Slovenian Competition Day, 3 October 2023, panel discussion on judicial review in competition cases

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Dear colleagues,

I would like to begin by thanking the Slovenian Competition Protection Agency for the opportunity to attend this conference today, and for choosing this topic for discussion. The question of judicial review in competition cases is an apt and timely one. During my remarks, I am going to begin by reflecting on the questions at hand from a national Swedish perspective, but I believe that the issues raised have wider relevance for the question of the effectiveness of EU law within the context of the decentralised system of enforcement.

First, a little context. For the vast majority of the modern competition regime in Sweden, a judicial model was in place. This meant that the competition authority had to bring an action in the courts in order to issue competition fines, or to block mergers. In 2018, the competition authority was granted the power to block mergers, and as late as March 2021 the authority was granted decision-making powers with respect to competition fines.

Another important recent development was the reform of the court system for competition cases in 2016. The previous specialised Market Court was replaced by a system of dedicated courts within the general court system that deal exclusively with competition, IP and marketing law cases. The rationale was that these are among the most complex and extensive cases brought to court, and there are connections between them in terms of law and principles. The fragmentation of these cases across different courts, along with the low number of cases heard, was seen to hamper quality and effectiveness.

Competition law has indeed developed over time to be a very complex area, where the standards of proof are high. Cases are substantial and case-handling

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times are long, and we can only pursue a limited number of cases every year. The development of case law takes time.

In the first years after the establishment of the new courts, the competition authority faced significant challenges in obtaining approval to the desired extent in cases that were tried on the merits by the appeal court. During the period of 2016 to 2021, eight cases brought by the competition authority were subject to a ruling by the appeal court. Almost all of these went against the authority. In this period, competition fines were issued only in cases where the parties accepted the sanction without requesting a court hearing. Private parties have had similar difficulties in having their actions upheld in the appeal court. No private damages actions or injunctions were determined in the claimant's favour during this time-frame.

It is also worth stating that the appeal court has not made any references for preliminary rulings to the European Court of Justice since its establishment in 2016. There is an additional national mechanism whereby the appeal court, in specific cases, can allow a further appeal to the Supreme Court, but so far this has not been granted in any case regarding substantive competition law issues. The reversal rate between decisions of the first instance court and the appeal court during this period was also strikingly high.

I should pause here to emphasise that we do not expect that we – or any public enforcer – should have a 100% success rate in court. It is inherent to the work of competition authorities that we sometimes pursue cases where the boundaries of the law are untested or unclear, and where we aim to contribute to the clarification of the law.

However, it is reasonable to expect from us that our court proceedings are efficient and successful to some extent. Given this, we saw a pressing need to evaluate how we can develop our work - our case prioritisation, our investigative methods, and our litigation - to take account of the legal framework that has been established by the Swedish courts.

But again, competition law is complex. We and other parties need clear guidance about the application of the law to be able to develop our work. For this reason, we set about undertaking an impartial review of the competition authority's litigation work in order to identify areas for improvement. We gave independent researchers the task of analysing the authority's court proceedings between 2016 and 2021. A reference group of lawyers, academics and former judges were attached to the project.

The researchers concluded, for example, that there is often uncertainty about how competition law should be applied in individual cases. They also described a

perception that certain rulings from the appeal court do not give the desired level of guidance with respect to future application of the rules.

One aspect that the researchers focused particularly on was the evidentiary requirements set by the courts. Although the question of whether the competition authority has met the requisite standard of proof is specific to each case, the researchers raised the question of whether the standard of proof has been set at such a level so as not to be in line with the principle of effectiveness of EU law. However, it was also noted that the interpretation of the law itself has been decisive in certain judgments. This is complicated further by the fact that questions of law and evidence are often conflated in competition cases.

The researchers concluded that preliminary references to the European Court of Justice should be used to a greater extent by the courts in Sweden, and that the competition authority should more actively request this from the court in its pleadings. The researchers also recommended that the question of the high standard of proof could be referred for a preliminary ruling in the context of the principle of effectiveness of EU law.

The researchers also provided recommendations about how we as a competition authority can adapt to the framework established by the court. For example, this included recommendations about how we prioritise and delineate the cases we bring.

It goes without saying that when we find classic cartels, we will bring a case. However, the reality is that many cases that we encounter are borderline. We are a small economy compared to the level that the European Commission operates in, and many of the cases we do bring involve bid-rigging in regional markets, tender cooperation in single procurements, and short-term cooperation. Such situations seldom come under the scrutiny of the Commission, which means that there are not always precedents or clear case law at the EU level when we write our decisions. But it is our job to enforce the competition rules, and ensure efficient competition, also in our regional and national markets. We therefore need to bring cases to clarify how competition law should be applied in circumstances that predominantly occur at the national level. A lack of clear precedents sometimes makes it more challenging to present our cases to the judges in court, but it cannot stop us from applying, and clarifying, the fundamental competition rules in new contexts. Obviously, the national courts also have a very important task in this area when our decisions are subject to appeal.

At this juncture it is also worth recognising that in court, we often litigate against well-resourced undertakings with significant teams of specialised competition lawyers, who also engage economic experts that are often questioned in court. It is therefore key that we maintain our own expertise in this area to meet the standards set when our decisions are tried in court. We have our own economic

experts who participate in investigations and offer quality assurance. When we go to court, we use our own staff from our litigation department. These experts often have a background as members of the bar or from the court system. They also help to delineate our investigations, and contribute to quality assurance and the evaluation of evidence. To be up to this task, we need to recruit and retain the right expertise, which is difficult as a public authority when salary levels differ. We can attract staff by offering interesting and important work, but there are challenges to this. Nevertheless, experienced staff are a key resource, both in our investigations and in court.

As I mentioned in my initial remarks, the competition authority has had decision-making powers for competition fines since 2021. This is a move that we had advocated for some time. It brings us in line with the majority of competition authorities in Europe. At the time of the change, some bodies, including the Patent and Market Court, advised against giving the authority such powers. However, we believed that it would result in procedural efficiencies and a quicker process to a decision in the first instance.

We also believe that the change has had a positive effect on the incentives to cooperate with our investigations. Instead of waiting to present the relevant facts in the court process, we expect the parties to cooperate early during the investigation, and at the latest when they get a draft decision (SO). The change also means that the same procedural law will apply in court regardless of the type of intervention, and the same type of evidence can be used in all cases now.

The change in decision-making powers also allows for more efficient proceedings in court. Appeals do not have to cover the entire decision, they could for example focus on the level of fine. Thus, subsequent court proceedings can be made more efficient and concentrate on the issues that are disputed.

Since March 2021, we have adopted three decisions with fines in antitrust cases. While the sample size is too small to discern clear trends, I can mention that the investigations in all three cases have been completed within our internal two-year timeframe. Only one decision has been subject to court review in the first instance, and that could be done without a main hearing, based on the documentary evidence in the authority's files. The overall timeframe to reaching a final decision has therefore been substantially shorter compared to the previous system. The frequency of appeals has been lower. I can also note that we have adopted a number of interim decisions in the past few years. Some of these have been challenged in court, but they have all been upheld.

This national experience brings me to some broader reflections about how we should look on the question of judicial review in the context of the EU. Since the modernisation of the EU competition regime 20 years ago, the responsibility for ensuring the effectiveness of EU law has been shared between the Commission, the national competition authorities, the European Court of Justice and the national courts. And the Member States' role is significant. They account for around 85% of all decisions applying the EU competition rules. Underpinning all of this, there needs to be an effective and well-functioning system of decision-making and judicial review both at an EU level and across all the Member States.

For the competition authorities' part, we have a responsibility to promote the development of case law through the cases that we pursue. Based on our experiences in Sweden, it is my view that this is most efficiently achieved through a system where the competition authority adopts decisions in the first instance which can then be appealed to the courts. In our decisions we can help to clarify legal issues, and in subsequent court actions we can strive where possible to achieve an outcome that gives clarity about the rules and creates legal precedent.

It goes without saying that there need to be appropriate procedures within the competition authorities to ensure due process and legally robust decisions. We have one important mechanism built into the architecture of the ECN: each of the national competition authorities has a legal obligation to inform the European Commission of envisaged decisions, which gives the Commission the opportunity to make observations on the case.

I also believe that the national procedural rules should not create unnecessary obstacles to the authorities in developing case law, for instance by limiting the competition authority's power to appeal rulings by the courts, which is the case in some jurisdictions.

This brings us to the national courts. They are of paramount importance within the EU competition law regime. As a former judge, I can see even more clearly now how vital it is that precedent-setting courts formulate judgments that offer clear guidance for lower courts and parties about the current framework of case law established by the Court of Justice of the EU, but also provide guidance where case law is lacking. This will help to strengthen trust in the courts and enhance the impact of their jurisprudence.

National courts have the exclusive power to make preliminary references to the Court of Justice. This is not to mention the right that is provided in Regulation 1/2003 to ask the European Commission for its opinion on economic, factual and legal matters. Preliminary references are a key mechanism in ensuring the coherence and effectiveness of EU law. I am reminded of the last time a preliminary ruling was issued in a competition case in Sweden back in 2011, in the Teliasonera margin squeeze case brought by our authority. Among other things,

the Court of Justice made the important finding that margin squeeze was to be considered an independent abuse of dominant position, distinct from refusal to supply.

Given their central role, I believe that the best possible conditions should be created to empower national judges to adjudicate effectively in cases applying the EU competition rules. For example, in Sweden, economic experts participate as specially appointed members of the court. This is something we welcome, as it acknowledges the complexity of the cases at hand and reflects how matters are investigated and decided in the first instance at the competition authority.

Having regular opportunities to adjudicate in competition cases would also, in my view, enhance the effective application of the EU competition rules in the national courts. As I mentioned previously, one of the reasons for the 2016 reform in Sweden was to increase the number of cases heard across related areas of law. However, the reality is that competition cases remain relatively few.

Given this, I believe that we, collectively, have a responsibility not be overly restrictive when determining whether EU competition law applies in individual national cases, that is to say when trade between Member States is affected. The national courts have a role to play here, and in my view, the Swedish courts have applied a very prudent approach in the cases it has heard.

In some Member States, there is a rich body of private actions that complements public enforcement, either as standalone or follow-on cases. However, the picture is rather uneven. The number of damages actions has increased significantly since the adoption of the EU Damages Directive, but while some national courts have extensive experience, the majority of jurisdictions have still heard few or no such cases. We should therefore continue to work to facilitate damages actions throughout the EU.

Finally, just as we competition authorities gain enormously from the possibility for cooperation in the ECN, I hope and assume that the opportunities that are offered within the EU for training and judicial cooperation in the field of competition law are utilised as much as possible by national courts.

The decentralised system of EU competition enforcement has proven to be an overwhelming success. Perhaps more than ever, our work is interconnected and cross-border. There is a commonness of purpose within the ECN, and the national competition authorities play an increasingly important role alongside the Commission. The evaluation of Regulation 1/2003 is an important step. Alongside this, it seems like an opportune time to reflect on whether our national rules for judicial review are appropriately designed to ensure an effective application of EU law across the Member States.