

The Modernisation Reform of EC Antitrust enforcement and its effects in the National Legal Order. Conference in Stockholm, 2 December 2005.

**Trends and experiences at the Swedish Competition Authority
Intervention by Claes Norgren, Director General.**

Check by delivery

Thank you for inviting me to discuss the modernisation in practice together with my colleagues and with this qualified audience.

The Swedish Competition Authority was, in my opinion, well prepared for the new challenges when the modernisation reform entered into force in May 2004. The Authority had participated in the early discussions about a reform in the Commission and also in the Council work together with our Ministry.

During the Swedish Presidency in 2001 questions related to the co-operation between the national authorities and the Commission were discussed in particular. And after December 2002, when the Council finally adopted the new Regulation, we had more than one year of discussions between the future members of the network about the notices and practical issues how to make our co-operation smooth and efficient.

The 1st of May 2004 was a critical date for the Authority in our law enforcement work. Before that date we tried to finalise many pending applications for negative clearance or exemption, and after that date the job began to close the files for other pending cases that could not be dealt with any more under the Swedish Competition Act. On 1 July 2004 our law was amended and the possibility to apply for negative clearance or exemptions at the national level was abolished. It meant that from that date we were fully in line with the order for enforcement of Articles 81 and 82 as applied by the Commission.

Harmonisation of rules and procedures for an efficient application of the EC rules at the national level was thus implemented in Sweden last year. I will come back later to harmonisation and convergence of the legal order, and to what extent further development might be necessary.

Our experience at the Swedish Competition Authority from the reform after one and a half year can be divided into two parts: first, the co-operation with the Commission and the national authorities within the European Competition Network, ECN, and second, the new system for the Authority of applying the competition rules.

Co-operation within the ECN

First, about the co-operation and the ECN. The obligation to apply Articles 81 and 82 of the Treaty did not really mean any material changes as we already had a blue print of those rules in our national law. Nor has it been any surprise to us that most of the cases qualify for the application of the EC rules. The Market Court even found in a recent judgment concerning access of buses at the Arlanda Airport that the criterion about trade between Member States was met on that limited geographic market and hence that the EC competition rules were applicable.

The possibility of allocating cases has up to now only been applied by the Authority once and in a very positive way. It concerned a suspected infringement of Article 81 where we received some useful information, indicating that the alleged infringement may not be confined only to the Swedish territory. When this was confirmed by some other national authorities we decided to inform the Commission. The Commission agreed that the information pointed to an infringement that could affect more than three Member States and that it therefore should be considered as best placed to investigate the case. Shortly afterwards the Commission carried out a so called dawn raid in several countries and we assisted the Commission here in Sweden.

We have also made use of the possibility in Article 22 to request assistance from other national authorities in our investigations. Last autumn the Danish Competition Authority carried out a dawn raid at our request, simultaneously as the Swedish Competition Authority did the same here in Sweden. In our experience such an operation requires very careful planning, but in this particular case the fact that the inspections were carried out in a very efficient way was certainly helped by the close and long-standing relations between us and our neighbour authority.

Before the reform entered into force, some comments, also inside the Authority, expressed concern about the consultation with the European Commission and the network before any final decision could be taken by the national authority. The fear was that the cases should be delayed even more than the 30 days stipulated in Article 11.4 of the Regulation.

In our experience however, which now counts up to about ten cases, the consultation has not led to any real prolongation in time. In our view the Commission has used its best efforts to come back to us as soon as possible, and in most cases only through a telephone call to the case handler. We have not received any comments from national authorities in relation to this consultation procedure. However, our impression is that the information exchange between the competition authorities has increased considerably, e.g. about investigation methods and competition assessment. This closer benchmarking between the authorities is, in my opinion, a clear benefit of the modernisation reform.

The Commission has also set up a number of ECN working groups which are useful platforms for exchange of information between the competition authorities. The reports from the Commission on professional services is one example of the outcome, another is the following-up of the block exemption on distribution of cars and a third example are the draft guidelines about the application of Article 82 that will soon be published for consultation.

One element of co-operation provided for in the Regulation that has not yet been used in Sweden is the possibility for the Commission or for the Swedish Competition Authority to act as *amicus curiae* before the national courts.

New working conditions

Second, the modernisation and the following amendments to the Swedish Competition Act have led to new conditions for our enforcement work at the Authority. We are now looking into our case handling procedures in order to make them as efficient as possible.

One example is the procedure related to the new type of commitment decision that has also been implemented into the Swedish competition law. We are now considering to publish our preliminary assessment together with the commitments proposed by the parties on our website. The Commission uses this model and it seems a reasonable way to increase transparency and to make a quality check by giving third parties the possibility to react. As far as I know, similar considerations are also under way in other Member States.

As many of you have already heard about, we have introduced a kind of “hearing” in our case handling procedures, thus giving the parties the possibility to comment on our statement of objections, not only in writing but also orally at a meeting in the Authority. We believe that this procedure could be of mutual benefit, for the Authority and for the parties, as both sides have an interest for instance in a correct description of the market and the competitive conditions. The standing of a complainant before the Swedish Competition Authority is another example of issues that we are looking into.

Leniency programs

Leniency programs are generally considered as a very useful tool to combat cartels. However, we have received very few leniency applications so far. Of course, I would like to see more of them. But I know that this is an area where we do not seem to have reached yet an adequate level of harmonisation of rules and practices within Europe. I hope though, that we will see a fruitful outcome of the on-going work in Brussels towards a model program and best practices for leniency.

A review of our Swedish leniency guidelines is now undertaken, in order to further adapt them to the Commission’s Leniency Notice. To come forward and apply for leniency is a very delicate situation for any company, and I believe that eliminating discrepancies between our guidelines and the Commission’s notice could contribute to reducing uncertainties and misinterpretation of our practices.

Further harmonisation and convergence needed?

Is then any further harmonisation or convergence of rules and procedures at the national level necessary? As I just commented, I do not believe that we have reached an adequate level of harmonisation yet regarding leniency programs. And here I also believe that harmonisation within the ECN is needed, in order to achieve the confidence and efficiency necessary to make companies inspired to use our leniency programs.

In other areas further convergence is, in my opinion, desirable or even necessary, to make the modernisation system function even better. I would like to comment on two such areas, one about the national legal order and another about the institutional design.

The first one is the sanction system at the national level. Sanctions that are sufficiently deterrent promote the incentive for companies to choose the leniency road. And in the ideal world, the deterrent effect should make companies refrain

from engaging in cartels. The level of sanctions in Sweden for infringements of the competition rules is low, compared to many other European countries. I believe that the level of fines must be raised considerably, to achieve deterrence and to make the enforcement of the EC competition rules in Sweden efficient, that is, to live up to the standard envisaged in the modernisation reform. However, recent legislative proposals in Sweden which refer to the Swedish legal tradition point in another direction.

Second, the enforcement models for competition authorities that exist in Europe have been mentioned here. The model in Sweden where the Authority does not take decisions on the sanctions was referred to as the third model, applied in a minority of the Member States. I believe that the co-operation in the European Competition Network and the efficiency of the decentralised enforcement system in Europe would benefit from further convergence in this area, that is, if the national competition authorities had more or less the same level of decision-making competences. A review of the Swedish situation is taking place by a governmental Committee, and the Swedish Competition Authority participates in this work. The result will be known within a year from now and I do not need to underline our commitment to co-operate with the Committee and how important this work is for efficient law enforcement in Sweden.

Thank you for your attention.