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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution by Sweden

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INDEPENDENCE OF COMPETITION AUTHORITIES – FROM DESIGNS TO PRACTICES

-- Sweden --

1. Introduction

1. The Swedish Competition Authority (SCA) enjoys significant autonomy in the carrying out of the tasks assigned to it, not only as a result of the legal, structural and administrative framework within which it operates, but also as a result of the measures which the authority itself takes to bolster its de facto independence.

2. The formal independence of the authority is ensured by constitutional and administrative safeguards, as well as the fact that the Authority is structurally and physically separated from government. The SCA's commitment to openness and transparency, its policy for prioritisation of its enforcement activities, and its efforts to engender confidence in the authority, contribute to the SCA also operating with de facto independence.

3. At the same time, the administrative model applicable to the SCA ensures that the authority can be held accountable for its actions.

4. This written contribution outlines the different factors which contribute to the SCA's formal and de facto independence. Furthermore, the contribution considers the interplay between independence and accountability, and outlines recent initiatives within the EU to enhance the independence of national competition authorities.

2. Structural independence

2.1 *A physically and administratively separate body*

5. As is the case in many jurisdictions, the Swedish Competition Authority is sorted under a government ministry, namely the Ministry of Enterprise and Innovation. However, the SCA is both an administratively separate body, and is physically located outside the government ministry. It has administrative autonomy, meaning that it is responsible for its own organisational structure, the recruitment of staff, its allocation of cases and the prioritisation of its activities.

2.2 *Financial and administrative autonomy*

6. The SCA is given a separate annual budget allocation within the national budget approved by parliament. This ensures that the financing of the SCA is transparent and foreseeable. Within the broad framework of its annual appropriation directive (see below), the SCA has discretion to use its budgetary

allocation as appropriate, without instruction or interference from other parties. The UNCTAD Secretariat has noted that this model of funding is “perceived to grant a high degree of budgetary autonomy to the authority.”¹

7. As part of its financial and administrative autonomy, the SCA recruits all staff other than the Director General, and has full discretion in terms of human resources and other administrative functions. The SCA can also initiate organisational changes, such as creating new departments or units. One recent example of this was the move in 2014 to conduct-based competition enforcement units instead of sector-based units, with the stated aim of enhancing specialised and effective enforcement.

8. This formal financial and administrative autonomy also enhances the de facto independence of the SCA, since it allows the authority to focus its resources in the manner that it deems necessary in order to carry out its portfolio of activities from time to time. Thus, the authority can make autonomous decisions about how it allocates resources between staffing, training, equipment, etc.

3. Legal independence

9. The legal independence of the Swedish Competition Authority (SCA) is enshrined within the constitution of Sweden. As an administrative authority, the Swedish Competition Authority is protected by Chapter 12, article 2 of the Instrument of Government, one of the four fundamental laws of the constitution, which states that “no public authority, including the Riksdag [the national parliament] or the decision-making body of any local authority may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis an individual or a local authority, or relating to the application of law.”²

10. Furthermore, since there is no public interest test for merger decisions in the Swedish competition regime, merger decisions cannot be overruled by any external body based on non-competition factors.

11. As a result of these factors, the decision-making of the SCA in the application of the competition rules is insulated from outside political influence. The SCA’s decisions may, of course, be challenged through independent judicial review.

4. Independence to prioritise

12. Similarly, the SCA is provided autonomy in respect of how it prioritises its activities.

13. Broadly, the Swedish administrative model draws a distinction between the policy-making responsibility of government, and the administrative and implementing responsibility of the public authorities. The general competencies of the SCA are determined through a government ordinance with instructions to the authority³. The government also issues an annual appropriation directive with a broad framework for the SCA’s activities in connection with its annual funding, as well as setting out its reporting requirements.

14. For example, the appropriation directive for 2016 states, among other things, that “within the Swedish Competition Authority’s responsibilities in the field of competition, law enforcement should

¹ UNCTAD (2008) United Nations Conference on Trade and Development, Independence and Accountability of Competition Authorities, TD/B/COM.2/CLP/67 http://unctad.org/en/docs/c2clpd67_en.pdf.

² Instrument of Government, chapter 12, article 2.

³ Förordning (2007:1117) med instruktion för Konkurrensverket, available in Swedish at <http://www.notisum.se/rnp/sls/lag/20071117.HTM>.

comprise a significant part of the activities, with particular importance given to fighting cartels, intervening against public and private actors that abuse a dominant position, as well as anticompetitive public sales activities.”⁴ The SCA is not issued directions as to which cases it should prioritise within this framework.

15. The SCA has a prioritisation policy for enforcement, which outlines the factors which it takes into account in the prioritisation of its enforcement activities⁵. By making this publicly available, and as a matter of policy making explicit reference to the prioritisation criteria in its decisions not to pursue a complaint, the SCA is able to transparently demonstrate its independence of decision-making in terms of which matters it prioritises.

16. Within the annual appropriation directives the government will from time to time assign the SCA the task of undertaking particular market studies, typically with the aim of assessing broader competitive conditions or suggesting measures that may be required to improve competition. This is in parallel to the SCA’s ex officio competence to select market studies. For example, the SCA has been assigned the task of analysing, among other things, the development of the sharing economy and e-commerce, the challenges for achieving effective competition, the effects on competition enforcement, and potential measures for improving competitive conditions, and will report to the government on 1 March 2017. Government-assigned market studies do not have as their purpose the investigation of potential infringements of competition law.

5. Transparency as a means to promote independence and accountability

17. The OECD Secretariat’s call for contributions notes that transparency in an agency’s operations and decision-making is instrumental in increasing its de facto independence, since undue influence in final decisions will be more visible and agencies will be more inclined to protect themselves against interventions.

18. Transparency is a cornerstone of the Swedish administrative system, and is manifested in the principle of public access to official documents which applies to the SCA. A stated aim of this principle is to “ensure that public sector services can be monitored and examined” and “ensure that abuse of power and irregularities are exposed”⁶ The SCA also believes that transparency is a prerequisite to the authority being able to be scrutinised by its stakeholders for the decisions it takes within its competences (see further section 1.8 below).

19. The SCA has taken several steps to enhance transparency in its operations. As well as publishing a prioritisation policy for enforcement (see section 1.4 above), it has made publicly available its communications policy, which describes how and when it will typically communicate about enforcement cases, and with what aim⁷. The explicit aim of the policy is to be an open and transparent authority.

⁴ Regleringsbrev för budgetår 2016 avseende Konkurrensverket inom utgiftsområde 24 Näringsliv, <http://www.esv.se/statsliggaren/regleringsbrev/?RBID=17115>.

⁵ The Swedish Competition Authority’s Prioritisation Policy for Enforcement, http://www.konkurrensverket.se/globalassets/english/about-us/english_prioritisation_policy_for_enforcement.pdf.

⁶ Council on Basic Values, Article S2014.021, *Common basic values for central government employees – a summary*, <http://www.government.se/contentassets/7800b1f18910475d9d58dba870294a63/common-basic-values-for-central-government-employees--a-summary-s2014.021>.

⁷ The Swedish Competition Authority’s communications policy, available in Swedish at <http://www.konkurrensverket.se/globalassets/press/kommunikationspolicy.pdf>.

6. Enhanced independence through reputation and expertise

20. The Secretariat's call for country contributions recognises that "a successful enforcement record by the agency can significantly strengthen its independence by enhancing its reputation and thereby its status in the society". The SCA agrees that the de facto independence of a competition authority can be enhanced by executing its enforcement tasks in a manner that engenders confidence and trust in the authority. It is, for example, imperative that the SCA is seen as objective, fair and successful in its application of the law.

21. Furthermore, the SCA can engender confidence in the authority as an independent, expert voice in competition matters through its advocacy work. Enshrined in the Swedish constitution is the obligation for information and opinions to be obtained from public authorities in the preparation of government business.⁸ Therefore, the Swedish Competition Authority is routinely consulted on draft legislation and regulations which are relevant to the SCA's field of activities, and as such the Authority has the role of an expert body on matters of competition law and policy. By carrying out this expert role in a rigorous manner, it can bolster its de facto independence from government and other bodies.

22. It can be useful for competition authorities to measure the level of confidence and trust in it from time to time. For example, the SCA has commissioned stakeholder surveys since its founding in 1992, the purpose of which is to measure attitudes to the authority and the legal framework it applies. These surveys have consistently demonstrated a positive attitude to the SCA's expertise, clarity of decisions, service and case-handling.

7. EU initiatives to address the independence of national competition authorities

23. In 2014 the European Commission published a Communication on Ten Years of Regulation 1/2003, whose aim was to provide a facts based review of enforcement during the past ten years, as well as examine institutional and procedural issues of the national competition authorities (NCAs) with a view to its further enhancement⁹. In its Communication, the European Commission identified a need to establish minimum guarantees on the independence of NCAs in the exercise of their tasks and ensure that they have sufficient resources.

24. A subsequent fact-finding effort highlighted that there are divergences among the NCAs in these respects. The European Commission recently issued a stakeholder consultation on how to empower the national competition authorities, which included the question of independence and sufficient resources. The consultation ran until February 2016¹⁰. The SCA supports the European Commission's initiatives to promote the effective enforcement of EU competition rules through ensuring authorities are independent and have sufficient resources, and looks forward to participating in future discussions on these issues.

8. Independence and accountability

25. Within the important discussion of agency independence, it is equally vital to consider the related question of accountability. As the UNCTAD Secretariat has noted, "independence does not mean that competition authorities answer to no one"¹¹. It is also important to acknowledge that ensuring the

⁸ Instrument of Government, chapter 7, article 2.

⁹ COM (2014) 453: Communication from the Commission to the European Parliament and the Council: Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives.

¹⁰ Public consultation on empowering the national competition authorities to be more effective enforcers, available at http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html.

¹¹ UNCTAD (2008), supra.

independence of competition authorities does not mean that governments should relinquish the responsibility of shaping competition policy. Such a development could risk resulting in granting competition authorities powers beyond democratic control.

26. As noted above, the Swedish administrative model is broadly predicated on government being responsible for the development of policy, while public authorities have responsibility for implementation and administration of the tasks that they are assigned within their area of expertise.

27. This necessarily implies that it is the government's prerogative to steer the direction of its competition policy. Within this responsibility, it determines the competencies of the competition authority, and issues general appropriation directives. The government also has the responsibility to appoint the director general of the SCA. The director general is appointed for a fixed term of six years, with the possibility of renewing the mandate for a further three years.

28. With the robust formal independence afforded to the SCA to exercise the tasks assigned to it, this also presupposes that the authority must be able to be held accountable for its actions. The SCA is primarily accountable to government. However, by operating in an open and transparent manner, other stakeholders can have insight into and scrutinise the authority's actions, decisions and publications. The SCA's decisions can also be subject to judicial scrutiny in the general courts.

29. Part of the accountability to government involves an obligation to report to government on the work the SCA carries out, principally in the form of an annual report. Another means for the government to hold the SCA to account is to have the ability to remove the director general from office in exceptional circumstances, though this has never been applied in practice.

30. A crucial factor when balancing independence and accountability, such as in the case of the appointment or removal of an agency head, is that the mechanisms for accountability are as transparent as possible, to guarantee against their abuse.