines, the argument could be made that the effective application of EU competition law, as expressed in several ECJ rulings[42] and Article 4 of the Directive, would require setting aside 35:6 RB, in order for the national court to request the SCA's assistance pursuant to 40:1 RB, on its own motion. The argument could be further supported by pointing out that it is already possible for Swedish courts to estimate the harm to a reasonable amount under

[35] Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos* EU:C:2006:443, para 110.

[36] Case C-555/07 *Kücükdeveci v Swedex* EU:C:2010:21, para 49.

[37] Case C-441/14 *Dansk Industri v Estate of Karsten Eigil Rasmussen* EU:C:2016:278, para 37 makes it clear that this is the course of action that the national court has to follow when it is impossible to interpret national rules *contra legem* to achieve compatibility with the EU rule.

[38] Case 4/64 *Flaminio Costa v ENEL* EU:C:1964:66; Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, para 3.

[39] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* EU:C:1978:49 and Case C-441/14 *Dansk Industri* (n 37) para 37.

[40] Case C-213/89 *R v Secretary of State for Transport, ex p Factortame* EU:C:1990:257.

[41] Case C-432/05 *Unibet (London) Ltd, Unibet (International) v Justitiekanslern* EU:C:2007:163, para 65; Case C-583/11 P *Inuit Tapiriit Kanatami et al* EU:C:2013:625, paras 103–04.

[42] See eg the cases cited above in n 3.

Chapter 35, section 5 of the RB where it is difficult or impossible for the claimant to provide full proof of the damage. Moreover, it should be noted here that the question of whether Article 17(3) of the Directive is (vertically or horizontally) directly effective is immaterial in this regard.[43] At the same time, the obligation on the national court applies *a fortiori* when the national court is seized of a dispute concerning the application of domestic provisions that have been specifically enacted to transpose a Directive intended to confer rights on individuals, as the Damages Directive.[44]

However, the Court's case-law would seem to preclude that very argument. In *van Schijndel*, the Court found that Union law:

> does not require national courts to raise of their own motion an issue concerning the breach of provisions of [Union] law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim.[45]

35:6 RB assigns to Swedish courts a passive role in cases amenable to out-of-court settlement. In the event that none of the parties in the proceedings has requested the court to initiate the SCA's assistance, it would seem an abandonment of that very passive role assigned to the court by virtue of the national rules of procedure, to take matters into its own hands in order to make the request.

The third and most likely option is for the PMD and other Swedish courts to do nothing. This is also the safest option, given that the parties will have no reason to challenge the fact that no request was made to the SCA for assistance in the quantification of harm. Clearly, a party that considers that the SCA's assistance would have been beneficial, would have initiated the request and the issue we are discussing in this subsection would simply not arise. Nevertheless, doing nothing *could* harm third parties in the exceptional cases where a third party is unable to claim damages from the infringer because the damages have already been fully awarded to other claimants, in light of the rule that the Directive should not lead to overcompensation.[46]

The question is whether such third parties would have recourse to any action for reparation in such circumstances. If not, this further reinforces the point that Article 17(3) of the Directive has not been correctly implemented in Swedish law.

[43] Case C-441/14 *Dansk industri* (n 37) paras 30–37. However, my understanding is that the rule still needs to have the qualities associated with direct effect, ie it will need to be clear, precise and unconditional as well as confer rights on individuals. On the issue of direct effect, see further below in this section.

[44] Joined Cases C-397/01 to C-403/01 *Pfeiffer et al* (n 34) para 112.

[45] Joined Cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* EU:C:1995:441, para 22.

[46] Directive 2014/104 (n 1) Art 3.

A first course of action would be an action for damages by such a third party against the Swedish state, arguing that the failure to transpose Article 17(3) of the Directive correctly has resulted in harm to it. Such an action would most probably fail. The claimant would have to meet the high threshold for state liability and prove that three cumulative conditions are met.[47] Firstly, the claimant would have to show that Article 17(3) is intended to confer rights on individuals. Yet that seems rather artificial, as the right claimed seems to be a right 'conferred' upon the national court, not the individual. Secondly, the claimant would have to show that the breach was sufficiently serious, which is not the case where the provision is capable of bearing the meaning understood by the Member State, or if there is a lack of consensus as to the meaning of the provision.[48] Thirdly, the claimant would have to show a direct causal link between the breach and the damage sustained. Even regarding this condition the claimant is in a rather difficult position, as the damage is sustained indirectly, through the awarding of damages to the first claimant by the competent national court.

A second course of action would be for the claimant to bring an action for damages against the Swedish state for a breach of EU law by the Swedish judiciary. The claim in this scenario would be that the failure of the Swedish court to ask for the assistance of the SCA in order to give full effect to Article 17(3) of the Directive by either consistently interpreting national law with the Directive or through setting aside 35:6 RB, has resulted in harm being caused to the third party. This action would also most probably fail. The same three conditions would have to be fulfilled as above, but the threshold would be even higher, since the second condition requires showing that the error is a *manifest* infringement of the applicable EU law.[49] Relevant factors to consider in that assessment include the degree of clarity and precision of the rule, whether the breach was intentional, whether the error was excusable, and whether the court had failed to make a preliminary ruling reference despite being bound to do so by virtue of Article 267(3) TFEU.[50]

A third course of action could materialise if the claimant were to bring an action for damages against the infringer under the KSL. One would expect the infringer to claim that damages have already been awarded to another party and that awarding damages to the second claimant would result in the damages exceeding the total amount of damages recoverable under the Directive. In other words, the infringer would be using Article 3(3) of the Directive as a shield. The claimant might claim that the judgment of the court in those earlier

[47] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany* and *R v Secretary of State for Transport, ex p Factortame (no 3)* EU:C:1996:79, para 51.

[48] Case C-392/93 *R v HM Treasury, ex p British Telecommunications* EU:C:1996:131, paras 43–44; Case C-278/05 *Robins v Secretary of State for Work and Pensions*, EU:C:2007:56, paras 78–81.

[49] Case C-224/01 *Gerhard Köbler v Republik Österreich* EU:C:2003:513; Case C-173/03 *Traghetti del Mediterraneo SpA v Repubblica Italiana* EU:C:2006:391, paras 42–44.

[50] *Traghetti*, ibid, para 43.

proceedings should be disregarded, as the failure of the court to initiate the assistance of the SCA entailed an infringement of Article 17(3) of the Directive. In effect, the claimant would be making a similar claim as the claimants made in *CIA Security* and *Unilever Italia*, trying to draw the benefit of a rule in a Directive horizontally as against another private party.[51] The difference making this even more exceptional than the already exceptional cases of indirect horizontal effect of Directives, is that the triggering event is not the failure of the state to comply with a Directive, but rather the failure of a national court to give effect to a provision of the Directive by setting aside a provision on national law. In effect, this third type of action contains the second type of case. Accordingly, it would also most probably fail.

Hence, the option of the national court doing nothing is safe, given that it would not be challenged by the parties themselves and that it would be all but impossible for third parties to challenge it, and even more so given the rarity of actions for infringement brought by the Commission under Article 258 TFEU.

As a consolation, it is worth pointing out that the third party could always try to recover its part of the damages from the first claimant, based on a claim of unjust enrichment, rather than pursue a claim against the state or the infringer.[52] Nevertheless, the point here was to show that the failure to transpose Article 17(3) of the Directive is problematic as it has the potential to harm at least some claimants and since those claimants would not have any effective means of redress to challenge the incorrect implementation of the Directive. This reinforces the thesis that the choice not to introduce a new rule in order to transpose Article 17(3) into Swedish law was misguided.

C. It is not Entirely Clear that the SCA can Deem it Inappropriate to Assist the Court

The two reasons offered above are sufficient to show that Article 17(3) of the Directive has not been correctly transposed in Sweden. A final reason that supports that conclusion is that the failure to transpose the Article was a missed opportunity to provide guidance as to when the SCA deems it inappropriate to assist a Swedish court in the quantification of damages.

Recall that Article 17(3) of the Directive stipulates that the NCAs 'may' assist where the national competition authority 'considers such assistance to be appropriate'. This would seem to leave it entirely to the discretion of the NCAs to determine the merits of providing assistance. The question is whether the current Swedish rules are compatible with that.

[51] Case C-194/94 *CIA Security International SA v Signalson and Securitel SPRL* EU:C:1996:172; Case C-443/98 *Unilever Italia SpA v Central Food SpA* EU:C:2000:496.

[52] Strand, *Passing-on* (n 19) 356–59 and 366–67 opts for the use of the term 'windfall award' rather than 'unjust enrichment' and includes a discussion of US case-law on the matter.

As we saw in section IV, according to 40:1 RB, Swedish courts may ask for an expert opinion from public authorities. Providing expert opinion to the court is voluntary, except for persons 'who are obliged to assist as experts in their official capacity'.[53] According to the Government's reasoning, which is set out in Government Bill 2016/17:9, the SCA is not obliged to assist Swedish courts as an expert, because this is not expressly required by the regulations that set out the SCA's mission.[54] However, the SCA has a clear mission to work towards effective competition in the private and public sphere to the benefit of consumers. It is possible that the broadly worded mission affects the option of denying assistance. Moreover, the obligation to provide assistance to courts does not only follow from Chapter 40 of the RB but also from section 6 of the Administrative Procedure Act (1986:223), which stipulates that all public authorities have an obligation to provide assistance to other authorities[55] within the scope of their activities.

Moreover, it is not clear what criteria govern the SCA's deliberation on the appropriateness of assisting the national courts. Would it be in line with the spirit of the Directive and the purpose of Article 17(3) for the SCA to factor in budgetary constraints, the time it would take to provide assistance and the associated cost, the complexity of the case, and whether the case is a follow-on or a standalone action? It is rather telling that there are – as of now – no cases in which the SCA has appeared as an expert under 40:1 RB, although that possibility has always been available in Sweden. Moreover, the SCA has intervened in a domestic case on its own initiative under Article 15(3) of Regulation 1/2003 only once.[56]

Additionally, it is not clear what kind of assistance the SCA would provide. There are indications that the SCA considers that its role in assisting the national courts is not to quantify the harm, but rather to simply enlighten the courts as to the methods that could be used to do so.[57] Yet that seems hardly necessary, or of any value, given the Commission's detailed Guidance on Quantifying the Harm.[58]

To the extent a new provision, or an appropriate amendment, would have been introduced to transpose Article 17(3) of the Directive in the Swedish legal order, the Government Bill would have included some deliberations on the matters discussed in this subsection. Those preparatory works would have provided guidance on the conditions under which the SCA will make the

[53] c 40, s 4 of the RB (author's translation).

[54] Proposition 2016/17:9, p 52.

[55] Swedish courts are public authorities for the purposes of the Administrative Procedure Act.

[56] Opinion of the SCA to the Svea Court of Appeal of 25 March 2010 in Case Ö 1561-10 *Sodastream*, in accordance with Art 15(3) of Regulation 1/2003, available at: www.konkurrensverket.se/globalassets/aktuellt/nyheter/las-yttrandet-dnr-6322009-69724kb.pdf (in Swedish).

[57] See Sweden's country report for the OECD 'Relationship between public and private antitrust enforcement', DAF/COMP/WP3/WD(2015)4.

[58] Above, n 21. See further Iacovides (n 15).

choice of assisting the national courts in the quantification of harm and would have shed some light both on the expectations of the Swedish legislature and the SCA's own view of the matter. The failure to transpose Article 17(3) of the Directive was a missed opportunity in this regard too.

VI. CONCLUSIONS

In this chapter, I examined whether Sweden has correctly implemented Article 17(3) of the Directive in Swedish law. Based on the legislative history of Article 17(3) and its aim as revealed by its broader context and soft law, it was submitted that Article 17(3) of the Directive has not been correctly transposed into Swedish law, mainly because Swedish procedural law precludes national courts from initiating the request for assistance to the SCA on their own motion.

The discussion regarding the transposition of Article 17(3) of the Directive into Swedish law shows that both Swedish courts and the SCA are quite passive in private damages actions for infringements of competition law. Moreover, the specialised competition courts in Sweden seem to be considered sufficiently competent to deal with issues of quantification without the assistance of the SCA. This misses the point that quantification is complex and that the SCA is often better placed than the national courts and the parties to estimate the harm caused by anticompetitive conduct.

The non-transposition of Article 17(3) of the Directive into Swedish law can prove to be detrimental to claimants in some exceptional cases. The discussion showed a certain tension between national rules of procedure on the one hand and the effective application of EU competition rules in Sweden on the other. It is submitted that it would have been much more appropriate if the tension had been resolved through legislation rather than court actions based on EU law principles, as it was shown that such actions would most likely fail.