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BACKGROUND AND BENEFITS OF THE COOPERATION AGREEMENT BETWEEN THE NORDIC COMPETITION AUTHORITIES

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Abstract:

The Nordic competition authorities have decades of experience in cross-border collaboration, and the first formal cooperation agreement between the authorities was signed in 2001. Sixteen years later, the cooperation agreement was renegotiated and expanded to enable wider forms of cooperation. On this occasion, Finland also joined the agreement. The European Competition Network provides for a well-functioning cooperation framework for the national competition authorities of the European Union. However, the EU framework does not meet all the needs of the Nordic countries and leaves room for a more extensive regional cooperation agreement. The Nordic Cooperation Agreement enables the exchange of confidential and non-confidential information in both antitrust and merger cases. In addition, the agreement also applies in purely national cases, i.e. where the competition restriction in question does not affect trade between the Nordic countries. Most importantly, as not all the Nordic countries are part of the EU, the Nordic agreement enables a deep cooperation between EU and non-EU countries.

Keywords:

Regional cooperation between competition authorities; Nordic Cooperation Agreement; European Competition Network; Information exchange and mutual assistance in antitrust and merger investigations

INTRODUCTION

In 2017, the director generals of the Nordic competition authorities signed an agreement on cooperation in competition cases.¹ The agreement facilitates information exchange and mutual assistance in investigations, thereby enhancing cross-border co-operation in both antitrust and merger control matters. The forms of cooperation include notifications about pending investigations, information exchange between authorities and assistance in carrying out inspections of undertakings and requesting information from them. The agreement replaces the previous Nordic Cooperation Agreement from 2001.

This article aims to describe the origins and reasons for the long-lasting cooperation within the Nordic region. Based on the new Cooperation Agreement, the Nordic competition authorities have more extensive cooperation tools than before, and more extensive than within the European Competition Network. The article also covers the main provisions of the Nordic Agreement and explains the benefits brought by the agreement compared to the EU legal framework.

HISTORY OF NORDIC COOPERATION

The Nordic countries have very similar market structures and the same companies often operate in more than one Nordic country. The Nordic countries also share similar values and a culture that has grown out of a common history. Because of these connecting factors, the competition authorities of the Nordic countries have a long history of cross-border collaboration. The authorities' delegations have been meeting each other in annual Nordic meetings since the end of the 1950s. In addition to Denmark, Finland, Norway and Sweden, the Icelandic Competition Authority has participated in these meetings since 1975, with the Faroe Islands and Greenland, autonomous territories of Denmark, joining in 2000 and 2002 respectively.² Besides the major annual meetings each autumn, the director generals of the Nordic authorities have a separate directors' meeting every spring. Both meetings are important fora for discussions and the exchange of experiences on topical cases and competition law issues.

In addition to those annual meetings, the Nordic competition authorities have founded several permanent and ad hoc specialist subgroups. A Nordic cartel working group was formed back in 2000. The working group meets annually and shares experiences

1 The agreement of 8 September 2017 between Denmark, Finland, Iceland, Norway and Sweden on Cooperation in Competition Cases. Available from: <https://www.kkv.fi/en/facts-and-advice/competition-affairs/international-cooperation-related-to-competition-affairs/nordic-agreement-on-cooperation-in-competition-cases/> [Accessed: September, 12 2020] (hereinafter also the '2017 Nordic Agreement').

2 OECD (2018) DAF/COMP/GF/WD(2018)14: Global Forum on Competition Regional Competition Agreements: Benefits and challenges contribution from Denmark, Finland, Norway, Iceland and Sweden-Session III -29-30 November 2018, p. 3. Available from: https://www.konkurrensverket.se/globalassets/om-oss/2018_regional-competition-agreements-benefits-and-challenges_daf-comp-gf-wd-2018-14.pdf [Accessed September, 12 2020].

concerning ongoing case activities, project management and investigation methodologies, among other things. The authorities have also formed working groups for chief economists, chief legal officers and merger control units. Furthermore, there are numerous ad hoc expert meetings covering a wide range of issues that may be arranged when needed. For instance, the authorities' communication departments and forensic IT specialists recently met each other and learned from each other's experiences.

The Nordic competition authorities have also joined forces in competition advocacy work. During the last two decades, the authorities have published several joint reports on topics of common interest. The reports cover various subjects and industry areas, such as airlines,³ the electricity market,⁴ the food chain,⁵ retail banking⁶ and waste management.⁷ In June 2019, the Nordic authorities published a joint article in which they gave their support to a strict merger control regime without political interference, thereby distancing themselves from the French-German initiative to ease the creation of 'European Champions'.⁸

It is worth mentioning that one of the combining factors facilitating the close relations and tight co-operation of the Nordic competition authorities has been the language. Historically, much of the Nordic co-operation has taken place in Nordic languages, though English is gaining ground in both formal and informal communication.

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- 3 Report from the Nordic competition authorities, No. 1/2002: Competitive airlines, towards a more vigorous competition policy in relation to the air travel market. Available from: https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic-report_competitive-airlines.pdf [Accessed September, 12 2020].
 - 4 Report from the Nordic competition authorities, No. 1/2003: A powerful competition policy, towards a more coherent competition policy in the Nordic market for electric power. Available from: <https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordisk-energirapport.pdf>. [Accessed September, 12 2020]. See also: Report from the Nordic competition authorities, No. 1/2007: Capacity for competition, investing for an efficient Nordic electricity market. Available from: <https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/capacity-for-competition.pdf> [Accessed September, 12 2020].
 - 5 Report from the Nordic competition authorities: Nordic food markets - a taste for competition, 2005. Available from: https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic_food_markets.pdf [Accessed September, 12 2020].
 - 6 Report from the Nordic Competition Authorities, No. 1/2006: Competition in retail banking. Available from: https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic_retail_banking.pdf [Accessed September, 12 2020].
 - 7 Report from the Nordic Competition Authorities: Competition in the waste management sector – preparing for a circular economy, 2016. Available from: <https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic-report-2016-waste-management-sector.pdf> [Accessed September, 12 2020].
 - 8 Finnish competition and consumer authority (2019) The Nordic competition authorities support a strict merger control regime [Press release of June, 26 2019]. Available from: <https://www.kkv.fi/en/current-issues/press-releases/2019/26.6.2019-the-nordic-competition-authorities-support-a-strict-merger-control-regime/> [Accessed September, 12 2020].

SIMILARITIES IN THE NORDIC COUNTRIES' COMPETITION LEGISLATION

The Nordic countries' competition acts resemble each other, which facilitates cross border cooperation even further. Even though not all the Nordic countries are Member States of the EU, the material competition rules are fairly similar across the Nordic region. In all the Nordic countries, the antitrust rules prohibit cartels and other restrictive conduct between undertakings. The abuse of a dominant position is also forbidden. The EU Member States: Denmark, Finland and Sweden, apply Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) in cases where trade between Member States may be affected. Where the competition restriction in question only has effects within the Member State in question, the national competition rules contain prohibitions identical to those found in the TFEU. Norway and Iceland, who are not EU, but are EFTA members (European Free Trade Area), apply Articles 53 and 54 of the EEA Agreement,⁹ which are almost identical copies of Articles 101 and 102 TFEU. The prohibitions contained in the Greenlandic¹⁰ and Faroese¹¹ competition acts closely resemble the EU rules as well.¹²

Every competition act in the Nordic area also contains rules on merger control. The EU Merger Regulation (EC) No. 139/2004 governs merger control at the EU level, but in cases without a community dimension the merger may be reviewable in one or more EU and EEA jurisdictions. The EU does not require the Member States to regulate mergers, and hence the merger control rules in Denmark, Finland and Sweden have been defined at a national level. The same goes for the merger control regimes of Iceland, Norway, the Faroese Islands and Greenland. However, as a result of convergence between national merger regimes both at the EU and Nordic levels, the merger control rules have become very similar. For instance, as regards the substantive assessment of mergers, all the Nordic countries have moved from a dominance test to the SIEC test.¹³

9 Agreement on the European Economic Area, OJ L 001, 03/01/1994, p. 3.

10 Chapters 2 and 3 of the Greenlandic Competition Act. Inatsisartutlov nr. 1 af 15. maj 2014 om konkurrence (konkurrenceloven) Grønlands Selvstyre d. 15. maj 2014. Available from: <http://lovgivning.gl/lov?rid=%7BB4B1627B-E5B2-4A41-AE64-63953E79FDE8%7D> [Accessed September, 12 2020].

11 Parts 2 and 3 of the Faroese Competition Act. Consolidated Act. No 35 of 3 May 2007 as amended with Act. No 35 of the 27 April 2012. Available from: <https://vs.cdn.fo/media/1355/kappingarlo-gin-ensk-u-tga-va.pdf?s=DSX9bpbv6fLub-JMcYefndJ1xjw> [Accessed September, 12 2020].

12 Report from the Nordic competition authorities, No. 1/2013: A vision for competition policy towards 2020, p. 44. Available from: https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic-report_a-vision-for-competition.pdf [Accessed September, 12 2020].

13 A significant impediment of effective competition, as in Article 2(2) of the EUMR 139/2004: "A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market." Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

However, the notification thresholds, timeframes for investigation and other procedural issues still vary across the Nordic jurisdictions.

NORDIC CO-OPERATION AGREEMENTS

The 2001 Nordic Agreement

Despite the long-lasting collaboration between the Nordic competition authorities, the first formal Nordic co-operation agreement was only signed in 2001, between Denmark, Norway and Iceland. Sweden joined the Agreement in 2004,¹⁴ but Finland was never a party to the 2001 Nordic Agreement.

The objective of the agreement was to strengthen and formalise the cooperation between the authorities and to enhance the parties' enforcement activities by enabling a wider exchange of both confidential and non-confidential information. The exchange of information under the agreement was implemented by notifications, whereby one competition authority informed the other of activities that affected competition interests within the other authority's jurisdiction.¹⁵ The information exchange applied both to antitrust and merger related issues.¹⁶ It was also agreed that the parties will exchange non-confidential information, which facilitates the more effective application of competition laws, and improves the understanding of the legal and financial conditions and theories of harm that were relevant to the authorities' enforcement activities.¹⁷

Shortcomings in the 2001 Nordic Agreement and the EU legal framework

The 2001 Nordic Agreement provided for information exchange in antitrust and merger cases, but lacked further tools for cooperation. Although the agreement proved useful on several occasions, the parties to the agreement found that a further strengthening and expanding of the forms of cooperation would be needed.¹⁸ In particular, a possibility to assist one another in investigative measures would have improved the examining of cases with cross-border effects in the Nordic region. However, the 2001 Nordic Agreement did not provide for legal grounds for such assistance.

The EU Legal Framework enables strong and in-depth cooperation within the ECN network in antitrust proceedings, but has limitations towards EFTA Member States. Article 22 of the Council Regulation (EC) No. 1/2003 provides a legal basis for national competition authorities to assist each other in inspections and other fact-finding

(the EC Merger Regulation) OJ L 24, 29.1.2004, pp. 1–22.

14 Agreement of 16 March 2001 and 9 April 2003 between Denmark, Iceland, Norway and Sweden on cooperation in competition issues. Available from: <https://www.konkurrensverket.se/globalassets/om-oss/nordic-agreement-on-cooperation-in-competition-cases.pdf> [Accessed September, 12 2020] (hereinafter also '2001 Nordic Agreement')

15 Ibid, Art. II.

16 Ibid.

17 Ibid, Art. III.

18 OECD (2018) DAF/COMP/GF/WD(2018)14, p. 3.

measures,¹⁹ but in the Nordic area this possibility only concerns Denmark, Finland and Sweden. Norway and Iceland are not members of the EU and Regulation 1/2003 does not extend to EFTA Member States, even though it has been implemented into the EEA Agreement.²⁰ The EEA Agreement, however, does not provide for the necessary tools for cooperation between national competition authorities in the two pillars. Hence, Article 22 of Regulation 1/2003 is not applicable between EU and EFTA Member States.²¹ It is worth noting that the EFTA states have stressed the importance of expanding the EU and EFTA ‘cross-pillar’ cooperation in the future.²²

In addition, the EU legal framework is limited to competition matters that are capable of having cross-border effects within the EU. If the competition restriction in question may not affect trade between the Member States, only national rules apply.²³ Consequently, a national competition authority may not seek assistance from another competition authority under Article 22 of the Regulation 1/2003 when investigating purely national restrictions that have no effect on inter-state trade.

Another shortcoming of Regulation 1/2003 is that it only applies in respect of antitrust proceedings. There was a wide consensus among the Nordic competition authorities that enhanced cooperation should cover merger cases and merger control procedures as well. Neither the 2001 Nordic Agreement nor Regulation 1/2003 established a legal basis for assisting in fact-finding measures relating to merger investigations.

Lastly, the fact that Finland was not part of the 2001 Nordic Agreement reduced the geographical scope of the Nordic cooperation. Finland did not join the first Nordic Cooperation Agreement, because in Finland the EU legislation was thought to enable sufficiently broad cooperation between the authorities.²⁴ However, the mutual aid

19 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. OJ L 1, 04/01/2003, p. 1.

20 The European Economic Area (EEA) consists of the Member States of the EU and three countries of the European Free Trade Association (EFTA), namely Iceland, Liechtenstein and Norway. The fourth EFTA Member State, Switzerland, has not joined the EEA. The Agreement on the EEA entered into force on 1 January 1994.

21 See the EEA Standing Committee of the EFTA States, Ref.17-2294 Subcommittee I on the Free Movement of Goods EEA EFTA Comment 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 (July, 6 2017), para 6. Available from: [https://www.efta.int/sites/default/files/images/EEA%20EFTA%20Comment%20-%20Proposal%20to%20empower%20NCAs%20to%20be%20more%20effective%20enforcers%20\(COM\(2017\)142\).pdf](https://www.efta.int/sites/default/files/images/EEA%20EFTA%20Comment%20-%20Proposal%20to%20empower%20NCAs%20to%20be%20more%20effective%20enforcers%20(COM(2017)142).pdf) [Accessed September 12, 2020].

22 Ibid, paras 7-10.

23 According to Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, pp. 3–33 (ECN+ Directive 2019/1), the scope of the directive covers both the application of Articles 101 and 102 TFEU on a stand-alone basis and the parallel application of national competition law to the same case. Recital 4 and Article 1(2).

24 Finish Government (2018) New agreement to enable more efficient monitoring of competition in the

within the ECN network does not extend to other Nordic countries, which was clearly a limitation to pan-Nordic cooperation.

The 2017 Nordic Agreement

In 2014, following the approval by the OECD Council of the Recommendation concerning International Co-operation on Competition Investigations and Proceedings,²⁵ the Nordic countries began work on updating and reassessing the scope of the Nordic Cooperation Agreement.²⁶ The OECD recommendation states that member countries should commit to effective international co-operation and take appropriate steps to minimise direct or indirect obstacles to effective enforcement co-operation between competition authorities.²⁷

Inspired by the OECD Recommendation, and given the shortcomings of the 2001 Nordic Agreement, the Nordic Competition Authorities negotiated and drafted an extended Cooperation Agreement. The new agreement²⁸ was signed in 2017 by the director generals of the authorities, and was thereafter subject to ratification, acceptance or approval by the parties in accordance with their respective constitutional requirements.²⁹ The new agreement expanded the Nordic cooperation geographically, as now also Finland became a party to the agreement. By July 2020, all five Nordic Countries had acceded to the agreement. The agreement also contains provisions on its entry-in-force in the Faroese Islands and Greenland.³⁰

The 2017 Nordic Agreement contains very similar provisions on notifications from one authority to another about pending investigations as the earlier 2001 Nordic Agreement:

Article 2

Notifications of competition investigations, proceedings and mergers

The competition authority of a Party shall have the power to notify the competition authority of another Party when its investigation or proceeding can be expected to affect the other Party's important interests. Circumstances that may justify a notification include, but are not limited to;

Nordic countries [Press release of November, 29 2018]. Available from: <https://valtioneuvosto.fi/en/-/1410877/pohjoismainen-kilpailuvalvonta-tehostuu-uudella-sopimuksel-1> [Accessed September, 12 2020].

25 OECD (2014) *Recommendation concerning international co-operation on competition investigations and proceedings*. Available from: <https://www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm> [Accessed September, 12 2020].

26 OECD (2018) DAF/COMP/GF/WD(2018)14, p. 6.

27 OECD (2014) *Recommendation concerning international co-operation on competition investigations and proceedings*, p. 3, Recommendation II.

28 2017 Nordic Agreement, footnote 1.

29 Article 7 of the 2017 Nordic Agreement.

30 Ibid.

- a) *Formally seeking non-public information located in the territory of another Party;*
- b) *The investigation of an enterprise located in or incorporated or organized under the laws of another Party;*
- c) *The investigation of a practice occurring in whole or in part in the territory of another party, or required, encouraged or approved by the government of another Party;*
- d) *The consideration of remedies that would require or prohibit conduct in the territory of another Party;*
- e) *A merger that belongs under the jurisdiction of another Party; or*
- f) *A merger where one or more of the participants in the transaction are enterprises located in, incorporated or organized under the laws of another Party.*

The notifying competition authority, while retaining full freedom of the ultimate decision, should take account of the views that the competition authority of the other Party may wish to express.³¹

In addition to the notifications referred to in Article 2, the agreement provides three main tools to facilitate Nordic cooperation. Firstly, the agreement enables the exchange of confidential and non-confidential information in both antitrust and merger cases. Article 3 of the agreement reads as follows:

Article 3

Exchange of information

For the purpose of applying competition rules and merger control rules the competition authorities of the Parties shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

Information exchanged shall only be used in evidence and in respect of the subject matter for which it was collected by the transmitting authority.³²

The wording of Article 3 is based on Article 12 (Exchange of information) of Regulation 1/2003, with the exception that under the 2017 Nordic Agreement there is no need to assess whether the competition restriction has effects on cross-border-trade or not. Another major extension to the EU framework is the possibility to exchange information with regard to merger cases.

The second mechanism brought about by the 2017 Nordic agreement concerns requests for information. Article 4 of the agreement states:

31 Ibid, Art. 2.

32 Ibid, Art. 3.

Article 4

Requests for information

The competition authority of a Party may in its own territory carry out any requests for information under its national law on behalf and for the account of the competition authority of another Party in order for the requesting authority to apply competition rules or merger control rules. Any exchange or use of the information collected shall be carried out in accordance with Article 3³³.

According to this provision, the requested competition authority will have the legal basis to carry out any requests for information under its national law on behalf of and for the account of the requesting competition authority. The article closely resembles the wording of Article 22 of Regulation 1/2003, but again it extends to merger cases and purely national antitrust cases.

When it comes to information exchange on merger cases within the European Competition Network, it must be noted that a lot of cooperation takes place between the merger control units of the national authorities, even without binding legal provisions. For instance, the authorities of the EU Member States have agreed on Best Practices, whereby they strive to enhance cooperation between the national competition authorities in multijurisdictional merger cases.³⁴ The Best Practices were prepared by the ECN Merger Working Group in 2011 and they set out the key steps at which the national competition authorities should cooperate, and the information they may share.³⁵ The merging parties are encouraged to facilitate cooperation, in particular by providing waivers of confidentiality.^{36,37} It is normally in the best interest of the merging parties to waive confidentiality in order to guarantee a prompt and efficient merger review process across jurisdictions. Therefore, the information exchange under the 2017 Nordic Agreement and within the ECN network, the latter based on voluntary waivers, probably does not differ that much in practice.

33 Ibid, Art. 4.

34 MWG (2011) Best practices on cooperation between EU National Competition Authorities in merger review adopted November, 8 2011. Available from: https://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf [Accessed: September, 12 2020].

35 EC (2011) *Mergers: competition authorities agree best practices to handle cross-border mergers that do not benefit from EU one-stop shop review* [Press release of November, 9 2011]. Available from: https://ec.europa.eu/commission/presscorner/detail/en/IP_11_1326 [Accessed September, 12 2020].

36 Internet page of the European Commission: 'European Competition Network, Cooperation in merger control'. Available from: <https://ec.europa.eu/competition/ecn/mergers.html> [Accessed December, 30 2019].

37 The format proposed by the ICN model waiver is recommended. ICN, Waivers of confidentiality in merger investigations. Available from: <https://www.internationalcompetitionnetwork.org/portfolio/model-confidentiality-waiver-for-mergers/> [Accessed September, 12 2020].

A third form of cooperation under the 2017 Nordic Agreement relates to unannounced inspections. According to the agreement, one competition authority may conduct inspections for another competition authority that is a party to the agreement.

Article 5

Inspections

The competition authority of a Party may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf of and for the account of the competition authority of another Party in order to establish whether there has been an infringement of competition rules governed by the requesting Party. Any exchange or use of the information collected shall be carried out in accordance with Article 3.

The officials of the competition authority who are responsible for conducting the inspection as well as those authorized or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the competition authority in whose territory the inspection is to be conducted, officials and other accompanying persons authorized by the competition authority requesting the inspection may assist the officials of the authority concerned³⁸.

Just like Articles 3 and 4, the power to conduct inspections under Article 5 for another Nordic competition authority covers matters in which national competition law provisions apply exclusively. However, it is relevant to note that, unlike the provisions on information exchange and requests of information, Article 5 only relates to antitrust enforcement. This is an important delineation, as in Finland inspections are possible and have been conducted in merger investigations as well.³⁹ As a result of the wording of Article 5, the Finnish Competition Authority is not, however, entitled to conduct dawn raids for fellow Nordic authorities in relation to their merger control proceedings.

³⁸ Article 5 of the 2017 Nordic Agreement.

³⁹ Finnish Competition Act No 948/2011, section 35 (Inspections on the business premises of an undertaking). Available from: <https://www.kkv.fi/en/facts-and-advice/competition-affairs/legislation-and-guidelines/competition-act/> [Accessed September, 12 2020]. In original language version: Kilpailulaki. Sisällysluektelo 948/2011. Available from: <https://finlex.fi/fi/laki/smur/2011/20110948> [Accessed September, 12 2020].

CONCLUSION

The 2017 Nordic Agreement entered into force so recently that the full benefits of the enhanced tools for cooperation are yet to be seen. However, the advantages of the Agreement for the effective enforcement of competition law in the Nordic area are evident. When investigating competition violations in the Nordic area, the adequacy of cooperation within the European Competition Network is uncertain, as the EU legal framework only enables cooperation between EU Member States and with regard to competition restrictions having inter-state trade effects. Cooperation in the area of merger control also falls outside the scope of the cooperation enabled by Regulation 1/2003.

The Nordic Cooperation Agreement provides a legal basis for more extensive collaboration in the day-to-day enforcement work of the Nordic Competition Authorities. This, in the end, contributes to the well-functioning markets to the benefit of consumers.