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REGIONAL COMPETITION AGREEMENTS: BENEFITS AND CHALLENGES

Contribution from Denmark, Finland, Norway, Iceland and Sweden

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Regional Competition Agreements: Benefits and Challenges

Benefits of and challenges to a successful Nordic competition agreement

-- Joint contribution by Denmark, Finland, Norway, Iceland and Sweden --

1. Introduction

1. The need of a well-functioning co-operation between countries engaged in cross-border competition cases is now well established. It has been discussed on a regular basis for many years and it is now common understanding that international co-operation in the field of competition law has played a key role in the effective enforcement of competition rules. However, the increasing number of cross-border competition cases has led to a need to rethink the forms of international co-operation. More specific co-operation tools have arisen, with regional co-operation agreements being one of them. Regional co-operation can encourage a more harmonised application of the competition rules within a specific geographic area, which can benefit both competition authorities and companies that operate across borders. By co-operating, competition authorities can also improve their methods and tools, leading *in-fine* to a more effective enforcement of competition rules.¹

2. Co-operation on competition law enforcement in the Nordic region has been made more effective by the co-operation agreement of 2001 between Denmark, Norway, and Iceland, which Sweden joined in 2004.² The past seventeen years of co-operation through this Nordic competition agreement have demonstrated significant benefits for the countries involved. However, certain obstacles and shortcomings have been observed which have hampered the competition authorities' ability to fully realise the potential for effective regional co-operation. That is why in 2014, following the approval by the OECD Council of the Recommendation concerning International Co-operation on Competition Investigations and Proceedings, the Nordic countries began work aiming to update and reassess the scope of the Nordic co-operation agreement, leading to a new agreement being signed in 2017.

3. This paper explores these developments by reflecting over both the benefits and the challenges that the Nordic competition authorities have faced since they entered into the Nordic co-operation agreement. It also identifies the improvements that the revised Nordic competition agreement will bring.

¹ OECD website: International co-operation in competition.
<http://www.oecd.org/daf/competition/internationalco-operationandcompetition.htm>

² Agreement of 16 March 2001 and 9 March 2003 between Denmark, Iceland, Norway and Sweden on co-operation in competition issues. The 2001 agreement included Denmark, Iceland and Norway. Sweden formally acceded to the agreement in 2004.

2. Background to the Nordic co-operation

4. Far from being the beginning of Nordic co-operation on competition issues, the agreement of 2001 represented the formalization of a long-lasting relationship between countries that had similar legal cultures and market structures, but which were missing the legal tools to effectively assist each other in enforcing competition law in the region. Understanding the broader context of the Nordic co-operation on competition issues is instructive in understanding the preconditions for the competition authorities entering into a formal agreement.

5. The co-operation between the Nordic countries on competition issues started almost sixty years ago. The first meeting between the competition authorities of Denmark, Finland, Norway and Sweden was held in Oslo in October 1959. Since then, they have met annually, gradually extending the scope of the co-operation. In 1975, Iceland was invited to participate for the first time, and the Faroe Islands and Greenland joined the meetings in 2000 and 2002 respectively. As far back as 1966, it was concluded that the directors should have a separate meeting in the spring to plan the annual meeting in the fall. This format, with a separate director's meeting in the spring and the annual Nordic meeting in the fall, has been more or less unchanged since then. These meetings have been, and remain, an important forum for the exchange of experiences regarding current competition law issues.

6. This Nordic co-operation also gave rise to the creation of a Nordic cartel group in 2000 that meets annually. The meetings typically allow for an overview of cases from the preceding year as well as ongoing activities. Moreover, experiences concerning case handling, project management, and investigation methodology are exchanged. Working groups for the Nordic chief economists and chief legal officers have since been created, and a meeting of merger staff will be held for the first time in 2018. Ad-hoc meetings covering other issues may be arranged when required. For instance, a workshop between communication departments and a Nordic forensic IT workshop were planned for the fall of 2018.

7. Another important benefit brought by the Nordic collaboration is to be found in market studies and advocacy work undertaken by the Nordic competition authorities. The Nordic competition authorities work jointly to deliver reports on specific subjects of common interest. Topics for the reports are decided at directors' meetings and the reports are written and edited by cross-Nordic project teams for joint adoption and publication. Twelve reports have been published since the first joint report in 1998. By combining efforts and exploiting synergies, the Nordic authorities can improve the quality of the output and enhance its impact.

8. Finally, since 2017, case handlers from the Nordic competition authorities have had the opportunity to participate in an exchange program to work at another authority for up to six months. This provides a valuable exchange of experiences in case handling and contributes to maintaining a good network between the Nordic competition authorities.

3. Benefits brought by the current Nordic co-operation agreement

9. The Nordic co-operation agreement reflected a common intention to formalise the co-operation between the authorities in order for them to acquire the legal tools they needed to achieve a more effective enforcement of competition law in their respective countries. This was even more important since Norway and Iceland were not part of the EU.

EU Regulation 1/2003³, which provides formal co-operation mechanisms in antitrust investigations, was consequently not applicable to co-operation with these countries. Nor did EU Regulation 1/2003 cover co-operation in merger cases or cases that exclusively applied national competition rules.

10. As well as containing provisions pertaining to notifications of measures with a bearing on the competitive conditions in another country, the Nordic co-operation agreement made it possible for the competition authorities to exchange both non-confidential and confidential information, which in turn has facilitated cartel detection and rendered merger investigations more effective.

11. The agreement places conditions on the exchange of confidential information. According to Article 4 of the agreement, the requisite for a competition authority to transmit confidential information is that the receiving authority is subject to a duty of confidentiality that is at least equal to that of the competition authority that provides the confidential information. Moreover, the information exchanged may exclusively be used for the purposes stipulated in the agreement and may only be provided by the receiving authority with the express consent of the issuing authority and only for the purposes covered by such consent.

12. Finally, and in addition to these formal methods of co-operation, the Nordic competition authorities also benefit greatly from more informal contacts made over the phone or via email. Informal contacts and exchanges of non-confidential information are facilitated by the existence of the Nordic co-operation agreement, but are also borne out of the long-lasting co-operation and mutual trust built up over a number of years between the authorities.

4. Obstacles that have prevented the Nordic countries from reaping the full benefits of the current Nordic co-operation agreement

13. Although the agreement has been instrumental in assisting the Nordic countries on several occasions, certain obstacles have been observed to the Nordic competition authorities' ability to effectively co-operate in the enforcement of competition law in the region.

4.1. Lack of legal basis leading to an incomplete set of investigative tools

14. Beyond being able to exchange confidential information in antitrust and merger cases, two other measures would have undeniably facilitated certain investigations with cross-border effects in the Nordic region, namely the ability to request assistance for fact-finding measures (requests for information) and to request assistance in inspections. So far, these two measures have not been able to be used because of the lack of legal grounds to do so, unless between two countries that are also EU member states and in respect of antitrust proceedings. This is because Article 22 of EU Regulation 1/2003⁴ is not applicable

³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁴ Article 22 of EU Regulation 1/2003 provides the legal basis to national competition authorities to assist each other in inspections and other fact-finding measures.

between EU (Sweden and Denmark) and EFTA (Norway and Iceland) member states.⁵ Regulation 1/2003 has been implemented into the EEA Agreement, but it does not provide for the necessary tools for co-operation between national competition authorities in the two pillars. While the question of expanding such EU and EFTA “cross-pillar” co-operation has been raised by the EFTA states,⁶ the issue has still not yet been resolved.

15. An effective Nordic co-operation has been further hampered by the fact that some Nordic competition authorities were not part of the 2001 agreement, namely the competition authorities of Finland, Greenland and the Faroe Islands. This has limited pan-Nordic co-operation, even though Finland was already a member of the EU and could therefore use Regulation 1/2003 as a legal basis in its exchange of confidential information⁷ and in respect of assistance in inspections with other EU countries.

16. Furthermore, the ability to co-operate in matters related exclusively to the application of national competition law is not covered by the EU legal framework. Nor is the ability to co-operate in merger cases. Thus, the Nordic competition authorities have lacked the legal basis to request assistance with sending out requests for information in merger cases, for example.

4.2. Examples of cases where cross-border investigation of possible violations of competition law has been negatively affected

17. In order to provide a better understanding of the limits imposed by the current Nordic co-operation agreement, this section provides some case examples that are particularly illustrative of the challenges encountered by the Nordic competition authorities.

18. In August 2016, the Norwegian Competition Authority (NCA) contacted the Danish Competition and Consumer Authority (DCCA) concerning a suspected joint-bidding case in which one of the companies involved was located in Denmark. Since Norway is not part of the EU, the DCCA could not assist with any inspection or other fact-finding measures under EU Regulation 1/2003. Nor could the Nordic co-operation agreement provide a legal basis for such assistance, since the agreement only provides a legal basis for notifications and the exchange of confidential information. As a result, the NCA decided to limit its formal enforcement action to Norway and to seek information from the party involved in Denmark on a voluntary basis. This case provides a clear example of a situation where additional tools within the Nordic co-operation agreement would have been necessary in order to provide the best support to the NCA.

19. In 2010, the Swedish Competition Authority (SCA) launched an extensive investigation into two companies’ alleged anticompetitive conduct on the Swedish market. In the course of its investigation and following unannounced inspections, the SCA decided

⁵ Joint letter to ministries from October 2017. See also the EFTA Court's judgement of 30 May 2018, where the legal effects of final rulings under the decentralised enforcement of EEA competition law, established in the EFTA-pillar of the EEA Agreement, is considered, at para. 47.

⁶ See the EFTA position paper of 6 July 2017 on the Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

⁷ Article 12 of the EU Regulation 1/2003 provides legal basis for the exchange of confidential information that is to be used in evidence.

to send out a questionnaire to companies located in seven different countries. The SCA requested the assistance of the respective competition authorities of these countries, including the Norwegian Competition Authority (NCA). The issue at stake was similar to one described above, that is to say that the NCA did not have the legal basis to require this company to answer to the questionnaire because of the lack of “cross-pillar” application of Regulation 1/2003 between EU and EFTA competition authorities. The NCA also lacked a legal basis to do so under the Nordic co-operation agreement. The NCA forwarded the questionnaire to the company in question but had no power to order a response.

4.3. The solutions provided by the revised Nordic co-operation agreement

20. The idea of a revised Nordic co-operation agreement arose in 2014 when the OECD Council approved a revised Recommendation concerning International Co-operation on Competition Investigations and Proceedings⁸. The recommendation states among other things that member countries should commit to effective international co-operation and take appropriate steps to minimize direct or indirect obstacles or restrictions to effective enforcement co-operation between competition authorities.

21. In light of this, as well as the shortcomings of the current co-operation agreement that had been identified by the Nordic competition authorities, work commenced to draft a revised Nordic competition agreement. The final revised agreement⁹ was signed in 2017 by the director generals of the competition authorities of Denmark, Finland, Greenland, Iceland, Norway and Sweden. The agreement is now subject to ratification, acceptance or approval by the parties in accordance with their respective constitutional requirements¹⁰. As of October 2018, only Sweden and Finland have deposited their ratification instruments in accordance with the agreement. The agreement will enter into force between these countries on 28 November 2018.

22. As further countries ratify the revised agreement, it will successively replace the previous one and will provide the legal basis for effective co-operation that the Nordic countries have so far lacked. It will furthermore apply to more competition authorities than is the case under the 2001 agreement.

23. It will provide three main tools to facilitate the Nordic co-operation. The first concerns Article 3 of the agreement, which relates to the exchange of confidential (and non-confidential) information. The requisite for such an exchange is now clarified, with the agreement now only stating that the information should “only be used in evidence and in respect of the subject matter for which it was collected by the transmitting authority”. The second mechanism brought about by the revised agreement concerns requests for information, stated in Article 4 of the agreement. According to this article, the requested competition authority will have the legal basis to carry out any requests for information under its national law on behalf and for the account of the requesting competition authority. Finally, the third new tool brought about by the revised agreement is the power of one competition authority to carry out inspections in its own territory on behalf of another

⁸ Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings” approved on September 16, 2014.

⁹ Agreement on Co-operation in Competition Cases, available at <http://www.konkurrensverket.se/globalassets/om-oss/nordic-agreement-on-co-operation-in-competition-cases.pdf>.

¹⁰ Article 7 of the 2017 co-operation agreement.

competition authority that is party to the agreement. The two last tools are the “Nordic equivalent” of Article 22 of the EU Regulation 1/2003. However, it is relevant to note that unlike EU Regulation 1/2003, these new tools will also be available for merger cases (articles 3 and 4) and cases exclusively under national competition rules.

24. As stated in a joint letter by the Nordic competition authorities sent to the relevant national ministries, “the intentions behind a modernized co-operation agreement would be to strengthen the ability of the Nordic competition authorities to efficiently investigate cases under their respective competences. This will improve the functioning of markets, to the benefit of consumers and businesses”.¹¹

5. Conclusion

25. Although not all Nordic countries have yet deposited their ratification instruments, it is the ambition of the competition authorities that the revised Nordic agreement will soon enter into force between more countries. This process towards a more effective set of tools for regional co-operation demonstrates the importance of a continued close co-operation between countries belonging to a same region. Long-lasting co-operation, such as between the Nordic competition authorities, gives the opportunity to reflect over both the benefits and the potential for improvement of such co-operation. Effective co-operation implies effective competition law enforcement, and this is only possible if authorities have the right tools.

¹¹ See supra note 5