

## **Protection of Competition in the International Context.**

### **Intervention by Claes Norgren, Director General, at the Brno Conference 29 November 2006**

#### **Check by delivery**

I am very pleased and honoured to participate in this Conference, organised to celebrate the 15<sup>th</sup> Anniversary of the establishment of competition law and a competition authority in the Czech Republic. An anniversary gives you the opportunity to reflect, assess and look forward. I will use this opportunity to do so by discussing the efforts internationally to protect competition. In this context I will make reference to experiences of co-operation and convergence from a Swedish perspective but also reflect on some EU related issues.

#### **Promoting competition globally – risks, benefits and gaps**

The landscape has changed for competition authorities in the last decades. This is to a large extent a reflection of the changes in the business environment where companies expand cross border. The globalised world is today part of our daily life in that we face competition problems that often are multinational in character. The need for convergence in regulatory frameworks and practices thus has become stronger over time as a response to increased cross-border trade.

This means that companies to an increasing extent work in a multi-jurisdictional environment where they, if they are truly global players, can meet around 100 different competition authorities. It goes without saying that if we mean business with competition we must also reflect on how we apply our own competition regulation in this new environment. The need for harmonisation and one stop shops is obvious, especially since also consumers to an increasing extent buy products and services cross border. In many fields of regulation, global fora for convergence and harmonisation have emerged. But the question is if there is a risk that we do not use them appropriately. Do we run the risk of not keeping pace with how market realities and our environment for competition policy develop?

Competition authorities and governments today have several more platforms for co-operation, information exchange and benchmarking. The OECD, UNCTAD and ICN are today meeting places for competition authorities around the world. No doubt, the discussions and outcome in these organisations make important contributions that we benefit from in our work at home, with competition law enforcement and with advocacy.

But the mandates of these organisations that specifically deal with competition issues overlap and compared with many other fields of government policy, co-operation and regulation these organisations work with a soft convergence strategy based on best practices rather than more straight forward legal harmonisation. There are several good reasons for this. First of all, a more hard wired convergence would need to come into fundamental legal and institutional issues. Secondly, the competition area is a difficult one where regulators must be cautious since there might not always be simple answers that can be translated into rules and regulations. Thirdly, governments themselves are important actors that not only work with legislation and enforcement, in many countries they own and run a number of businesses, and as the discussions on national champions demonstrate, competition policy can be very controversial and touch upon vital national interests.

My view is, however, that the international community should try to take further steps in order to achieve more convergence and harmonisation at the global level. We must have in mind that we are now around one hundred authorities around the globe. From that perspective I think it is fair to say that there is a gap between the need for convergence and what is actually delivered. In order to close this gap there are some principles that I think are important to implement when looking ahead.

- The one stop shop approach which would mean that we should try to limit the parallel decision making processes. This presupposes of course that the basic condition for this in terms of harmonisation is fulfilled.
- A mutual recognition of rules so that competition authorities themselves do not create unnecessary distortions in markets.
- A greater reliance on economic analysis and an effects based approach. Although we must be careful not to put too much of the burden of proof on ourselves we must find the elements that could provide the common ground for further harmonisation.

- We should not only focus on the competition legislation alone but rather have a broader perspective where we also take into account the different sector specific regulations of infrastructure sectors that have emerged as complements or substitutes for competition law.

I am well aware of that these are tricky issues but at the same time I know from other fields that global harmonisation is possible as long as there is a vision and a political will. In my opinion competition regulation deserves both this vision and political will in order to make life better for consumers.

### **Convergence in the EU**

Turning now to convergence more in practical application let me now discuss the developments in the EU. In Europe important steps have been taken in terms of co-operation and harmonisation. As an example of this it is important to note that information in individual competition cases could not normally be exchanged unless authorities have the possibility by law to exchange confidential information. In the Nordic countries we have had for some time an agreement among the competition authorities that gives us this possibility. But it is via the modernisation and the European Competition Network that the landscape really changed. Real co-operation could not function without this instrument.

The 1<sup>st</sup> of May 2004 was a critical date for law enforcement in many authorities in member states. Before that date we worked with applications for negative clearance or exemption without the legal possibilities to exchange confidential information. After that date we could exchange information in a different manner and we could focus our resources on infringements based on complaints and other sources. On 1 July 2004 our Swedish 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.

Our experience at the Swedish Competition Authority from the reform after two and a half years can be divided into two parts: first, the co-operation between the Commission and the national authorities within the European Competition Network, ECN, and secondly, the new system for the Authority of applying the competition rules. Let me now elaborate on our experiences of co-operation within the ECN.

## Co-operation within the ECN

First of all the obligation to apply Articles 81 and 82 of the Treaty did not really mean any material changes in Sweden 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 our cases qualify for the application of the EC rules. The Market Court, our supreme Court in competition cases, even found in a judgment concerning access of buses at the Stockholm 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.

As regards the issue of parallel enforcement in different member states we have also made use of the possibility in Article 22 to request assistance from other national authorities in our investigations. The Danish Competition Authority carried out a dawn raid at our request, simultaneously as the Swedish Competition Authority did the same 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, 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.

This possible risk of prolongation has, moreover, been countered by the clear benefit for member states of having a clear and systematic method of quality assurance when applying EC regulations. To apply EC rules in a national framework is not always undisputed. The consultation in the network complements in my view already existing structures of quality assurance and has the benefit that the EU Commission could intervene if necessary.

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.

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.

The ECN working groups are useful platforms for policy development and exchange of information between the competition authorities. Professional services are one example of the outcome, another is the following-up of the block exemption on distribution of cars and a third example is the current review of the application of Article 82.

Another example of policy development within the ECN is the leniency model program. Leniency programs are generally considered as a very useful tool to combat cartels. This seems to be an area where we have to strive for an adequate level of harmonisation of rules and practices within Europe. The EU model leniency programme that has recently been elaborated in an ECN working group, provides a common ground for national leniency programs. Further harmonisation of rules and procedures in this area could contribute to a more efficient treatment of international cartels.

A review of our Swedish leniency guidelines has now been 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. This means that another review of our guidelines is now necessary to further adapt them to the model programme.

### **Further harmonisation and convergence needed?**

Is then any further harmonisation or convergence of rules and procedures necessary? As I just commented, I do not believe that we have reached an adequate level of harmonisation yet in the EU regarding leniency programs. Moreover I believe that further harmonisation within the ECN is needed in order to achieve the confidence and efficiency necessary to make companies inspired to use our leniency programs and for our co-operation in enforcement to be enhanced.

There are also other issues and areas where further convergence of competition rules and enforcement in a more broad sense is desirable or even necessary. I would like to point at three such areas: one about the national legal order, another about the institutional design and a third about the relations to ex ante sector regulation in infrastructure markets.

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.

Secondly, the enforcement models for competition authorities that exist in Europe should be mentioned. Institutional issues emerge in a number of ways.

One example of such institutional issues is the model in Sweden where the Authority does not take decisions on the sanctions. This 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 has just now taken place by a governmental Committee, and the Swedish Competition Authority participated in this work. The result will actually be presented to the responsible Minister today. And I look forward with great interest to studying the proposals.

Another example is the sanctions and leniency systems that are based on different legal traditions and where the interaction is critical for efficient enforcement. I do

not see a quick fix in this regard but a long and hard work ahead. But it is clear that the issue of criminalisation can only be valid in EU countries if there is a legal system that allows for leniency in criminal cases.

Thirdly, sector regulations in infrastructure markets have been used to enhance competition via ex ante regulation of access in order to avoid discrimination. This type of ex ante regulation is most often not the responsibility of competition authorities but of sector regulators. These rules and the subsequent enforcement complements and to a certain extent substitutes general competition rules. Therefore these regulations should be seen as a part of the family of competition rules. The telecom market is the obvious example and especially the EU application of telecom regulations.

We have by now seen these rules in practice and the EU Commission is going to evaluate the development. Drawing on my experiences from Sweden there is a mixed picture. On the one hand we have deemed it necessary to intervene by sector regulation to solve problems. On the other hand it is clear that this process in Sweden is not swifter than applying general competition rules. The ex ante regulation has been transformed through the legal system to an ex post regulation which risks to differ from the principles of competition policy. What is worse: due to fast technological innovation in combination with slow legal procedures we run the risk of creating uncertainty and inefficiency in enforcement.

There are a number of markets where technology is developing by the day. Is this the road model for other infrastructure markets? Are we sure that we do not construct a legal framework for a sector that cannot accommodate the requirements of flexibility that we have built into competition regulation? Do we not run the risk of a overburdened sector regulation that may hinder innovation and increase the regulatory burden?

These are very serious questions and I do not pretend to have the answers but it is now the time to reflect upon them.

### **Conclusions**

Let my try to sum up. The need for cooperation in various forms between competition authorities increases as the globalisation process goes on worldwide. Competition authorities meet new challenges of companies and consumers who act on a global market.

The experience of convergence thus far is very positive, especially regarding the experiences of modernisation in the EU. The risks encountered have been outweighed by the benefits. But more needs to be done in this regard. This is not

only an issue for law enforcement in the EU as such but also an issue regarding competition legislation globally since competition rules now are being applied by around 100 countries world wide. It seems clear that rules and procedures need to be further harmonised in order to increase efficiency in enforcement and to avoid distortions.

However, I feel confident that we all are within a process that goes in the right direction and that we will develop new instruments in order to facilitate international co-operation. The good example from the modernisation in Europe paves the way.

Thank you for your attention.