

*Speech by Director General Dan Sjöblom at the ICN-conference
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Introduction

The title of today's session is "alternative case resolutions". It seems useful to ask oneself alternative – to what?

As we are all aware, one characteristic of cartel cases is that extensive investigations tend to be followed by even more extensive legal proceedings. Due process issues underlie much of the lengthy procedures. Questions are raised ever so often about cartel procedures and fines as quasi-criminal in nature. Anti-cartel enforcement is – and should be – at the core of the activities of competition agencies. There are good reasons to consider if this key activity is handled in the most efficient way and – importantly – if we do all we can to discourage new cartels from being formed.

One problem that can be observed is that the need for rigorous procedures easily leads to creating a rather weak link between the infringement and the subsequent conclusion of the case and the imposition of any fine. This is likely to reduce the deterrent effect. Lengthy proceedings also generate more litigation costs and ties agency resources that could be used for other investigations. Therefore it is in the interest of competition authorities to seek appropriate alternative case resolutions. The aim of which should be to increase agency effectiveness.

Arguably, quick settlements are beneficial not only to competition authorities but also to the companies involved. It minimizes litigation costs and, often more importantly, the duration of negative publicity. Quick settlements may thus be a common goal for the authorities and the parties, at least in clear-cut cases where, in the absence of contentious legal issues, the result of court proceedings should be quite predictable.

In 2004 the Swedish government launched an inquiry to review the Swedish Competition Act and the remit of the inquiry included to identify factors that

slowed down the system and to present proposals for changes aimed at reducing the time for processing cases under the Competition Act, particularly cartel cases.

At the time, the Swedish Competition Authority suggested to move from the existing system where it acts as a prosecutor towards an administrative model, where it – like the EU Commission - would be granted the power to adopt the decision, including on administrative fines. The government, however, decided not to go as far, but settled for a solution whereby the Competition Authority is authorized to adopt decisions on administrative fines in cases that are not contested.

Administrative fine orders

The Swedish Competition Act includes, since November 2008, a provision whereby the Authority is authorized to adopt fining decisions that become legally binding if accepted by the undertaking to which it is addressed. This is not referred to as a settlement, but as a “fine order”.

Chapter 3 Article 16 of the Swedish Competition Act reads:

Fine order

Article 16

Instead of instituting proceedings regarding an administrative fine in accordance with Article 5, the Swedish Competition Authority may order an undertaking to pay such a fine (fine order).

Such an order may only be issued if the Swedish Competition Authority considers that the material circumstances regarding the infringement are clear.

When the new act entered into force few stakeholders thought that the possibility to issue fine orders would be of significant practical value. There were several reasons for this scepticism. Sweden is a small jurisdiction and our case law regarding cartel cases is not very rich. The case law therefore provides relatively limited guidance on how to calculate fines. At the same time, the Swedish Courts have in some cases imposed fines far below the amounts sought by the Competition Authority. This has created a feeling of uncertainty regarding the level of fines that should be expected for various types of infringements.

Unlike some other systems, the relevant Swedish provisions explicitly address – and reject – the ability to give a discount on the fine if the involved firms accept a fine order, rather than go to court. The incentive to accept a fine order is thus limited by the provisions themselves. If the addressee does not accept a fine order issued by the Authority, the system foresees that the Authority should instigate court proceedings seeking the same amount of fines as in the fine order. The underlying reason was a wish not to create any disincentives for firms to fully use their legal rights to a court hearing.

The uncertainty regarding the calculation of fines, the inclination of courts to cut fines and the fact that no discount can be given for accepting a fine order would lead to the conclusion that companies would choose to challenge the fines claimed by Swedish Competition Authority.

The first cases

Against this backdrop it is interesting to note that there have been two recent cartel cases where all the involved firms have accepted fine orders issued by the Competition Authority.

The first fine order was issued in mid 2009. Two companies being the only manufacturers of wooden power line poles impregnated with creosote oil had indulged in bid rigging and had also agreed a system whereby whoever won the contract would buy half the amount of power line poles from the other company. One of the two companies was granted leniency and the other company accepted all infringements and the fine order issued by the Authority.

In parallel with the investigation of the power line poles cartel the Swedish Competition Authority had prepared guidelines on the calculations on fines according to the new Competition Act. The guidelines were aimed at increasing the transparency regarding fines. As the power line poles cartel was the first time the new method of calculating fines was applied, a one-off novelty discount was applied.

The second time we issued fine orders was in 2010. The market in question was a rather morbid one, namely that for transporting deceased persons. In a number of procurement procedures regarding such transportation services, several firms agreed to submit identical bids in order to induce the contracting authorities to sign contracts with all of them. The firms in question were all relatively small companies, the relevant market covered only a limited part of Sweden and the duration of the infringement was not very long. All together this limited the size of the fines and all firms accepted the fine orders.

Although the circumstances in these two cartel cases differ from each other, they show that the system of fine orders does have a practical use and that accepting a fine order can be an attractive alternative for companies. Being able to issue fine orders in clear cases is an efficient form of enforcement and it enables us to use our resources for litigating cases that are contested or that raise difficult legal questions.

Other alternative case resolutions

Other efficient ways to deal with infringements of competition law can be through dialogue with the companies with the aim to come up with a solution where the

involved firms change their behaviour and bring the infringement to an end. This kind of resolution is unlikely to be applied in the more traditional type of hard-core cartels, but may well be an appropriate way to deal with other types of illegal coordination between firms. There are particularly good reasons to consider this if court proceedings would require a disproportionate level of agency resources or if the expected level of fines and precedent value is low.

The Swedish Competition Authority has recently had four cases where the infringement ended during the Authority's investigation into certain activities implemented by different associations of undertakings.

In the first case the Authority investigated a system whereby media companies, when selling advertising space, made available what was known as an "advertising and media agency remuneration". The Association of Advertisers had specified certain percentage levels for such remunerations in its training materials and on its website.

The Competition Authority's assessment was that the specified rates were anti-competitive and informed the Association of Advertisers of this opinion. The Association thereupon provided a written commitment whereby it agreed to cease specifying the size of such remunerations, or making recommendations in this respect, for instance by recommending percentage rates.

In view of the commitment, the Authority concluded that there were no longer grounds for taking action against the association. The Authority applied to the Court for an order requiring the association to abide the commitment under the penalty of a fine.

In a second case, an umbrella organization for private laboratory companies, had in its provisions set out fixed percentage rates for determining charges payable when deliveries were delayed. The Competition Authority approached the association stating its view that the provision was anti-competitive. In the Authority's view, the laboratory companies should compete over the rates they offer since this was an important aspect of quality of the service that can influence the speed of delivery.

The trade association then voluntarily undertook to change its general contracting terms to no longer include such provisions. The Authority then decided not to pursue the case further, but to attach a conditional fine to the association.

In a third case the Authority received information, actually from the Norwegian Competition Authority, that a Swedish association of translators distributed recommended pricelists to its members and published them on their website. The issue was raised since the Norwegian counterpart wanted to implement a similar pricelist as the Swedish association.

We contacted the association and informed it about the competition rules. As the association informed the Authority that it would no longer distribute or publish pricelists on its website, the Authority decided to take no further action and closed the case.

Finally we have recently had an interesting case with a cartel among golf clubs, in which the Authority found that around 50 Swedish golf clubs, all members of the Swedish Golf Association, had coordinated their behaviour to charge a higher green fee from players belonging to a so called "mailbox golf club". The latter offered its members very low membership fees and the coordination between the more traditional clubs had the intention to discourage the growth of this business model, basically for fear of losing membership income. Following intervention by the Competition Authority, the Golf Association undertook to stop any coordination of green fee levels and to inform all its members about the inappropriateness of such behaviour. The Association also undertook to publish an article about the competition rules written by the Competition Authority in their member journal.

Conclusion

The Swedish Competition Authority's considerations in these and other cases is seek to employ the most efficient means to deal with an identified competition problem and to send clear policy signals. We strongly believe that the most efficient way to terminate cases will differ according to circumstances and that an active decision about the preferred direction of the case should be adopted early on in the procedure so that the case can be built towards court proceedings, the issuing of a fine order, a solution through appropriate commitments or simply to end the investigation once the infringement of the Competition Act has been terminated.

The Authority's preferred choice will depend on several factors. The overall ambition of anti-cartel enforcement is to provide maximum disincentives for firms to engage in cartels. To achieve this aim, it is needed to work with advocacy measures at several levels. Effective advocacy is best served by a relatively frequent stream of clear examples of unacceptable behaviour being detected and punished. Although it remains important for certain key cases to be heard and decided by the courts, alternative case resolutions offer the possibility to conclude cases more rapidly and therefore to do more cases, multiplying the references that can then be used in advocacy efforts.

Having said that, all types of alternative case resolutions require an amount of cooperation between the Authority and the involved firms. This means that the Authority must remain willing to bring any identified infringement to an end by means of unilateral action, be that by an administrative decision or through action in front of the competent courts.