THE SECURITIES LITIGATION REVIEW

Seventh Edition

Editor
William Savitt

THE LAWREVIEWS

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SEVENTH EDITION

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PREFACE

This seventh edition of *The Securities Litigation Review* is a guided introduction to the international varieties of enforcing rights related to the issuance and exchange of publicly traded securities.

Unlike most of its sister international surveys, this review focuses on litigation – how rights are created and vindicated against the backdrop of courtroom proceedings. Accordingly, this volume amounts to a cross-cultural review of the disputing process. While the subject matter is limited to securities litigation, which may well be the world's most economically significant form of litigation, any survey of litigation is in great part a survey of procedure as much as substance.

As the chapters that follow make clear, there is great international variety in private litigation procedure as a tool for securities enforcement. At one extreme is the United States, with its broad access to courts, relatively permissive pleading requirements, expansive pretrial discovery rules, readily available class action principles and generous fee incentives for plaintiffs' lawyers. At the other extreme lie jurisdictions such as Sweden, where private securities litigation is narrowly circumscribed by statute and practice, and accordingly quite rare. As the survey reveals, there are many intermediate points in this continuum, as each jurisdiction has evolved a private enforcement regime reflecting its underlying civil litigation system, as well as the imperatives of its securities markets.

This review reveals an equally broad variety of public enforcement regimes. Every country has its own idiosyncratic mixture of securities lawmaking institutions; each provides a role for self-regulating bodies and stock exchanges but no two systems are alike. And while the European regulatory schemes have worked to harmonise national rules with Europe-wide directives – an effort now disrupted by the departure of the United Kingdom from the European Union – few countries outside Europe have significant institutionalised cross-border enforcement mechanisms, public or private.

We should not, however, let the more obvious dissimilarities of the world's securities disputing systems obscure the very significant convergence in the objectives and design of international securities litigation. Nearly every jurisdiction in our survey features a national securities regulatory commission, empowered both to make rules and to enforce them. Nearly every jurisdiction focuses securities regulation on the proper disclosure of investment-related information to allow investors to make informed choices, rather than prescribing substantive investment rules. Nearly every jurisdiction provides both civil penalties that allow wronged investors to recover their losses and criminal penalties designed to punish wrongdoers in the more extreme cases.

Equally notable is the fragmented character of securities regulation in nearly every important jurisdiction. Alongside the powerful national regulators are subsidiary bodies –

stock exchanges, quasi-governmental organisations, and trade and professional associations – with special authority to issue rules governing the fair trade of securities and to enforce those rules in court or through regulatory proceedings. Just as the world is a patchwork of securities regulators, so too is virtually each individual jurisdiction.

The ambition of this volume is to provide readers with a point of entry to these wide varieties of regulations, regulatory authorities and enforcement mechanisms. The country-by-country treatments that follow are selective rather than comprehensive, designed to facilitate a sophisticated first look at securities regulation in comparative international perspectives, and to provide a high-level road map for lawyers and their clients confronted with a need to prosecute or defend securities litigation in a jurisdiction far from home.

A further ambition of this review is to observe and report important regulatory and litigation trends, both within and among countries. This perspective reveals several significant patterns that cut across jurisdictions. In the years since the financial crisis of 2008, nearly every jurisdiction reported an across-the-board uptick in securities litigation activity – an increase that has been recapitulated by the covid-19 pandemic roiling society and the global economy. Many of the countries featured in this volume have seen increased public enforcement, notably including more frequent criminal prosecutions for alleged market manipulation and insider trading, often featuring prosecutors seeking heavy fines and even long prison terms.

Civil securities litigation has continued to be a growth industry as a new normal has set in for the private enforcement of securities laws. While class actions are a predominant feature of US securities litigation, there are signs that aggregated damages claims are making significant inroads elsewhere. There appears to be accelerating interest around the world in securities class actions and other forms of economically significant private securities litigation. Whether and where this trend takes hold will be one of the important securities law developments to watch in coming years.

This suggests the final ambition for *The Securities Litigation Review*: to reflect annually where this important area of law has been, and where it is headed. Each chapter contains both a section summarising the year in review – a look back at important recent developments – and an outlook section, looking towards the year ahead. The narrative here, as with the book as a whole, is of both convergence and divergence, continuity and change – with divergence and change particularly predominant in recent years, following political upheaval in the United States and the United Kingdom that produced a sharp break from international cooperation and forceful government regulation in the global finance capitals of New York and London.

An important example is the matter of cross-border securities litigation, treated by each of our contributors. As economies and commerce in shares become more global, every jurisdiction is confronted with the need to consider cross-border securities litigation. The chapters of this volume show jurisdictions grappling with the problem of adapting national litigation systems to a problem of increasingly international dimensions. How the competing demands of multiple jurisdictions will be satisfied, and how jurisdictions will learn to work with one another in the field of securities regulation, will be a story to watch over the coming years. We look forward to documenting this development and other emerging trends in securities litigation around the world in subsequent editions.

Many thanks to all the superb lawyers who contributed to this seventh edition. For the editor, reviewing these chapters has been a fascinating tour of the securities litigation world, and we hope it will prove to be the same for our readers. Contact information for our contributors is included in Appendix 2. We welcome comments, suggestions and questions,

both to create a community of interested practitioners and to ensure that each edition improves on the last.

William Savitt
Wachtell, Lipton, Rosen & Katz
New York
May 2021

Chapter 17

SWEDEN

David Ackebo and Magnus Andersson[1]

I OVERVIEW

i Sources of law

The Swedish legal framework relating to securities has undergone major changes since the beginning of the twenty-first century as a result of increasingly extensive and detailed EU legislation. The current legal framework in the field of securities law is largely based on EU directives and regulations. The most important sources of law for the current Swedish securities law framework are:

a the Markets in Financial Instruments Directive (2004/39/EC) (MiFID I);
b its successors MiFID II and MiFIR;[2] and
c Regulation (EU) No. 596/2014 (the Market Abuse Regulation (MAR)).

EU directives are implemented in Sweden via acts passed by parliament. The principle of the primacy of EU law entails that courts, authorities and other practitioners and users must interpret national laws and regulations implementing the directive in conformity with EU law and principles. EU regulations, on the other hand, are directly binding and applicable after they have been adopted by the European Parliament and the European Council.[3] EU regulations therefore apply to the same extent as acts passed by the Swedish parliament.

The principal pieces of legislation in the field of securities law are:

a the Companies Act (2005:551);
b the Securities Market Act (2007:528);
c the Financial Instruments Trading Act (1991:980);
d the Central Securities Depositories and Financial Instruments Act (1988:1479);
e the Notification Requirement Act (2000:1087);
f the Act on Public Takeover Offers (2006:451);
g the Market Abuse Act (2016:1307);
h the Act Complementing the EU's Market Abuse Regulation (2016:1306);
i the Act Complementing the EU's Prospectus Regulation (2019:414);
j Regulations promulgated by the Swedish Financial Supervisory Authority (SFSA); and

1 David Ackebo is a partner and Magnus Andersson is a senior associate at Hannes Snellman Attorneys Ltd.
2 Markets in Financial Instruments Directive 2014/65/EU (MiFID II) and Markets in Financial Instruments Regulation (EU) No. 600/2014 (MiFIR).
3 Typically, regulations contain implementing provisions, stipulating for example the date of entry into force and provisional application of certain rules. See for example Article 39 of the MAR, which states that the MAR is applicable from 3 July 2016 subject to certain exceptions set forth therein.

k rules of the relevant regulated markets and other bodies (e.g., the Nordic Main Market Rulebook for Issuers and the Takeover Rules published by Nasdaq Stockholm Stock Exchange as well as the Swedish Corporate Governance Code issued by the Swedish Corporate Governance Board).

There are also several statutes potentially relevant in the context of securities litigation that do not deal specifically with securities. These include, inter alia:

a the Code of Judicial Procedure (1942:740); and

b various items of consumer protection legislation.

ii Regulatory authorities

Regulatory authority – the SFSA

The SFSA[4] is the central competent regulatory authority responsible for the regulation, authorisation and supervision of financial markets and their participants. The SFSA is authorised by statute to promulgate regulations and guidelines in furtherance of the fundamental provisions set forth in acts passed by the parliament. Furthermore, the SFSA possesses a wide range of supervisory and administrative enforcement powers.

Self-regulatory bodies

The Nasdaq Stockholm Exchange

In Sweden, there are two regulated markets.[5] The largest and by far the most dominant is Nasdaq Stockholm Exchange (NSE). Although the SFSA has been given a more active supervisory role during the past years regarding the supervision of listed companies, self-regulation is still an essential and distinctive feature of the Swedish securities market. In particular, the role of the NSE remains significant. Pursuant to the Securities Market Act (SMA), an exchange shall have clear and transparent rules for the admission to trading of financial instruments on a regulated market.[6] The SMA also stipulates that an exchange must have rules regarding takeover bids for shares admitted to trading on a regulated market operated by the exchange.[7] The listing and takeover rules of the NSE indirectly implement several EU Acts, and the NSE is responsible for monitoring compliance with its rules. In furtherance of its obligations to regulate markets, the NSE has appointed a Disciplinary Committee, independent from the exchange, which decides on compliance matters brought before it. If the Disciplinary Committee were to conclude that applicable rules have been violated, it can decide upon sanctions, including warnings or reprimands, monetary fines, delisting, and termination of membership and to revoke trader authorisation.

The Swedish Securities Council

The Swedish Securities Council (SSC) is a self-regulatory body, functionally similar to the Takeover Panel in the United Kingdom, but with a much larger scope. Its stated mission is to promote good practices on the Swedish stock market by issuing statements and providing

4 Sw. *Finansinspektionen*.

5 In addition, there are three multilateral trading facilities in Sweden: First North, Nordic MTF and Spotlight Stock Market.

6 Chapter 15, Section 1 of the SMA.

7 Chapter 13, Section 8 of the SMA.

advice and information. The SFSA has delegated certain duties under the Act on Public Takeover Offers on the Stock Market to the SSC, for example matters relating to defensive measures, mandatory bids and offer documentation. Additionally, the NSE has delegated to the SSC the right to decide on exemptions from the provisions in the NSE's takeover rules and how these rules are to be interpreted. As a result, parties may request the SSC to assess contemplated transactions in advance, thereby ensuring compliance with the applicable rules. As a result of its mission, scope and delegated authority, the SSC plays an important role on the Swedish securities market.

Judicial authorities

There are three kinds of courts in Sweden: the general courts, which comprise district courts, courts of appeal and the Supreme Court; the general administrative courts, which comprise administrative courts, administrative courts of appeal and the Supreme Administrative Court; and the special courts, which have specific subject matter jurisdiction, for example the Labour Court.

There are no special courts or specialist judges for litigation relating to the securities markets. Rather, the Swedish general courts have jurisdiction to adjudicate both civil and criminal actions relating to the securities markets. Administrative sanctions imposed by the SFSA, on the other hand, are appealed to the administrative courts and not to the general courts.

The Swedish National Economic Crimes Authority

The Swedish National Economic Crimes Authority (SNECA) is the relevant prosecutorial body in relation to criminal enforcement of securities laws. The SNECA is a specialised authority within the public prosecution service and manages the prosecution of all sorts of economic crimes, including insider trading, market abuse and market manipulation.

iii Common securities claims

Insider dealing and market manipulation

Rules relating to prohibitions on insider trading, unlawful disclosure of inside information and market manipulation are set out in the Market Abuse Act.[8]

Inside information is defined as information of a precise nature that has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.[9]

8 The Market Abuse Act regulates criminal enforcement proceedings and MAR and the Act Complementing MAR (2016:1306) regulate administrative enforcement proceedings relating to market abuse.

9 MAR Article 7.1.a. Information is deemed to be of a 'precise nature' if it indicates a set of circumstances that exists or that may reasonably be expected to come into existence, or an event that has occurred or that may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument (Article 7.2).

The Market Abuse Act prohibits any person who has obtained inside information from acquiring or disposing of financial instruments to which the information relates, and from advising or in any other manner causing any third party to acquire or dispose of those financial instruments.[10]

The Market Abuse Act also prohibits any person from disclosing information that constitutes inside information, unless the disclosure occurs in the normal course of the exercise of a person's employment, profession or duties, or where the information is placed into the public domain simultaneously with its disclosure.[11]

Furthermore, the Market Abuse Act prohibits any person, in connection with trading on the securities market or otherwise, from acting in a manner that gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of financial instruments.[12]

Insider trading and market manipulation are criminal acts that are often difficult to investigate and obtain a conviction, partly because they are usually committed by persons who are much more familiar with securities and trading than the prosecutors and, particularly, the members of the court. Statistics from the past four years reveal that, on average, approximately 350 suspected insider trading cases and 250 suspected market manipulation cases per year are investigated by the SFSA, and nearly all of them are reported to the SNECA.[13] However, few cases lead to prosecution and even fewer lead to convictions.

MAR entered into effect on 3 July 2016, thereby repealing the Market Abuse Directive in its entirety. MAR constitutes one of the most significant changes in the field of securities law in Sweden in the past years. To begin with, MAR is an EU regulation and not a directive. This entails that its provisions are directly applicable and binding.[14] Furthermore, MAR imposes new requirements on listed issuers and introduces more comprehensive procedural powers for the competent national authorities (in Sweden the SFSA). MAR is also broader in scope compared with its predecessor, encompassing a wider range of financial instruments and trading facilities.

Some of the key changes for listed issuers include:

a more extensive and detailed record-keeping obligations in relation to insider lists;

b amendments to the regime for the approval and reporting of transactions executed by persons discharging managerial responsibilities;[15] and

c introduction of stringent procedures to follow when conducting market soundings.[16]

10 Chapter 2, Section 1 of the Market Abuse Act.

11 Chapter 2, Section 3 of the Market Abuse Act.

12 Chapter 2, Section 4 of the Market Abuse Act.

13 www.fi.se/sv/publicerat/statistik/marknadsmissbruk.

14 The Swedish parliament has adapted several acts in the field of securities law and enacted the Act Complementing the EU's Market Abuse Regulation (2016:1306) to ensure consistency with MAR.

15 A person discharging managerial responsibilities means a person within an issuer, an emission allowance market participant or another entity referred to in MAR Article 19(10), who is: (1) a member of the administrative, management or supervisory body of that entity; or (2) a senior executive who is not a member of the bodies referred to in point (1), who has regular access to inside information relating directly or indirectly to that entity and power to take managerial decisions affecting the future developments and business prospects of that entity (MAR Article 3.1.25).

16 Market soundings are interactions between a seller of financial instruments and one or more potential investors, prior to the announcement of a transaction, to gauge the interest of potential investors in a possible transaction and its pricing, size and structuring. Market soundings could involve an initial or secondary offer of relevant securities and are distinct from ordinary trading (MAR Article 11).

The SFSA may impose administrative sanctions under a variety of rules, including under MAR in cases of, for example, market abuse, and the NSE may sanction breaches of its listing and takeover rules (see Section III).

A listed issuer is under a continuous disclosure obligation to disclose inside information in accordance with Article 17 of MAR (delayed disclosure is only permitted in certain circumstances). There is also a general requirement that the issuer must ensure that the inside information is made public in a manner that enables fast access and complete, correct and timely assessment of the information by the public. Common administrative investigations include supervision and enforcement of the disclosure rules.

II PRIVATE ENFORCEMENT

The majority of enforcement actions in Sweden are public enforcement actions. Private securities litigation is unusual. This is probably partly because of the fact that under Swedish law there are no statutory rules stipulating civil liability for improper activities with respect to securities, and partly because there is no tradition of aggressive litigation in Sweden. A third reason might be that the majority of investors acquire financial instruments through financial intermediaries. Therefore, the most natural claim for damages is against an agent or a financial adviser.

There are explicit civil liability provisions for founders, board members, managing directors, auditors, general examiners and special examiners of a company that has prepared and issued a prospectus. Each of these persons is liable to compensate anyone who has suffered damages caused by a breach of (1) the provisions in Chapter 2a of the Financial Instruments Trading Act (1991:980) regarding information contained in offer documents; or (2) Regulation (EU) No. 2017/1129 regarding information contained in prospectuses.[17] The same applies where a shareholder or other person has suffered damages as a result of a breach of the Annual Reports Act (1995:1554).

Apart from this, there are no statutory rules under Swedish law as regards which parties can be held liable for false or misleading information, whether in a prospectus or otherwise. Private litigation is rare, and case law on the matter is very scarce.[18] The main rule under Swedish law is that, in the absence of a contractual relation or explicit statutory provisions, tort liability presupposes that the aggrieved party has suffered damages as a result of a criminal act.[19] There are a number of exceptions to this main rule, established in case law. None of these exceptions relate specifically to the securities market.[20] It is, therefore, still undecided to what extent, or if at all, a person or entity may be liable for false or misleading information in the field of securities law.

The special provisions set forth in the Swedish Companies Act on the liability towards shareholders and other investors for breaches of the applicable annual accounts legislation

17 Chapter 29, Section 1, Paragraph 2 of the Companies Act.

18 It is unclear whether the issuer itself can be held liable to pay damages for false or misleading statements made by its representatives. According to the predominant view, the answer is negative; see af Sandeberg (ed.), *Börsrätt* (2011), p. 237 et seq.

19 The acquisition of shares in connection with an issue is not considered a 'purchase', as this notion is otherwise understood in the law of obligations under Swedish law. Therefore, the rules regarding, for example, sale of goods are not considered applicable to such acquisitions.

20 NJA 1987 p. 692, NJA 2001 p. 878 and NJA 2005 p. 608.

were subject to a landmark judgment in 2014 (the *BDO* case). The case concerns an auditor's (BDO's) liability for false and misleading information contained in an annual report. However, it has been argued with good reason that the ruling contains important statements of general application, and that the *BDO* case is therefore relevant when assessing director liability pursuant to the Swedish Companies Act.[21] In its judgment, the Supreme Court introduced a new element of justifiable reliance'. This element, which is necessary to establish liability, in essence, qualifies the proximate cause analysis insofar that the aggrieved party must demonstrate that its reliance on the false or misleading information was of a certain nature. Thus, the Supreme Court held that a business decision is deemed to be based on a justifiable reliance on information in a certain annual report if 'the decision concerns a business relation with the company or a transaction in respect of shares or other instruments issued by the company'. In other words, it appears that investors who purchase shares on the secondary market cannot establish that their reliance on the false or misleading information was justified. The number of investors entitled to compensation thus seems to have been significantly narrowed, and the judgment has been criticised for weakening investor protection.[22]

i Forms of action

A person who has suffered damages because of improper activities relating to securities cannot turn to the SFSA for damages. The only alternative to claim damages is to file a civil claim against the damaging party. In cases of insider trading or market abuse, an aggrieved party may also intervene in a criminal proceeding and seek damages in the course of the trial.[23] Under Swedish law, whoever causes damage to another person by way of a criminal act is liable to compensate that person for loss suffered.

Although civil liability for losses resulting from false or misleading statements or any other improper activity relating to securities exists under Swedish law, such claims are, as mentioned, rare. In recent years, there has been an increasing amount of claims against auditors, as manifested by the *BDO* case mentioned above.

ii Procedure

The Code of Judicial Procedure (CJP) governs all aspects of the conduct of civil court proceedings, and, thus, also private securities claims.

21 Sveen and Andersson, *Skyddet för investerare efter BDO-domen: Bör investerare överhuvudtaget bry sig om svenska börsnoterade aktier?*, Juridisk Tidskrift No. 12017/18 p. 233 et seq. As noted above, the board, the CEO and the auditor share joint and several liability for breaches of the applicable annual accounts legislation.

22 ibid.

23 This requires that a party is considered as the 'aggrieved party' as this concept is defined in the field of criminal law. The criminal definition of the concept of aggrieved party is set forth in Chapter 20, Section 8, Paragraph 4 of the CJP, according to which the aggrieved person is the person against whom the offence was committed or who was affronted or harmed by it. It is, however, unclear whether a person suffering damage because of insider trading or market abuse falls within the scope of the definition of 'aggrieved party'.

Judicial proceedings are commenced by the claimant's submission of a written complaint to the district court, which must comply with certain requirements stipulated by the CJP. Thereafter, the respondent is ordered by the court to respond to the complaint, after which the court decides on a schedule for the remainder of the proceedings.

A key feature of litigation in Sweden as regards evidence is the concept of 'free evaluation of evidence'. This concept entails that there are no restrictions as to admissibility of evidence. Instead, it is up to the court to consider and evaluate all evidence presented by the parties during a hearing or otherwise referred to, and to assign appropriate weight to each item of evidence. Only under exceptional circumstances, for example if the court finds certain evidence to be clearly superfluous, may the court dismiss evidence. Furthermore, there is no pretrial discovery in Swedish civil litigation. However, upon request by a party, a party (and third parties) can be ordered by the court to produce documents. Thus, anyone possessing a written document that can be expected to be of importance as evidence may be ordered to produce the document.[24] A prerequisite for the court to order a party (or third party) to produce documents is that the party seeking production must be able to sufficiently identify the documents to be produced and explain their evidentiary relevance in the specific case. The level of precision is hard to define generally. To the extent that a document cannot be specified exactly, it may be sufficient that the requesting party identifies a narrowly defined category of documents, provided that the fact to be proved with the documents is clearly specified.[25]

Litigation costs (for example, the cost for legal representation) are apportioned by the court at the end of the trial. The general rule is that the costs follow the event (i.e., the losing party reimburses the prevailing party for its costs).[26] However, only costs that the court deems have been reasonably incurred to protect the prevailing party's interest are compensable.

Rules governing lawyers' fees are set forth in the Code of Professional Conduct issued by the Swedish Bar Association. Pursuant to that Code, all fees charged by a licensed attorney[27] must be reasonable, having regard to what has been agreed with the client and the extent of the mandate, its nature, complexity and importance, as well as the attorney's expertise, the result of the work and other such circumstances.[28] Contingency fees are generally considered to be contrary to the Code and, therefore, prohibited.[29] That being said, the Code does not restrict an arrangement pursuant to which the fees are a function of the outcome and degree of success as long as the fees are not calculated as a fraction of the amount awarded.

Furthermore, there is no general restriction against third-party litigation funding. Although unusual, such arrangements are becoming increasingly common, particularly with respect to major claims. Notably, a Swedish third-party litigation funding company recently filed claims against a number of public companies relating to the improper redemption of preference shares.

The judgment of a district court in a civil action can be appealed to the court of appeal. Leave to appeal is required for the court of appeal to review the district court's judgment.

24 Chapter 38, Section 2 of the CJP. There are of course exceptions to this rule, relating to, for example, privilege and certain mandatory rules on confidentiality.

25 NJA 1998 p. 590 and 2012 p. 289.

26 Chapter 18, Section 1 of the CJP.

27 Sw. *Advokat*.

28 Sections 4.1.1 and 4.1.2 of the Code.

29 Section 4.2.1 of the Code.

Leave to appeal may be granted if there is reason to believe that the district court erred in its decision or the case involves issues of a precedential nature.[30] Accordingly, a court of appeal may also review issues of facts. The threshold for leave to appeal to the court of appeal is relatively low. However, the Supreme Court is much more restrictive and only grants leave in cases that have precedential value. In other words, the court of appeal is, in practice, the final instance for most cases.

iii Group litigation

The Group Proceedings Act (2002:559) (GPA) provides the possibility of aggregating a plurality of claims against the same respondent into one group action (or class act). The statutory criteria for such an action include, inter alia, jurisdiction, commonality as to the group and its interests and overall appropriateness. Claims for damages resulting from improper activities relating to securities fulfil the jurisdiction criterion and are therefore permitted in principle under GPA. However, GPA is not frequently used and has, as far as we know, never been used in connection with securities litigation.

iv Settlements

Civil actions litigated in district courts may be settled at any time by way of a settlement agreement. Settlements may be entered into either before the court or out of court. Furthermore, the claimant may, at any time, withdraw its claim. However, should the claimant withdraw its claim after the respondent has submitted its answer, the case shall nonetheless be tried by the court if the respondent so requests.

If the parties agree on a settlement of the dispute, they are free to decide whether the settlement shall be confirmed by the court by way of a consent judgment. If confirmed, the judgment, namely, the settlement, will be enforceable and have res judicata effect. The court does not assess the fairness or reasonableness of the settlement, but it may refuse to confirm a settlement that violates public policy, or that is too difficult to enforce, for example if the settlement includes too many uncertain elements and subjective conditions. If not confirmed, the settlement agreement will be subject to general principles of Swedish contract law, thereby contractually replacing the underlying basis for the claim.

v Damages and remedies

The general damages remedy under Swedish law gives the aggrieved party right to full compensation. Thus, the purpose of the damages remedy is to put the aggrieved party in the same economic position it would have been in had the harmful act (or contractual breach, as the case may be) not occurred.

The aggrieved party has the right to (1) full compensation for economic losses suffered by it (2) as a consequence of a harmful act (or a breach of contract), where (3) the causation between the harmful act and the damages is adequate, in other words, proximate cause exists, to the extent that (4) the aggrieved party has proved actual losses or proved facts that lead to the reasonable inference that the losses are plausible. Only economic losses are recoverable. However, if a category of losses that typically is viewed as non-economic, such as loss of goodwill and reputation, can be measured and established, such losses are recoverable. Punitive or exemplary damages are, however, not available under Swedish law.

30 Chapter 49, Section 14 of the CJP.

To establish the losses suffered by the aggrieved party one should contrast a hypothetical scenario, in which the harmful act did not occur, with the actual scenario and analyse to what extent there is a difference in wealth between the two. If it can be concluded that the wealth is greater in the hypothetical scenario, the difference in wealth is recoverable as damages. This conceptual model is called the differential doctrine and has been adopted by the Supreme Court as the main test for determining damages. In the *BDO* case (mentioned above), the Supreme Court held that because of the hypothetical nature of the inquiry, the court shall generally not consider subjective, party-specific factors when determining the hypothetical scenario. To the contrary, the court shall make an objective determination, unless any subjective factors were visible for the breaching party. Further, the aggrieved party is under an obligation to avoid or mitigate any losses by taking reasonable measures. To the extent that the aggrieved party fails to take such measures, losses that are a result of the aggrieved party's failure are not recoverable. It should be emphasised that the duty to mitigate damage is relatively limited. For example, an aggrieved party is not obliged to take a measure that would be disproportionately burdensome.

III PUBLIC ENFORCEMENT

i Forms of action

Public enforcement actions may be divided into two main categories:

a administrative and quasi-administrative proceedings, conducted by the SFSA and the relevant exchange respectively; and

b criminal proceedings conducted by the SNECA before the criminal courts.

Administrative actions

The SFSA may commence administrative proceedings to investigate whether a breach of securities laws has occurred, and it is authorised to impose sanctions that can be appealed to the administrative courts. The range of supervisory and investigatory powers available to the SFSA has increased as a result of the MAR.

The supervisory and investigatory powers of the SFSA include the power to:

a request information from market participants and disclosure of relevant documents;

b summon and question any person who might possess relevant information;

c carry out on-site inspections;

d suspend trading of a financial instrument that is of relevance to an investigation;

e require the temporary cessation of any practice that the SFSA considers contrary to the MAR;

f refer matters for criminal investigation;

g impose a temporary prohibition on the exercise of professional activity; and

h take all necessary measures to ensure that the public is correctly informed, inter alia, by correcting false or misleading disclosed information, including by requiring an issuer or other person who has published or disseminated false or misleading information to publish a corrective statement.

Furthermore, the SFSA may, with respect to violations of the insider trading and market manipulation rules, impose administrative sanctions against both natural and legal persons.[31]

Quasi-administrative actions

The continuous supervision of issuers of securities is mainly carried out by the relevant stock exchange. In this respect, the stock exchanges have been delegated the authority to define the contours of the self-regulation system upon which the Swedish securities market rests. As noted above, the listing and takeover rules of the NSE indirectly implement EU legislation in the field of securities law and the stock exchange is also responsible for monitoring compliance with its rules. In parallel, the SFSA supervise the stock exchanges, thereby ensuring that their rules are correctly enforced in relation to the issuers.

In the event that an issuer fails to comply with the NSE's rules, the Disciplinary Committee may decide upon sanctions, including warnings or reprimands, monetary fines, delisting and termination of membership and to revoke trader authorisation. Monetary fines may correspond to not more than 15 times the annual fee paid by the issuer to the exchange.[32] Prior to a sanction, the Issuer Surveillance department of the NSE conducts an investigation of the potential violation and will, within the context of that investigation, issue a written request for an explanation from the issuer. The issuer shall, upon request by the exchange, supply the exchange with the information and documentation it requires to determine whether a violation has occurred. Detailed provisions about the Disciplinary Committee are set forth in the SMA and in regulations issued by the SFSA.

Criminal actions

Pursuant to the MAR, regulated markets, multilateral trading facilities and persons professionally executing transactions are required to report any observed trade order or transaction that can be assumed to be related to insider trading, market manipulation or unlawful disclosure of inside information, or attempts at such conduct. Such reports shall be filed with the SFSA. In accordance with the Market Abuse Act, the SFSA submits these matters to the SNECA, which typically starts a criminal investigation. The SFSA itself may not initiate criminal investigations.

Pursuant to the CJP, a prosecutor is under a professional obligation to conduct a criminal investigation when a crime has been committed.[33] During the investigation, the prosecutor may, among other things, examine witnesses, gather documentary evidence and under certain circumstances use wiretapping and other coercive measures. Normally the SFSA and SNECA collaborate closely and exchange information. Suspects have no obligation to cooperate with either the court or the prosecutor or to produce evidence.

Legal persons cannot be held liable for criminal offences.[34] Any criminal liability is instead attributed to directors or representatives of the relevant entity. The punishment that

31 The maximum sanction for market manipulation for natural persons has previously been raised from €100,000 to €5 million and for legal entities from €10 million to €15 million or from 10 per cent of the total annual turnover to 15 per cent.

32 The annual fee is based on the average market capitalisation for the previous year (December to November). The minimum fee is 205,000 kronor and the maximum fee is 3,105,000 kronor.

33 Chapter 20, Section 6 of the CJP.

34 Although companies cannot be convicted of criminal acts, note that companies may be liable to pay a corporate fine (Sw. *företagsbot*) if a criminal act has been committed in the course of a business activity. The maximum amount has been increased to 500 million kronor.

the court may impose varies depending on the type of criminal act, and some acts (e.g., serious insider trading and serious market manipulation) are punishable with up to six years of imprisonment. Less serious instances of such criminal acts could be punishable with a fine. If convicted, the defendant has the right to appeal to the court of appeal.

If administrative sanctions have been imposed on a defendant by the SFSA, prosecutors are precluded from requesting further (criminal) sanctions on the defendant (provided that the matter concerns the same act).[35] However, if the SFSA has not imposed administrative sanctions and the prosecutor decides to bring charges, the prosecutor is under a duty, in parallel with the criminal prosecution, to file a motion for administrative sanctions.[36] Hence, a court, and not the SFSA, can impose an administrative sanction in the event that the defendant is acquitted. This might appear contradictory given the prohibition of ne bis in idem, but taking into account that the standard of proof in criminal cases is higher than in administrative cases, the underlying reason is that the court shall decide on an administrative sanction only if the prosecutor fails to prove the criminal act.[37]

ii Settlements

Settlement of administrative proceedings commenced by the SFSA is not possible under Swedish law. Nor are settlements available in criminal proceedings, and there is no equivalent of plea-bargain agreements.

IV CROSS-BORDER ISSUES

i Jurisdiction under EU Regulation No. 1215/2012

Jurisdictional issues are governed by the Brussels I *bis* Regulation (Brussels I), provided that the respondent is domiciled in an EU Member State.[38] A respondent not domiciled in a Member State is, in general, subject to national rules of jurisdiction.[39] However, there are a few exceptions. For example, national rules of jurisdiction do not apply regardless of whether the respondent is domiciled in a Member State or not if a matter falls within the scope of Article 17 of Brussels I (consumer contracts).

The general rule of jurisdiction under Brussels I is that the courts of the Member State in which the respondent is domiciled will have jurisdiction to hear the dispute, regardless of the respondent's nationality (Article 4). An action may also be brought against a respondent in the courts of a Member State other than the Member State in which the respondent is domiciled in the cases mentioned in Articles 7–23 (rules of special jurisdiction).[40] It must be stressed that it is only possible to deviate from the general rule in the specific cases expressly stated in Brussels I.

35 Chapter 3, Section 5 of the Market Abuse Act (this means that the administrative sanctions are considered to fall within the scope of the ne bis in idem principle).

36 Chapter 4, Section 1, of the Market Abuse Act.

37 Chapter 4, Section 1, Paragraph 2 of the Market Abuse Act.

38 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

39 Article 6 of the Brussels I Regulation.

40 There are also exclusive jurisdiction provisions (Article 24) and provisions governing prorogation agreements (Articles 25–26).

Special rules of jurisdiction apply in matters relating to, for example, contracts[41] (Article 7.1.a), tort[42] (Article 7.2) and consumer contracts (Articles 17–18).[43] In the controversial judgment *Kolassa v. Barclays Bank*, the Court of Justice of the European Union (CJEU) for the first time decided which, if any, of these special jurisdictional grounds are applicable for claims against an issuer of securities based on an allegedly false or misleading prospectus.[44] In the *Kolassa* ruling, the CJEU held that a claim against an issuer is delictual in nature and that therefore, pursuant to Article 7.2, the courts of the place where the harmful event occurred or may occur have jurisdiction in parallel with the courts where the respondent is domiciled. Pursuant to settled case law, the expression 'place where the harmful event occurred or may occur' covers both the place where the damage occurred and the place of the event giving rise to it, meaning that the respondent may be sued, at the option of the applicant, in the courts of either of those places. As regards the place of the event giving rise to the damage, the CJEU held that this place was where Barclays had its seat. As regards the localisation of damage, the CJEU held that the courts at the place of the domicile of Mr Kolassa had jurisdiction, 'in particular when the loss itself occurred directly in the investor's bank account and if that bank account is held with a bank established within the jurisdiction of these courts'. Absent a clarification of the finer nuances of the *Kolassa* ruling, the issue of jurisdiction in prospectus liability cases remains somewhat unclear.

ii Jurisdiction under national rules

If the respondent is not domiciled in an EU Member State and provided that the matter does not fall within the scope of Article 17 of Brussels I (consumer contracts), Swedish national rules on jurisdiction apply. These rules are set out in Chapter 10 of the CJP.[45]

If the respondent is resident outside Sweden, the main rule provides that the district court in the place where the respondent last resided has jurisdiction.[46]

Other courts of Sweden have jurisdiction in parallel with the court where the respondent last resided in the following cases.

a Section 3 confers jurisdiction upon the district court in the place where the respondent's property is located.

b In matters relating to contracts, Section 4 confers jurisdiction upon the district court in the place where the contract was entered into.[47]

c In matters relating to tort, Section 8 confers jurisdiction upon the district court in the place where the tortuous act was committed or had effect.

41 In which case the courts for the place of performance of the obligation in question have jurisdiction.

42 In which case the courts for the place where the harmful event occurred or may occur have jurisdiction.

43 In which case the courts for the place where the consumer is domiciled have jurisdiction.

44 Harald *Kolassa v. Barclays Bank* Plc, C-375/13; ECLI:EU:C:2015:37.

45 It should be noted that these rules determine the internal jurisdiction, but they are considered applicable ex analogia in international disputes.

46 Chapter 10, Section 1, Paragraph 5 of the CJP.

47 The provision requires that the contract must have been entered when the respondent or his or her legal representative was in Sweden. It is thus not sufficient that a preparatory negotiation has taken place within Sweden. Moreover, in NJA 1940, p. 354, it was held that a contract concluded by telephone between a Swedish company and a foreign company is not sufficient for jurisdiction.

d Section 6 confers jurisdiction upon the courts in the place where a business establishment is located, provided that the dispute arises directly out of the business activity carried out at the establishment. Unrelated claims are therefore not sufficient for conferral of jurisdiction.

iii Conflict of law issues

The governing law of contracts will be determined in accordance with the Rome I Regulation (Rome I).[48] The basic principle is based on party autonomy, namely, that the parties are free to choose the governing law of their contract.[49] To the extent that the law applicable to the contract has not been chosen by the parties, the law governing the contract shall be determined in accordance with Article 4.1, which contains different choice-of-law rules for different types of contract. Where the contract may not be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it is to be governed by the law of the country where the party required to effect the characteristic performance of the contract has his or her habitual residence (Article 4.2).[50] However, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in Articles 4.1 or 4.2, the law of that other country shall apply (Article 4.3).[51]

The governing law of matters relating to tort will be determined in accordance with the Rome II Regulation (Rome II).[52] The main rule is that the law applicable to a tort claim is the law of the country in which the damage occurred (lex loci damni), irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

The *Kolassa* ruling likely has ramifications for the determination of the applicable law under Rome I and Rome II, particularly with respect to the meaning of the terms 'contract' and 'tort', in view of the principle of parallel interpretation between the Brussels and the Rome Regulations.[53]

48 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

49 The freedom of contract is subject to certain exceptions; for example, in relation to mandatory provisions (Article 9, Rome I Regulation).

50 There is a specific choice-of-law rule in Article 4.1(h) relating to certain types of financial contracts. Pursuant to that article, a contract concluded within a multilateral system that brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law. The exact scope of this Article is to some extent unclear, but our understanding is that it encompasses contracts relating to financial instruments that have been concluded within a regulated market or a multilateral trading facility by financial entities that have special permission to trade in such organised financial markets. Thus, contracts concluded between such financial entities and their clients are not included in this category.

51 Where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract shall be governed by the law of the country with which it is most closely connected (Article 4.4).

52 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

53 Rome I and Rome II, recital 7.

iv Criminal jurisdiction

A Swedish court may exercise jurisdiction over crimes committed outside Sweden according to Swedish law where the crime has been committed:

a by a Swedish citizen or an alien domiciled in Sweden;

b by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in Sweden or who is a Danish, Finnish, Icelandic, or Norwegian citizen and is present in Sweden; or

c by any other alien, who is present in Sweden, and the crime under Swedish law can result in imprisonment for more than six months.

There are also a few other rules that allows Swedish courts to exercise jurisdiction over crimes committed outside Sweden according to Swedish law (e.g., if the least severe punishment prescribed for the crime in Swedish law is imprisonment for four years or more).

V YEAR IN REVIEW

The Swedish courts and authorities are in the process of establishing a new practice following the new laws and amendments that MiFID, MiFIR and MAR gave rise to and that came into effect during 2017. Similar to the situation in 2019, only minor changes have been made to the relevant regulations during 2020. By way of example, an exemption from the Leo rules in the Companies Act, namely, that a transaction between the company and a disinterested officer must be brought before a general meeting, was introduced during the year. In addition, the parliament has passed amendments to the Companies Act that strengthen the rights of minority shareholders, for example the right to appoint a special examiner. Furthermore, the investor protection for consumers has been strengthened insofar that the liability for negligent advice by a financial adviser has been clarified.

With respect to self-regulation, on 1 January 2020, the Swedish Corporate Governance Board issued a revised version of the Swedish Corporate Governance Code. The revised version, for example, incorporates supplementary rules relating to remuneration guidelines and clarifications relating to the boards' responsibility for sustainability issues and the work of the nomination committee. On 1 December 2020, the same body published its Rules on Remuneration of the Board and Executive Management and on Incentive Programmes. The rules replace prior self-regulation rules on remuneration to senior executives and on share and share price-related incentive programmes.

With respect to enforcement, the SFSA continued its investigation of some of Sweden's major banks as to whether their internal processes and measures were sufficient to discover and prevent money laundering activities, and whether the banks had acted appropriately upon suspicions of illicit activity. Such investigations were carried out in parallel with investigations by US authorities (the Department of Justice and FBI), focusing on possible fraud and breaches of anti-money laundering regulations. The US investigations are currently ongoing.

On 19 March 2020, the SFSA sanctioned Swedbank for major breaches of applicable Swedish anti-money laundering rules with respect to banking operations in Estonia, Latvia and Lithuania from 2015 to 2019. In its decision, the SFSA strongly criticised the management and board of Swedbank for, inter alia, repeatedly neglecting several internal and external reports that highlighted deficiencies in the Baltic operations. The SFSA also concluded that

Swedbank, within the context of the investigation, repeatedly provided false information as well as withholding information that was requested by the agency. As a result of the breaches, the SFSA imposed a warning and a fine in the amount of 4,000 million kronor.

On 25 June 2020, the SFSA similarly sanctioned SEB (a Swedish financial group) for breaches of applicable Swedish anti-money laundering rules. The SFSA concluded that SEB's violations did not warrant a warning but nevertheless imposed a fine in the amount of 1,000 million kronor.

Neither Swedbank nor SEB has appealed the decisions by the SFSA to the administrative courts. In early 2021, Swedbank informed the market that it will not file claims for damages against its former CEO and board as a result of the activities in the Baltic countries.

Another notable enforcement trend is that the SFSA has to a greater extent imposed administrative fines on natural persons for market manipulation incidents of a minor nature. For example, during the year, the SFSA sanctioned 20 natural persons for market manipulation. The SFSA has received some criticism for these measures on the basis that they are misguided.

It can be expected that, in the coming years, the SFSA will continue its strict enforcement policy with respect to anti-money laundering rules, market manipulation and other important regulatory areas.

VI OUTLOOK AND CONCLUSIONS

In our opinion, the rules relating to civil liability for false or misleading statements in prospectuses has to a certain extent proven ineffective in private enforcement cases. In 2013, the Swedish government proposed that the rules regarding civil liability for prospectuses should be amended to include, inter alia, express liability for the company itself and the advisers participating in the preparation of the prospectus.[54] The proposal did not lead to any law reforms. It therefore remains to be seen what changes, if any, will be implemented in the coming years.

There are currently several proposals regarding anti-money laundering supervision under review within the EU. One of these proposals relates to a regulation that, if adopted, would further harmonise the Member States' anti-money laundering legislation.[55] The Swedish government is nevertheless still determined to combat money laundering and has therefore initiated a governmental study whose purpose is to, in consultation with relevant parties, suggest further additional legislative measures. It can be expected that greater emphasis will be placed on the banks' role and responsibility for discovering money laundering schemes. As described above, the SFSA has taken a decidedly more active role in investigating possible violations and it has also coordinated its investigations with its colleagues in the Baltic countries.

54 Ds 2013:16.

55 *FI:s arbete mot penningtvätt och finansiering av terrorism*, *Finansinspektionen*, 15 November 2019.

Appendix 1

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