The concept of undertaking(s) in dominant position and the system of control in the Nordic countries antitrust law

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THE CONCEPT OF UNDERTAKING(S) IN DOMINANT POSITION AND THE SYSTEMS OF CONTROL IN THE NORDIC COUNTRIES ANTITRUST LAW

1. ECONOMIC COMPETITION IN THE NORDIC COUNTRIES—A GENERAL SURVEY

Like other European countries, the Nordic countries—i.e. Denmark, Finland, Norway and Sweden (Iceland will not be treated in this work)—have inherited their views on how to deal with unfair and undesirable restrictive business practices in the 20th century from the USA. Earlier these methods were generally not prohibited by law and the market had to regulate the conditions for competition itself. Norway passed its first law on economic competition in 1926 and has slowly been followed by the other countries. It was, however, not until the end of the Second World War that they found comprehensive solutions to keep control of the market.[1]

[1] *Denmark:*
1937 Price Agreements Act.
1949 Trust Commission Act.
1955 The Monopolies and Restrictive Practices Control Act (with the Monopoly Control Authority—Monopoltilsynet).

Finland:
1957 Act on Control of Restrictive Business Practices.
1964 Act on the Promotion of Economic Competition.
1973 Amendment of the 1964 Act.

Norway:
1926 Trust Law.
1953 The Act on Control of Prices, Dividends and Restrictive Business Arrangements (The Price Act).
1957 Prohibition of vertical fixing of minimum prices.
1960 Prohibition of horizontal price-fixing.

Sweden:
1946 Cartel Register Act.
1953 Restrictive Business Act.
1956 Amendment of the 1953 Act.

In the Nordic countries, unlike the United States and the European Communities, competition is not a goal in itself, but merely one among several other means of achieving a mixed and balanced economy. This has meant that free competition has never been emphasized in the same way in the Nordic countries as it so often is in others.

Another common feature is that Denmark, Finland, Norway and Sweden regarded separately are each relatively small markets, which as a matter of principle have been open to free and unrestricted world trade. The main result of all this has been, that, even if the legislator and the authorities did not always approve of the measures undertaken by the enterprises operating in the national market, the most efficient counterweight was not intervention from the authorities, but competition from outside markets. Together these facts can partly account for the lower priority given to a smooth and well-working system for regulation by law in comparison with, for example, the situation in the USA, the EEC and Germany.

Through the years the legislators and the authorities in the Nordic countries have co-operated closely. In contrast to the position in several other fields, there has been no actual harmonization of the laws on competition, but yet there are to a large extent common features in how the systems have been built up. In Sweden and Finland the laws are harmonized to a very large extent. Denmark and Norway have each followed their own line of development, but in all countries there are great similarities in the conception of the aim of the market laws.

Europe is today paying more attention to restrictive business practices and how they should be dealt with. The same tendency is noted in the Nordic countries, but only to a certain extent. The close links which exist between the different national systems and the rules of competition in the Rome Treaty—directly applicable in Denmark, a new member of the EEC—have added to the interest and underlined the need for a debate about these questions. In Sweden there has been an investigation in progress since 1973 as to whether to change the present legal system or not. It is generally believed, that a change may lead to a stricter and more severe law-system, which will primarily be directed towards large and dominating enterprises.

The fact that Sweden has recently changed government after forty-four years of social-democratic rule could—contrary to what is generally supposed—lead to a much more active policy of com-

petition which will be in the favour of small and medium-sized enterprises. This new development is not subject to Nordic operation and it might lead to less united systems in the Scandinavian countries and Finland in the future.

This exposé of the situation in the Nordic countries will concern enterprises with a dominant position and how they are dealt with. After a short introduction to each law-system the notion « dominant position » and the question of how this position can be « abused » will be analysed. This abuse is firstly considered from the normal standpoint and thereafter interest will be focussed on mergers and the control of mergers.

2. THE LEGAL SYSTEMS

Control of abuses. Common to the laws on competition in the Nordic countries is the fact that they all rely on a system based on the control of abuses and not "per se"—prohibitions. In general, arrangements by individual enterprises are not hit by prohibitions and not ab initio declared null and void. On the contrary, business practices are accepted up to the point where they are declared to be in abuse of the law.

"Per se"—prohibitions. The abuse-system in the Nordic countries can be regarded as being basically different from the American antitrust system or the Common Market Law. It might, however, be added, that certain specified practices are prohibited "per se"—vertical fixing of minimum prices, tender cartels and in Norway horizontal price-fixing. These prohibitions are complements to the general abuse system.

Compared with for example the EEC competition rules and the possibilities of exemption from prohibition given in article 85 : 3, it could be argued that the differences between the system of prohibition and the abuse system are fairly limited. Undoubtedly there is a practical difference for enterprises involved: under the abuse system, industry seldom runs any great risk of being penalized by fines or by other types of intervention from the authorities. The result is that less attention is paid to the Nordic Competition Laws in day work compared with the amount of notice paid to the Common Market rules.

Price-control. In accordance with a long tradition there have

been close links in all the Nordic countries between the control of restrictive business practices and the control of prices and dividends. This combination is quite clear in Denmark and Norway, but it is also present in the Swedish and Finnish systems.

Principle of Negotiation. A point of similarity between most laws is that it is stressed in the law, that harmful restrictive practices should first of all be eliminated through negotiation.

Principle of Publicity. Finally it could be argued that an open procedure with as much information as possible to the public is a common feature. Both the procedure and the registers are open to public inspection. This method is in itself said effectively to prevent abuses and to eliminate dangerous practices.

The different national laws

One effect of the described uniform concepts is that the laws are fairly vaguely formulated. One or two "general clauses" cover most types of abuse.

Denmark

The aim of the Monopolies and Restrictive Practices Act (1955) is to counteract unfair competition and unacceptable pricing.

To achieve this goal the Act claims, that agreements between enterprises and decisions made by organisations shall be notified in cases where they exert an effective influence on price, production, distribution or transport conditions throughout the country or in local market areas. They are, however, subject to notification only on the order of the Monopolies Control Authority (art. 6).

Formerly it was stated that any increase in prices subject to notification could not be put into effect without approval. This clause was, however, dropped with the introduction of law n° 115 (Lov om priser og avancer 1971.04.02 amended by law n° 59, 1974.02.15) article 15 : 3.

Any practice fixing minimum prices or margins to be observed by subsequent resellers must not be enforced until approval has been granted (art. 10). In a parallel law—Licitationsloven—the tender cartel has been prohibited "per se".

The main clause in the Danish antitrust legislation is article 11 in the Monopolies and Restrictive Practices Act:

"1) If upon investigation the Monopolies Control Authority finds that restriction of competition within the meaning of the first subsection of Section 2 results in, or must be deemed to result in unreasonable prices or business conditions, unreasonable restraint of the freedom of trade or unreasonable discrimination in respect of the conditions of trading, the Monopolies Control Authority shall attempt to terminate the said unreasonable restrictions through negotiations with the individual enterprises or combinations concerned.
2) In judging whether prices are unreasonable, regard shall be had to conditions in enterprises which are operated with comparable technical and commercial efficiency."

The laws shall primarily be enforced through *negotiations* with the concerned enterprises. If an acceptable solution cannot be reached the authority may issue an *order* to that effect. Such an order may cancel, wholly or in part, the agreements, decisions or practices concerned and/or prescribe alterations in prices, margins and terms of business. The authority may also order an enterprise to supply goods to a specified buyer (art. 12). Failure to notify or non-compliance with an order is punishable by fines or, under aggravating circumstances, by imprisonment.

If the harmful effects cannot be eliminated through negotiations or orders the matter shall be referred to the Minister of Commerce.

Finland

There is no expressly defined scope of the Act on the Promotion of Economic Competition (1973). It is, however, clear from the law, that it is applicable to every kind of restrictive business practice.

The Act prohibits resale price maintenance (art. 23), but, as in the other countries, it allows recommended prices. Collusive tendering is also prohibited (art. 24). The scope of the prohibition on collusive tendering induces, as is the case in Sweden, in addition to explicit agreements, also other corresponding actual arrangements.

As from the enactment of the changed law in 1973 an entrepreneur shall notify on his own initiative to the national Board of Trade and Commerce agreements, decisions or other arrangements, which he is a party to and which oblige him or another enterprise to apply fixed prices. The obligation to notify applies only to cases enacted in detail in a statutory order and which may be of wider significance for the purchasers. Other practices shall be notified upon request (art. 8, 9, 10, 11, 12, 13 and 14).

The "general clause" of the Act (art. 15) states that a restraint of competition shall be deemed to have harmful effects when it, contrary to public interest, unduly affects the formation of prices or conditions of sale or restrains productivity in business or prevents the trade of others. This formulation has been interpreted to cover all kinds of restrictive business practices. Thus harmful horizontal agreements, information agreements, specialisation and rationalisation agreements, co-operation between small and mediumsized enterprises etc. come within the scope of the "general clause" in article 15.

When after legal procedure a restriction is found to have harmful effects by the Competition Council, legal negotiation proceedings may take place to eliminate the harmful effects. If the negotiations fail the Council shall notify the Government thereof. The Government in its turn may forbid the enforcement of a restriction. To enforce observance of the prohibition the State Council may impose a fine in cases where the orders have been disobeyed.

Norway

In Norway the links between price control and the control of restrictive business practice are more obvious than elsewhere.

The purpose of the Act on Control of Prices, Dividends and Restrictive Business Arrangements is to serve as a means "in the endeavour to attain full employment and the effective utilisation of production potentialities.". The law shall also assist in counteracting marketing crises and in promoting an equitable distribution of the national income. These goals, which in many respects are similar to those of the Rome Treaty, are to be achieved by:

1. *Promoting a development of prices as is desirable from the point of view of the public.*

According to article 24 the King may in furtherance of these purposes issue regulations concerning maximum prices, minimum prices, price freezing, price calculations, discounts, additions, maximum profit margins, terms of delivery and payment and other provisions with regard to prices, profits and terms of business.

2. *Safeguarding against improper marketing or competitive conditions and against restrictive business arrangements which are unreasonable or detrimental to the public interest.*

In this part the Act is fairly similar to the laws in the other Nordic countries. Through amendments in 1957 and 1960 Norwegian legislation contains strict prohibitions on the vertical fixing of minimum-prices and horizontal price-fixing. Tenders are not prohibited by law, but enterprises shall, when submitting a tender, inform the prospective purchaser of the implications of the tender (art. 39).

The main clause—article 42—rules on the possibilities of counteracting restrictive practices:

> "The King may amend or abolish any provision which has been made by a restrictive association if it is deemed likely to have a harmful effect on production, distribution or other business activities within the realm, or if the provisions must otherwise be considered unreasonable or detrimental to the public interest. Such prohibitions or requirements as are deemed necessary to ensure that the purpose of the abolition or amendment is achieved may be issued in connection with the decision. . . ."

Any person, who violates provisions in the Act, shall be liable to a fine or imprisonment of up to one year or both. In particularly serious circumstances the offender may be sentenced to imprisonment for up to three years. The offence has been committed by someone acting on behalf of a corporate body, this enterprise may be sentenced to a fine and deprivation of the right to carry on business. If anyone has charged a higher price than is lawful, an amount, which the court considers to be equivalent to the excess price, shall be forfeited.

As can be seen the Norwegian sanctions are more severe than those in the other Nordic countries. Apart from the risk of heavy sanctions the offender may have to go through a civil procedure, where he may have to face claims of damages for excessive prices or refusals to deal.

Sweden

The purpose of the Swedish Act to Counteract Restraint of Competition in Business in Certain Instances (1956) is to promote competition to such an extent as is desirable in the public interest.

For this purpose the law prohibits vertical fixing of minimum

prices (art. 2) and tender cartels (art. 3). Apart from these prohibitions the law is limited to the elimination through negotiations of the harmful effects of restraints of competition. Negotiations take place—according to article 5—when restraints of competition have harmful effects. This notion has been specified in the following paragraph of the article:

> "Restraint of competition shall be deemed to have a harmful effect if, contrary to the public interest, it unduly affects the formation of prices, restraints productivity in business, or impedes, or prevents the trade of others."

Notification of restrictive agreements and other practices should on request be made to the State Price and Cartel Office, which keep the Cartel register, a register open for public inspection. Agreements are registered regardless of whether they have detrimental effects or not.

When detrimental effects are suspected, negotiations are opened between the Ombudsman for the Freedom of Commerce and the enterprises concerned. It might be wise briefly to summarize the negotiation procedure in Sweden, as an example of how negotiations in the Nordic countries are carried out:

1. The abuse is either presented by an individual or a competitor or found out by the Ombudsman "ex officio".

2. Firstly negotiations are undertaken between the Ombudsman and concerned enterprises. Normally these negotiations will lead to an arrangement where the enterprise refrains from the alleged violation in order to avoid too much public scrutiny.

3. If it is a matter of principle or if the concerned enterprise is not willing to withdraw from its arrangements on its own initiative, the Ombudsman will as a prosecutor present the matter to the Market Court. This court is the first and final instance in questions concerning competition and consumer protection. It consists of three judges and representatives from the trade unions, consumer organisations and industry.

4. The Market Court will in the first part of the proceedings establish whether the alleged behaviour is contrary to the law. If the answer to this question is yes, the next step is to start negotiations with the enterprise in order to make the defendant refrain from the violation.

The Court is entitled to impose fines to avoid harmful prices, refusal to supply and price discrimination. Other infringements cannot be punished. The ultimate action that can be taken is to an-

nounce to the government the failure to reach an acceptable solution. In this notification lies the implicit threat for industry of changes in law—which so far has proved to be a sufficiently efficient pressure on industry as a collective to obey the Court.

Institutions

All countries have special institutions outside the ordinary administrative system to deal with questions concerning competition. The institution-system is summarized in the following schedule:

	Denmark	Finland	Sweden	Norway
Investigating authorities.		National Board of Trade and Consumers' Interests	State Price and Cartel Office	
	The Monopoly Control Authority (Monopol-tilsynet)			Price Directorate
Special prosecutor.		Competition Ombudsman.	Ombudsman for Freedom of Commerce	
Court.	Appeal Tribunal (Monopol-ankenœvnet)	Competition Council	Market Court	Price Council
	Ordinary Court			Ordinary Court

3. Dominant position

The rest of this article will be devoted to how the different legal systems in the Nordic countries deal with an enterprise having a dominant position on the national market.

Firstly, the question can be posed as to whether the notion of a "dominant position" is mentioned in the laws at all and, if the answer is in the affirmative, one may ask how this notion has been defined. Secondly the question of how this position can be "abused" will be scrutinized.

Denmark

The Purpose of the Danish Monopolies and Restrictive Practices Control Act is to prevent unreasonable business conditions by means of public control of monopolies and restrictive business practice (art. 1).

It is already apparent from this statement of the purpose of the Act that a single firm with a strong position—a position of monopoly—comes within the scope of the legislation. This fact is confirmed by several subsequent provisions. The reference to a position of monopoly is, however, not completely relevant, as the law also applies when a less dominant position is a fact.

According to the second paragraph of the Act the law can be used not only to prevent restrictions from a firm which totally controls the relevant market. The law can also be applied whenever competition, throughout the country or in local market areas, is restricted in such a manner that the enterprise exerts or may exert *a considerable influence* on prices, production, distribution or transport conditions.

The same definition is used when stating the enterprises which are obliged to notify on request. It is only when the enterprise exerts a considerable influence on prices etc. that it should be subject to notification (art. 6).

A *considerable influence* is not defined in law or in preparatory work, but is left to the discretion of the authorities. The Monopolies Control Authority has considered a wide range of circumstances when clarifying this notion:

1. The art and the importance of the commodity in question. It must be a commodity of considerable interest to trade.
2. The market structure for the product, including an evaluation of the number of competing enterprises and their respective influence on the market. When making a decision on this point substitutes and competition from foreign markets should be taken into consideration.

In a case concerning the dominance of the Scandinavian Airlines System Corporation, the dominant position of the enterprise, which had about 90 per cent of the relevant market, was clearly established. Indications of a lower percentage were given in a case concerning opticians (Monopolitilsynets meddelelser 1975 : 6 p. 231). Fourteen retailers controlled 40 % of the market and together abused their strong position. As the strongest enterprise in

the relevant market did not participate in the restrictions, no dominant market position was found to exist.

It can be concluded, that in Denmark a dominant market position is not the same as an absolute monopoly in the normal meaning of the word. The criteria cannot be defined in exact figures, but only in fairly general terms: when the corporation has a *considerable influence* on market conditions it has a dominant position. One must take into consideration not only its share of the market expressed in a percentage but also the entire range of circumstances which affect the behaviour of the enterprise in the market.

Finland

The Finnish Act on the Promotion of Economic Competition is less clear than the corresponding Danish law on the point of whether the law applies to single firms or not. The "general clause" in article 15 is, however, meant to cover all kinds of abuses irrespective of the form these abuses take. Accordingly the harmful effects of a single firm's arrangements come within the scope of the Act. This interpretation is confirmed as far as dominant enterprises are concerned by the rules on notification (art. 9 and 10). Here the law states, that any entrepreneur having a dominant position must on request inform the authorities as to whether he has a monopolistic position or in practice dominates a branch to such an extent that there is *no competition* or competition is *considerably distorted* (art. 9).

When estimating the dominancy of their position not only legal rights like patents and trademarks, but also the total turnover in production or sales in the relevant branch must be taken into consideration.

The Finnish law was promulgated in 1973 and so far there have been no cases dealing with the notion of a dominant position. In theory and according to the Finnish Ombudsman the law is applicable when an enterprise controls 50 per cent of the market or more.

Norway

In Norway there is no doubt that the law applies when a single enterprise abuses its strong position in the market. According to article 2 of the Act on the Control of Prices, Dividends and Restrictive Business Arrangements, the Act shall apply to business

acitivities of every kind, as defined in Section 60, point 4, where it is stated, that "business activities" means "any party—whether an individual, a corporate body, a foundation or an association which carries on business activities."

From this extract it is thus clear that the law applies to single enterprises. The law, however, in contrast to the other laws, gives an indication of what is meant by the notion examined here. Under the regulations issued by the King, the dominating enterprises shall according to article 34 submit a report on restrictive provisions, the purpose of which is to regulate prices, profits, calculation of costs, terms of business, production or distribution. Dominance is defined in the following manner:

> "Enterprises which must be assumed to produce or distribute *at least one quarter of the total production* or distribution in the realm of one or more commodities produced or distributed by the enterprise, or of services provided by it."

In judging the market-position of a single enterprise the economic unit should be taken into consideration. If an enterprise has a controlling influence over enterprises other than those which are operated in its own name, all the enterprises concerned shall be considered as a unit in determining the question of their obligation to submit a report.

It is further interesting to note, that foreign or foreign-owned enterprises, regardless of their share of the market, have the same obligation to give a notification as is the case for a dominant enterprise. This follows from the subsequent paragraph of article 34:

> "Persons who own or are responsible for the running of enterprises which are subsidiaries or subject to the controlling influence of:
> *a*) A foreign firm which may be assumed to have a substantial influence on the prices in one or more countries of one or more commodities or services, or which is associated with an association of firms which, together, may be assumed to have such an influence. Association of foreign firms or Norwegian and foreign firms which may be assumed to have such an influence as mentioned under *a*)."

In practice the Norwegian authorities, however, seem, like the authorities in the other Nordic countries, to pay a minor interest to the question of whether a dominant position is at stake or not. The determining factor is solely *the effects* of restrictive business practices.

Sweden

In the Swedish legislation there is no express provision concerning dominant position and no indication as to whether the law applies at all to this type of restriction. There has, however, not always been a lack of provisions for this. In the old 1953 Act the way was open for counteraction in two types of situation:

a) When agreements between two or more enterprises had harmful effects (The s.c. *"Trust situation"*)

b) When an enterprise, or a group of enterprises gathered in an economic unit, controlled a considerable part of the relevant market in the country or in a local area (The s.c. *"Monopoly situation"*).

At this time there were strong similarities between the Swedish and the Danish legislations and it could also be argued, that the law was similar to the Common Market system in articles 85 and 86 of the Rome Treaty. The rules were, however, criticized on the assumption that they did not cover every situation where negative consequences of restrictive business practices could appear. The legislation was thus amended to its present version which is more vague. This was done with the express understanding, that the change did not mean a *more restricted* legislation, but, on the contrary, wider possibilities for the authorities to act.

From this historical point of view it is clear that article 5 of the Act to Counteract Restraints of Competition was meant to be an instrument against not only restrictive agreements, but also against the abuse of the law by a single enterprise.

Indications as to what is meant by the notion "dominant enterprise" are found in the preparatory work of the 1953 Act, which is still partly valid. The government here stated, that the law is not only applicable to monopolies, but that there might be cases when a company which does not control more than 40 % of the market, but which still has a dominant position that necessitates negotiations as a result of the market structure, technical and commercial advantages or other circumstances. All that was said about the share of the market was, that it had to be a *substantial* part of the relevant market.

This definition has also been followed in practice. There have so far been no doubts, that a company having 80-90 per cent of the relevant market is in a dominant position. In a case concerning a merger in the food industry the Ombudsman concluded (Margarinbolaget-Fabriks AB Viktoria, Pris och kartellfrågor (PKF) 1975: 4-5 p. 80), that the acquiring enterprise had 45 per

cent of the market and the acquired 5,5 per cent. The Ombudsman was of the opinion that in a branch which is gradually becoming concentrated there is always a risk of harmful disturbance of competition. The acquiring enterprise is enforcing its dominant position through the merger. In this special case, however, the Ombudsman did not take action for reasons of potential competition.

There is no enlightenment on the question as to whether two or more enterprises can have a dominant position together. Firms in the same economic unit will probably be regarded as one enterprise—in other cases, where there are no economic links, the enterprises should consequently not be seen as a dominant couple if there are no agreed or special links between them.

Dominant position—a summing up

From what has been said it is evident that, even if there are differences between the Nordic laws, their approach to the concept of a "dominant position" has great similarities. No law requires a dominant position as a pre-condition for the applicability of the law. In fact, all legal systems stress the need to counteract harmful effects of *any* restrictive business practices regardless of the fact that the cause of the restriction is an agreement or a single enterprise in a dominant position. It is thus clear, that all the laws can be used to counteract abuse by any single enterprise. It is not necessary to establish an agreement or the like between two or more enterprises.

The notion "dominant enterprise" is, however, not totally irrelevant. As will be seen in subsequent parts, the harmful effects should be evaluated from the point of view of public interest. This requires, that the restriction is of a certain magnitude—otherwise public interest is not affected. Consequently, some indications on the position in the market that must be held by a single enterprise are found in the laws. In Finland an enterprise is said to hold a dominant position when controlling 50 per cent of the relevant market—while Norway only requires 25 per cent. Sweden and Denmark are probably somewhere in between these two extremes, but on the other hand this is a simplification which does not give a true picture of the situation. One must take into account not only a narrow interpretation of the relevant market and what percentage of that market a corporation holds. Substitutes, competition from foreign markets and the importance of the goods must be examined

as well as the structure of the relevant market. In practice there is no reason to believe that differences in principle exist between one country and the other.

Where the single enterprise does not hold a dominant position according to the above mentioned vague standards one would normally be prepared to conclude, that there could be no harmful effects from the arrangements of that enterprise and that the laws should not be applied. In this indirect way, it might be argued that a dominant position is a criteria, which must be proved by the authorities. In practice, however, this matter is only occasionally given due regard. On the contrary, the authorities in all countries seem to overlook this condition when for example intervening in the numerous cases of refusal to deal. This lack of consistency is to some extent balanced by the principle of negotiation and the less dramatic system of sanctions, which can be used when single enterprises act against the purpose of the law.

4. THE "TRADITIONAL" ABUSE OF A DOMINANT POSITION

Although the dominant position as such is of limited interest in all Nordic countries attention has to be paid to abuse. The laws apply to all enterprises, which can create a disturbance of free competition on the market. From this point of view one may summarize in a circular definition the fore-going definition of the notion "dominant position": Those enterprises, which are in a position to disturb normal market conditions have a dominant position. The proof of dominance receives a subordinated legal meaning. The main point is whether the arrangements give rise to harmful effects or not. Emphasis has accordingly to be put on the notion of "harmful effects":

Denmark

The Danish law is applicable to *unreasonable* prices and business conditions and is supposed to secure the best possible conditions for the freedom of trade. The law can, however, not be used against all restrictions, but only against restrictions that have *a considerable influence* on market conditions. The Danish preparatory works to the anti-trust legislation indicate where the use of the law is foreseen and the authorities can issue orders to

achieve the effect designed by the law. The following arrangements especially can be counteracted:

1. Exclusive dealing arrangements.
2. Boycotts.
3. Refusals to sell—especially refusals from a monopoly or a dominant firm.

Finland

The Finnish Act on promotion of competition applies to any restriction, which is found to have *harmful effects* (art 15). These harmful effects are considered to exist when the restriction induces *unreasonable* prices, conditions of sale or without any acceptable ground hinders the work of others. The effect must be related to the total economic context and the harmful effects should *to a noticeable extent affect society* and not only the competitor.

Norway

The scope of the Norwegian price act is to counteract *unreasonable* prices and conditions of business clearly *contrary to public interest* (art. 18).

Sweden

Article 5 of the Swedish Act provides, that the law is applicable when a restraint of competition has *"harmful effects"*. This notion is specified in the subsequent paragraph: "A restraint of competition shall be deemed to have harmful effects if, *contrary to public interest,* it unduly affects the formation of prices, restrains productivity in business, or impedes, or prevents the trade of others."

As may be noticed, the main passages concerning abuse in the Nordic laws have all in common that they are general and vague and thus leave it largely to the discretion of the authorities to define what is acceptable and what is not. This obviously leads to uncertainty for involved parties—which, as stated above, is balanced in a way by the mild system of sanctions. The enterprise—if it has not committed a breach of the absolute prohibitions which are clear and defined—seldom runs a risk of being fined.

During the years rather similar practices have been established in the Nordic countries as to what should be deemed unacceptable behaviour on the market. The following points apply to all restrictive business practices and among them, dominant enterprises:

1. *Vertical price-fixing*

Regardless of whether a dominant enterprise is involved or not vertical price-fixing has been absolutely forbidden in all the countries. The laws prohibiting re-sale price maintenance are designed to cover all forms of price-regulation by suppliers. This includes indirect or devious means of trying to fix prices vertically (Denmark: Law nr. 115/1971 art. 10 and law nr. 59/1974 art. 10, Finland: art. 23, Norway: Royal decree of 18 October 1957, Sweden: art. 2).

Suggested or advisory prices are permitted as long as the supplier makes it clear that the dealer is free to price as he pleases.

Breach of these provisions is severely sanctioned. The proceedings are handled by an ordinary court outside the general scheme of the market-law system.

There are possibilities of exemption from prohibition, but they have only occasionally been used. For several years exemption was granted to the book market in the Scandinavian countries. In 1973 Denmark still granted exemptions for tobacco, books, daily and weekly papers and steel products. Sweden abolished all existing exemptions, but was forced to reintroduce exemption for the steel-market due to the free-trade treaty with the Coal and Steel Community.

2. *Bans on tender-cartels*

This ban concerns the entering into or the carrying out of an agreement requiring consultation or other forms of co-operation among entrepreneurs before any of them bid on a contract to supply a commodity or a service. Both the Swedish (art. 3) and the Finnish (art. 24) Acts prohibit, with possibilities for exemptions, the bidding or tender cartel. In Norway there was no prohibition until 1960, but enterprises which were members of an association which regulated or controlled prices or terms of tenders, did when submitting a tender, have to inform the prospective purchaser of the implications of the regulation or control. This was also the case when restrictive business agreements had otherwise been made regarding the regulation or control of tendered prices or terms.

3. *Prohibition of horizontal price-fixing*

In Norway—but not in the other countries—a Royal Decree of

1 July 1960 prohibiting the horizontal fixing of prices and profits was enacted. This is a general prohibition covering the sale of commodities or the rendering of services. It actually also embraces regulations in respect of tenders, so that it could be stated that the Norwegian law also contains a definite prohibition on tender-cartels.

4. *Refusals to deal*

The principal restriction that has caused the intervention of the authorities in the Nordic countries is the refusal to sell or deal. There is no direct prohibition against these restrictive business practices, but it might be asked whether the rigidity with which the authorities intervene does not make this type of restriction close to a "per se"-prohibition.

This practice invokes the question as to whether a dominant position is at stake or not. In ordinary cases the refusal must be looked at in its economic context. If the buyer has other potential sources from which he can get equivalent goods and can carry on trade with these substitutes, the complaint should normally be rejected. This is the position in principle in Denmark, Finland and Sweden. In practice, however, there is a tendency to disregard the economic context and not to treat the question of a dominant position seriously. In those countries mentioned there are good grounds for asking if the practice is in accordance with the law. If there are other potential sources of equivalent goods it may well be argued that there are no harmful effects for the buyer from a wider point of view.

In Norway refusal to sell is expressly dealt with in the law (art. 23) and put on a special level in comparison with other types of restrictions. The Price Council may forbid enterprises to refuse to have business connections with another enterprise if the refusal is detrimental to public interest or if it has an unreasonable effect on the other party. In order to secure that the prohibition is carried out the Price Council may issue supplementary regulations.

The limited consideration which is paid to the dominant position in Norway is shown by a case from 1960 concerning a refusal to deal with a men's clothing store in Stavanger. The store complained that the manufacturer refused to supply an expensive brand of hats. The hats in question represented only a very limited part of the total turnover of the person lodging the complaint. Furthermore he had access to cheap imported hats and other expensive hats

made in Norway. Yet the Price Council found the refusal unacceptable because the supplier had no systematic scheme for selecting his customers. Thus, when a supplier arbitrarily refuses to sell, even if the supplier is not in a dominant position, he must normally calculate with being in abuse of article 23.

The same factual situation in Sweden, but in regard to shoes instead of hats, led to the opposite decision. In this case (Masterskor PKF 1963 : 9-10 p. 48) the supplier was able to prove that he was not in a dominant position as other exclusive shoes existed on the market. This was, however, not the reason which made the court reject the complaint. Consideration was first of all given to the fact that the manufacturer was able to prove an acceptable selective distribution system. In practice it is difficult to see any difference between how the laws are applied in Norway and Sweden. Another circumstance in the Norwegian case, which would have been relevant also in Sweden, is that a refusal to deal is normally not allowed when it is a breach of a former supply-policy. A sudden cut-off in supply is treated more severely than other refusals.

It can be of some interest to relate briefly a Danish case concerning refusal to deal. It is the "Omega-case", a parallel case to the selective distribution Decision of the EEC-Commission. Omega refused to supply a retailer, invoking the selective distribution system of the company comprising of a high standard, trained staff and equipped stock and sale service. Omega also claimed the right to concentrate their sales. The authorities did not order Omega to supply. The underlying reason for this decision was not expressly that the selective distribution form was accepted, but, as Omega did not hold a dominant position, the person lodging the complaint would have had to show his interest in being supplied in a more obvious way. The way the matter was presented there was no unreasonable obstacle to this trade. (The case is from 1973.)

The conclusion to be drawn from the shoe case in Sweden and the Omega decision in Denmark is not that an enterprise in a non-dominant position may refuse to supply and one in a dominant position must not. This distinction is of fairly limited interest. The main conclusion is that a refusal is accepted when it can be proved, that it is based on considerations of efficiency and rationalization. Consideration is also taken of refusals based on the buyer's poor financial or credit status or his unfair methods of competition. The reasons should be objective and based on fact.

A refusal will normally not be accepted when it is based on the fact that the buyer will re-sell the product below suggested prices.

Thus generally the refusal to supply supermarkets, new types of distribution channels or low-price channels will be defeated.

The above mentioned circumstances apply in the Nordic countries regardless of the fact that the supplier holds a dominant position. The only difference is that control becomes more severe if he holds a dominant position. If substitutes cannot be found in the market the authorities will normally not accept a refusal, as this will or may harm public interest. The dominant enterprise has for example fewer possibilities of invoking a selective distribution system.

5. *Discrimination*

Discrimination concerning the conditions of supply, prices, etc. is often very close to the complete refusal to supply and such restrictions are consequently treated in almost the same way as refusals. In the Norwegian Act (art. 23) it is even clear that discrimination where a party is willing to have business connections only on terms which are unreasonable or unusual is deemed to constitute a refusal.

Normally the authorities will intervene when suppliers discriminate with prices, terms of delivery, use aggregated rebate systems, quantity-discount arrangements and rebates based on dealer classification.

Different treatment must be based on a provable fact such as actual cost savings or other gains for the supplier. The authorities have intervened with negotiations where there is evidence that the discrimination is in fact unreasonable and the buyer is prevented from finding solutions.

> In a recent Swedish case complaints were made on discrimination from a computer-service corporation alleged to discriminate on prices. Investigations disproved that the company was in a dominant position and objectively based price differentiation from a non-dominant enterprise was accepted (IDATA-decision presented 1976.09.28).
>
> In Denmark and Sweden there have been parallel proceedings against the dominant Scandinavian aviation company (SAS). The company had a subsidiary dealing with charter-flights (Sterling). Like the other charter-companies Sterling to a large extent used Copenhagen as a starting point. On the connecting trips between Copenhagen and other Scandinavian towns SAS has a legal monopoly. The company abused this dominant position by granting

passengers of their own charter-company cheaper connection-fees. The system was challenged in both Denmark and Sweden and SAS was by means of negotiations forced to abandon its discriminatory policy.

6. *Unreasonable prices*

One of the main problems with dominant enterprises and monopolies is the risk that they, having no competition to face, charge unreasonably high prices. The only remedy which has been used to counteract this risk is price-control with the possibility of forcing the supplier to lower his prices.

The authorities in both Denmark and Norway have concentrated their activities to quite a large extent on price-control. According to the Danish Price Supervision Act (Act nr. 59, 1974.02.15) the Monopolies Control Authority may require that an enterprise shall notify a rise in price and the authority has the power to prevent such a rise. The Norwegian authorities are expressly empowered to issue regulations concerning maximum and minimum prices, price freezing, price calculation, discounts, additions, maximum profit margins, terms of delivery and payment and other provisions with regard to prices, profits and terms of business. In general, enterprises have to notify their price-system on request (art. 15), but the law is enforced by a general prohibition on unreasonable prices in article 18. Nor may terms of business be demanded, if they affect the other party unreasonably or if they are clearly contrary to public interest.

In Sweden and Finland there is a clear distinction and separation between the price-control and the antitrust legislation. This fact, however, does not mean that the Ombudsmen are prevented from acting when unreasonable pricing is the effect of an agreement or abuse of a dominant position. In Sweden the Ombudsman has on several occasions controlled the prices fixed by a dominant enterprise. In the "Mölnlycke-decision" (PKF 1975 : 1 p. 51), Mölnlycke, which had a share of 90 per cent of the market in women's tampons, had, thanks to its strong position, raised prices considerably. After negotiations with the Ombudsman prices were reduced by 10 %.

7. *Tying clauses*

In practice, tying arrangements, where a dominant firm uses its

position to oblige the buyer to accept obligations in other fields, where the dominant enterprise has not a strong position, have been counteracted. In both Denmark and Sweden the obligation to buy paper and spare-parts when buying or leasing a photo-copy machine was abandoned after negotiations.

Abuse—a summing up

The laws do not especially aim at abuse by a dominant enterprise. Any restrictive business practices can be counteracted when they disturb normal market conditions in a way which is detrimental to public interest. It is, however, clear that the harmful effects are more often obvious when a dominant enterprise is involved and evidently the authorities, by means of obligatory notifications of restrictive practices and general control, supervise the monopolies and the dominating corporations.

Firms in the Nordic countries must abstain from price-maintenance. Over and above this prohibition special regard must, in Finland, Norway and Sweden be paid to tender-cartels and in Norway to horizontal price-fixing. A dominant enterprise must be particularly careful with its pricing-policy, refusals to deal and discriminatory practices. These practices in no way exhaust the list of possible offences, but are merely examples of where possible action could be expected from the competent authority. The law is applicable whenever public interest is at stake, which gives large and vaguely specified possibilities for the authorities to act at their own discretion.

It could often be argued that the authorities disregard far too much the question of whether an alleged violation has a connection with a dominant firm. Where there is no dominance harmful effects detrimental to public interest are often doubtful. In recent Swedish case-law there is at least a tendency to give this consideration a somewhat higher priority.

5. Mergers as an abuse of a dominant position

This final part will briefly comment on the treatment of mergers in the Nordic laws. As a starting point it should be said, that none of the legislations have dealt directly with the problem and there is no judgment concerning a merger in any of the Nordic countries.

This statement does, however, not mean that there is a total lack

of interest in the matter. As in the rest of Europe it was originally assumed, that rather than a need for measures to counteract mergers between enterprises there has in the Nordic countries been a need for stronger and more competitive corporations which were more able to compete with foreign industry. Today attitudes are changing. Different branches are now characterized by only a small number of competitors and sometimes the limit where "size is no longer equivalent with superiority" has been reached. During the period 1960-1970 *2,000* mergers were carried out in Sweden. The mergers concerned 20 per cent of all Swedish workers. Concentration has steadily increased in the first years of the seventies: 1971 - 269 mergers were reported, 1972 - 396, 1973 - 497, 1974 - 730. There are good reasons to believe that this acceleration continued in 1975 but has been halted in 1976. In general the acquiring enterprise has more than 500 workers while the acquired has less than 50. These facts of course necessitate an investigation as to whether continued concentration can be accepted and if the law has to be enforced.

In Denmark—I disregard the EEC-law—and in Norway it has been said that mergers are discouraged by the fact that participating enterprises together may become dominant through the merger and as a dominant enterprise have to face the risk of being more severely scrutinized by the authorities. Here the main obstacle for intended mergers is thus the possibility the authorities have of counteracting *harmful effects* created by activities of the new dominant enterprise. This situation arose in Denmark when the Scandinavian Tobacco Company merged with a Danish subsidiary of the British-American Tobacco Company. The restrictive effects of this merger were strengthened by exclusive dealing agreements between the Danish and the foreign company. The authorities, however, did not question the merger as such although the new enterprise gained a strong position on the market, but only required a notification of the enterprise and its agreements with other firms. (Monopoltilsynets årsberetning 1973 p. 29).

The majority view has in Sweden been, that the law is not applicable to concentration and it is clearly stated in the preparatory work, that the law may not be used to dissolve an existing unit into several independent parts. Whether this statement applies to the control of mergers is disputed today. The Ombudsman has turned his attention to concentration in industry *during recent years* claiming that he has the authority and the competence to intervene when the merger as such produces harmful effects contrary to

public interest. This was claimed when the two remaining cement-producers on the Swedish market decided to merge in 1973. The Ombudsman saw in this concentration an obvious risk for excessive pricing and other effects detrimental to the interests of society. Thus in a memorandum he proposed to take action to stop the planned concentration. Meanwhile the involved enterprises notified their intentions to the government, which presented the matter to Parliament. Parliament accepted the merger. After this political treatment—wholly outside the procedures foreseen by the antitrust laws—the Ombudsman no longer saw any possibility of pursuing his action. The cement-case, even if not successfully carried out by the Ombudsman, led to a lively discussion in Sweden and several members of the different groups in Parliament proposed motions for developing the legislation.

In 1974 the Swedish Justice Department drafted a proposal for an act on merger control. According to the proposal the main interest to be protected was that of the employers and consequently not those of competition, market structure or consumer interests. The proposal, however, found very limited support because it did not consider the problems from a realistic point of view as far as trade was concerned. Furthermore it has been criticized that the controlling authority was to be the government and not the Ombudsman and the Market Court. As the Swedish Act on restrictive business practices is being revised at present the proposal will probably not be presented to Parliament. The verity of this appraisal is stressed by the recent change of government in Sweden.

Finally as far as the investigations on changing the law are concerned the experts' considerations have in no part so far been presented to the public, but it is known that a system for the control of mergers is seriously being considered. If a final proposal builds on the Swedish tradition in matters of competition and the debate that has been going on in the country during the last few years it seems likely that the following points will be given consideration:

1. Mergers will *not* be *prohibited* "per se" but counteracted when they have harmful effects.

2. *Any merger*—disregarding its form—will fall within the scope of the law. This means that it does not have to be a total take-over. Control over 10-20 per cent (10 % if the enterprise is noted on the stock-market and 20 % if not) of the shares in another company can be sufficient. The determining factor is the amount of influence held over the making of decisions in another company. If

the acquiring enterprise has 50 per cent of the acquired corporations shares it is definitely regarded as a merger. The holding of 10-50 per cent can, depending on the circumstances, be regarded as a merger.

3. *"Bagatell-mergers" exempted.* It is clear that some restrictions fall outside the scope of the law because they are too minor to have any noticeable influence on the market. To use an evaluation of the market-shares has not been accepted as an effective instrument for dealing with this matter. Somewhat arbitrarily there is a tendency to consider the importance of an enterprise in relation to the number of people working in it. When the acquiring enterprise has not more than 50 people employed and the total annual turnover is not more than 10 million SCr the law will not be applicable. When the acquiring enterprise has between 50-500 people employed and 10-100 million SCr in annual turnover the authorities can in specially defined circumstances take action, but normally the law should only be applied to an acquiring enterprise in excess of these limits.

4. *No general obligation to notify.* There will not be a general obligation to notify a merger. The Ombudsman may request notification and he can do so during a period of three years from the day the merger took place. During this fairly long period of time the possibility is open for intervention.

In general it is believed that the insecurity which enterprises may feel in doubtful cases will lead to a notification and thus an opening of the procedure.

5. *Fairly rapid procedure.* Once the procedure is opened the Ombudsman has to act rapidly. He shall within one month decide whether he is going to take action or not. If he does, the Ombudsman has to make his final decision within three months. He will not have the authority to forbid and dissolve a merger, but only to submit a case where harmful effects can be suspected to the government. The government must take their final decision within another three months.

6. *Harmful effects.* The harmful effects of a merger will be judged from four different points of view:

1. Does the merger unduly affect the formation of prices, restrain productivity in business or impede trade of others? These criteria are equivalent to those in article 5 of the Act to counteract restraints on competition. Other criteria will, however, most certainly be added to these traditional criteria.

2. Does the merger affect the concentration of control over trade in Swedish industry?
3. Are employment and the interests of the employers affected by the merger?
4. Are consumer interests affected by the merger?

With this in the background it should be decided whether a merger can be accepted or not. The question is if these criteria can be used already today when evaluating what really constitutes a dominant position which the authorities intend to counteract.

It should finally be mentioned that the new development in Sweden is not a matter of Nordic cooperation.

6. Conclusions

This seminar deals with the notion of a "dominant position" and this exposé is supposed to enlighten on how the notion is treated in the Nordic countries. From what has been said it must be concluded that the notion is of secondary interest in all the countries. All laws aim at counteracting any restrictive business practice which has harmful effects contrary to the public interest. This means that the law normally applies to single enterprises even if they are not in a dominant position. This stipulation of harmful effects is, however, of interest in this respect because it means that the restriction must be able to influence market-conditions and consequently be of some magnitude. The dominance required is judged in relation to the importance of the corporation on the relevant market. If this percentage is low a whole range of circumstances will add to the judgment of the market-shares. A precise definition on the notion can thus not be given.

Nor can an exhaustive list of abusive behaviour be presented. The law applies to all kinds of restrictions which have harmful effects. In practice there has been a tendency to concentrate on refusals to deal and discriminatory practices, but there are in principle no limits.

On one occasion all the Nordic countries were on the point of receiving common rules concerning the dominant position. This was when trying to establish a Nordic Economic Community —Nordec—in 1969. In chapter 12 of the statute restrictive business methods were treated. These rules of competition gave the participating states the responsibility of surveying restrictive business practices affecting the trade between them. One express

practice according to the Nordec-statute was the abuse of a dominant position. Nordec, however, never came into being and the notion was not defined in practice. Today the countries all have obligations in accordance with the EFTA-convention and the free-trade treaties with the Common Market. So far these obligations have not added to the interpretation of the notion of a "dominant position".