



Fifth Roundtable on “Due process in the face of divergent national procedures and sanctions”
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When discussing due process in competition cases one issue of great interest is the legal framework - an administrative process or a criminal process? Which system is preferable, which system would be the most effective? Is a parallel application of the two systems the most efficient way to combat restrictions on competition?

Of course it is possible to identify advantages and disadvantages with both systems. Well functioning criminal sentences have a strong deterrent effect. Furthermore, an under cover detective with a bugging device is something for most competition authorities to wish for, when standing in court, clinging on to the lacking memory of a witness in an alleged cartel. On the other hand an effective leniency programme in an administrative system could be very effective to discover the cartel in the first place.

The question is how to square the circle. The starting point for the reasons discussed in this roundtable is of course the legal obligation imposed by Regulation 1/2003 to apply Article 81 in cartel cases. This obligation extends not only to competition authorities but also to prosecutors and criminal court judges.

**A Swedish proposal for parallel systems**

The Swedish Competition Authority (the Authority) recently had reason to analyse this issue. The Swedish Competition Act is currently based solely on an administrative system. Last year, a governmental committee (the Committee), was instructed to study the issue of making it a criminal offence to infringe the prohibitions on anti-competitive behaviour of the competition rules. The assignment included the drawing up of a concrete legislation model and making an in-depth legal analysis. The Committee came to the conclusion that the benefits of a criminalisation indeed are uncertain, an opinion shared by the Authority.

The Committee proposed that the criminal area should be limited to horizontal cartels and that vertical restraint of competition and abuse of a dominant position should not be criminalised. According to the proposal any person entering into an agreement that is prohibited under section 6 or under Article 81 of the EC Treaty and which implies that companies at the same production or trade level set selling prices, restrict or control production or divide up the market, if the agreement was designed to seriously impede, restrict or distort competition in the market, shall be sentenced to prison for a maximum of two years for anti-competitive crime. The same applies to a person who puts such an agreement into practice. If the crime is regarded as serious, the penalty for gross anti-competitive crime shall be imprisonment for a minimum of six months and a maximum of six years. When determining whether the crime is serious, particular consideration shall be given to whether the act was otherwise of a particularly dangerous nature.¹

When analysing the proposal, we found that there were reasons to abandon the dream of secret agents. With a functioning leniency programme, and the new order of cooperation between the European Commission and national competition authorities, we found that a criminalisation of the Swedish competition rules rather would damage than improve the possibilities to forceful intervention against cartels. There is a kind of paradox here – strengthening the sanction system may not prove to be more efficient – it may even be counterproductive in that it makes it harder to detect cartels.

Even if it is possible to assume that a criminalisation would have a preventive effect that might refrain companies from engaging in collusive behaviour, it is most certain that the Authority, or the prosecutor, would face even greater difficulties to detect secret cartels if a criminalisation is adopted. This because the

¹ Reformed monitoring of competition – Consequences in Sweden of the EU's new implementing regulation, Final report (SOU:2004:131), p. 18-19.



effectiveness of the Swedish leniency programme would be in great danger since the Swedish legal tradition does not permit plea bargaining and Swedish prosecutors are obliged to prosecute crimes. Companies would probably be more reluctant to cooperate with a competition authority with no possibilities to guarantee total amnesty in its leniency programme. With a lame duck leniency program, fewer cartels will be discovered, with the inevitable effect that less competition crimes will be prosecuted. We would risk ending up with a criminalized system with neither criminals nor preventive effects.

Legal consistency

A parallel action of the two systems also cause uncertainty as regards the application of the competition rules in courts. In the administrative court proceedings the competition rules are applied firstly on application by the Authority at the City Court of Stockholm and finally by the Market Court. In a parallel criminal process the competition rules would be applied, in the context of anti-competitive crime, by the public courts as any other crime. Questions that arise are possible differences in burden of proof, how criminal legal principles could affect the interpretation of competition rules and how to ensure the consistent interpretation of the case-law of the European Court of Justice.

So far, Swedish courts, except for the Market Court (final instance in competition cases) have very limited experience of applying the EC competition rules. In addition, a parallel system with parallel court proceedings would be very resource consuming. Moreover, a criminal court, that is not designated as a competition authority, does not have the same duty to consult the Commission in line with the Regulation. It is my opinion that a criminalisation, without a proper legal framework, could jeopardize the consistent and effective application of the EC rules.

The efficiency of leniency programme

The Swedish leniency programme came into force in 2002. It is too early to evaluate it but there have only been a few applications so far. It would however be a too easy explanation to simply state that the system is a failure and that it has to be supplemented with a criminal system. When the system was introduced only one cartel case had been appealed to the Market Court. In the cases that have been decided by the Stockholm City Court so far, the fines were modest, between € 1 000 and € 16 700. Taking into account the case law that existed at the time, there were little incentives for companies to come forward and assist the Authority. At the moment several proceedings are pending in court and the Authority has claimed for high fines. Recently the Market Court raised the fines set by the Stockholm City Court in the Swedish petrol-cartel case, doubling the amount to € 12,4 million.



The result of this petrol case, and other legal processes pending in the courts, will be of great importance for the development of the leniency programme. The higher level of sanctions will undoubtedly increase the incentive for companies to come forward. The introduction of the Regulation, constituting a network for effective co-operation between the national competition authorities and the Commission, makes the leniency programme more attractive as a consequence of the increased risk of disclosure.

Further, a criminalisation could jeopardize the effective application of EC Regulation in Sweden. According to Article 12 of the Regulation information exchanged may not be used to impose sanctions on individuals, unless the laws of the transmitting and the receiving authorities provide for sanctions of a similar kind in respect of individuals in case of violation of Articles 81 and 82, or if the rights of the individual concerned as regards the collection of evidence have been respected by the transmitting authority to the same standard as they are guaranteed by the receiving authority. Article 12 also clearly stipulates that the information exchanged cannot be used by the receiving authority to impose custodial sanctions as this would jeopardize leniency programmes and effective competition law enforcement.

Alike the other national competition authorities, the Swedish Competition Authority has declared to follow the principles of cooperation and to protect a company which has revealed a cartel. It could be a problem for the Authority to fulfil this commitment if criminalisation, as proposed by the Committee, would be introduced, due to the fact that under Swedish law, prosecution of cartels would be mandatory. The Authority would not be able to guarantee amnesty from an anti-competitive crime and, as a consequence, would not be able to guarantee an efficient leniency programme.

Therefore, criminalisation could seriously diminish the possibilities to be fully involved in the information exchange programme between the national competition authorities and the Commission. There could be an actual risk that no cases would be allocated to the Authority and that the Authority would not be able to effectively investigate cartels. Moreover, as the government Committee points out², it is not impossible that a situation might occur where a case is allocated from the Authority to the Commission or to another Member State, while the Swedish prosecutor is investigating an anti-competitive crime which derives from the same cartel. This kind of situation would not be acceptable in my

² Ibid. p. 257.



view. Moreover, leniency programmes in other countries would also be undermined.

The risk of a prolonged investigation and trial process

The right to a due process encompasses the right to an effective process. The proceedings in the courts in competition cases are already time consuming. A criminalisation would probably enhance this problem. According to the Committee's proposal, an investigation at the Authority shall be possible to continue in parallel, when a criminal investigation is in progress.³ The Committee does however acknowledge that there would be limitations as regard to the Authority's right to investigate and pursue its case before the prosecution office has concluded the preliminary investigation.⁴ Moreover, the anti-competitive crimes would have to compete with other crimes in the priority process. According to experiences from other countries, anti-competitive crimes not always belong to the most prioritised cases. Both these factors, the limitation of the Authority's investigation and the question of how the cases would be prioritised, most definitely could prolong the proceedings to the detriment of the companies and employees. In my view a prolonged process as a consequence of the parallel proceedings could affect their right to a due process in a negative way. The costs involved for companies, courts and the society as a whole would be multiplied.

Conclusion

If criminal sanctions are more effective than administrative sanctions or vice versa is not relevant per se. The relevant question is rather whether the competition rules can be applied in an efficient way. In conclusion, I believe that criminal sanctions in a system with no plea bargaining would jeopardize the efficient enforcement of the competition rules. The reason for this is that a strengthening of sanctions and investigation powers can lead to a weakening of the possibility to detect cartels. Furthermore, parallel systems can in some circumstances bring about uncertainty about the consistent interpretation and application of the EC rules.

³ Ibid p. 20.

⁴ Ibid p. 218.