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Scandinavian Competition Policy  
Reform***

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## **Dancing to the European Tune? Scandinavian Competition Policy Reform**

When Denmark adopted the ‘prohibition’ approach to competition policy in 1998 it left the UK as the last European Union member states to retain the traditional West European ‘abuse’ system of competition law. The UK soon followed suit, and even European Economic Area (non-EU) member Norway is currently considering competition policy reform. At least in terms of substantive law, the case for harmonisation of EU member state competition policy thus appears confirmed. Denmark, Norway and Sweden all reformed their competition policy regimes substantially in the 1990s, aligning the national systems more closely with that of the EU. All three have moved away from the traditional ‘abuse’ approach to competition policy, which entails focus on the harmful effects in each specific case rather than banning specific forms of anti-competitive behaviour. Sweden adopted a ‘prohibition’ regime, which bans specific forms of anti-competitive behaviour per se, modelled on the EU regime in 1993. Building on more moderate reforms from 1990, the Danes followed suit in 1998. Norway’s 1994 reform left a mixed system in place, but a Royal Commission was appointed in November 2000 to consider further reform. The main difference between the three may therefore yet prove to be in the pace of change, rather than the degree. However, such an outcome is far from certain, and from a comparative perspective these cases differ considerably. Despite similar starting points in the early 1990s, when Denmark was an EU<sup>1</sup> member and Norway and Sweden were negotiating the EEA and applying for EU membership, Denmark initially opted for moderate reform whereas Sweden adopted a radical and Norway a mixed approach. In what follows, it is argued that this is the result of different strategies adopted by the governments that reform member state competition policy.

Although the broad economic ideas that have shaped competition policy make up a ‘European tradition’, and the mutual impact of different West European regimes is indisputable, the extent to which this has shaped each policy regime has depended on the

preferences, resources and strategies of the central actors.<sup>2</sup> The present comparative analysis of competition policy reforms in Scandinavia over the last decade is therefore largely a matter of similar cases with different outcomes, explained in terms of variations in governments' strategies. When they adopted their respective 1993 and 1994 changes, both Sweden and Norway were about to be subject to single market rules (including competition policy) under the European Economic Area agreement, but neither government could be confident of securing victory in the forthcoming referendums on EU membership. With respect to competition policy, the three states therefore faced similar influences and constraints from the EU. Moreover, their traditional approaches to competition and industrial policy had come under increasing criticism over the last decade, generating broader pressure for change. The central question is how these pressures were interpreted and channelled into reform. The present paper therefore turns to the central actors in each case and their strategic decisions to explain this variation.

Finally, the adoption of 'prohibition' approaches is far from saying that the competition policy regimes have converged on a single European model. Despite a degree of convergence, the differences in the content of the recently reformed German and British competition laws means that these can be described as 'national tunes' that differ considerably with reference to the 'European melody'.<sup>3</sup> A recent review of competition law in the EU member states concluded that "true harmonisation will only be achieved if enforcement is at an equivalent level throughout the Community, by both the Commission and national authorities."<sup>4</sup> In other words, although member state competition policies are increasingly similar in form, they retain a considerable degree of national content. While the application of competition law in Scandinavia falls beyond the scope of the present paper, the differences in the strategies adopted by parties,

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<sup>1</sup> For the sake of simplicity, the term EU is used to refer to the European Union as well as its European Community predecessor.

<sup>2</sup> D. Gerber, *Law and Competition in the Twentieth Century: Protecting Prometheus*, (Oxford, Clarendon Press, 1998).

<sup>3</sup> S. Eyre & M. Lodge, "National Tunes and a European Melody? Competition Law Reform in the UK and Germany", *Journal of European Public Policy*, 7:1 (2000), 63-79.

<sup>4</sup> L. L. Laudati, "Impact of Community Competition Law on Member State Competition Law" in S. Martin (ed.), *Competition Policies in Europe*, Amsterdam, Elsevier, 1998.

competition authorities and industry point to future obstacles to full harmonisation of competition policy.

## **1. COMPETITION POLICY REFORM: NEGOTIATED COMPROMISE**

Comparative analysis of competition policy from a public policy perspective invites analysis of at least four levels of politics. Doern distinguishes between the macro level of political parties, ideologies and the interests of business and competition authorities, the meso level that includes the competition policy institutions and decision making process, and the micro level of implementation, enforcement and compliance. He adds a broader fourth level, the internationalisation of competition policy, which goes beyond the increased trade and technological changes associated with globalisation and includes the influence of ideas and international institutions.<sup>5</sup> The last point sits well with Gerber's analysis of Twentieth Century competition law in Europe as *European*, i.e. a focus on "how experiences from diverse European systems relate to each other and how national developments relate to the process of European integration."<sup>6</sup> In line with Gerber's analysis, the current paper addresses developments in Scandinavia in the light of developments in European Competition policy and national economic policy, as mediated by the governments of the day. This entails focus on three of Doern's four levels, and includes some references to the micro-level of implementation as well. The macro and international levels represent the main independent variables, and in the Scandinavian cases the international variable does not vary significantly between the states in the 1990s. The interests of political parties, competition authorities and business therefore make up the central independent variables. The meso level provides the dependent variables – the changing competition policy institutions. These should in turn shape the micro level, but for the purpose of the current paper the main problems are identified rather than analysed in greater detail. It is suggested that problems in harmonising

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<sup>5</sup> G. B. Doern, "Comparative Competition Policy: Boundaries and Levels of Analysis" in G. B. Doern & S. Wilks (eds.), *Comparative Competition Policy: National Institutions in a Global Market*, Oxford, Clarendon Press, 1996.

<sup>6</sup> Gerber, *Law and Competition in the Twentieth Century*, p.4.

implementation reflect the broader questions of competition policy reform, and they are driven by similar dynamics.

### *Competition Policy Reform and the Scandinavian Economic Model*

In comparative analyses, the three Scandinavian states are usually grouped together in a distinct ‘social democratic’ or ‘neo-corporatist’ category as far as broader economic policy is concerned, particularly with reference to the post-war regimes.<sup>7</sup> To be sure, they feature considerable differences in economic policy and market regulation, e.g. in the form of administrative systems. The central point here is that in terms of macro-level economic politics, all three saw challenges to the classic Scandinavian welfare state-oriented public policy model during the 1980s. The broad challenges to economic policy were based on a combination of new economic ideas and reassessment of current policy, including the rising costs of the Scandinavian economic model. Politically, this was compounded by challenges to consensual public policy, and to social democratic hegemony in Sweden and Norway. All three states therefore began to reassess their competition policy regimes, starting in the 1980s. Despite differences in the inter-war era, the three states had developed comparable abuse-based regimes in the aftermath of WWII. Their broad approach to competition policy through price regulation and abuse control not only shared central features, but also faced similar challenges.

The pressure for competition policy reform in the three Scandinavian states cannot be isolated from wider developments in West European economic thought and European integration. The Norwegian Committee set up to review competition policy in 1990 was unambiguous: “The Committee’s recommendations are influenced by the contents and design of similar statutory instruments in other countries with efficient competition legislation as well as European Community law. The Committee has kept in touch with corresponding committees in Sweden and Finland [...] and the main elements of the

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<sup>7</sup> See e.g. G. Esping-Andersen, “Power and Distributional Regimes”, *Politics and Society*, 14:2 (1985), 223-256; G. K. Wilson, *Business and Politics: A Comparative Introduction*, (London, Macmillan, 1985).

proposed legislation in these three Nordic countries are the same.”<sup>8</sup> Although the initiatives and reform processes were driven by domestic politics, they took place in the context of accelerated European integration in the aftermath of the Single European Act. Hence the focus on two levels of drivers for competition policy reform, at both international and domestic level.

However, the Scandinavian economic model’s relatively strong industrial policy and large public sector introduce a potentially problematic element in the form of the relationship between competition policy and other regulated aspects of economic policy. Under the ‘abuse’ approach this need not be a significant problem inasmuch as enforcement leaves considerable room for discretion. However, the prohibition approach begs the question of how exemptions are determined in general and the extent to which the public sector is exempt from or covered by competition policy. Even if the regimes are harmonised in terms of the broad legal approaches, or even based directly on the texts of the EU Treaties, this question suggests that European competition policy has a considerable way to go before policy convergence matches regime convergence.

### *The International Context*

Despite the differences in the three states’ paths toward European integration, the international context represents an independent variable that does not vary across the cases. To be sure, from a 1999 perspective the reforms may appear to correspond to membership inasmuch as the old EU member went through slow but comprehensive reform, the recent member reformed with the zeal of the convert and the non-member proved the reluctant reformer. However, when the Norwegian and Swedish reforms were debated in the early 1990s both were engaged in the EEA negotiations and about to submit applications for full membership (Sweden in July 1991, Norway in November 1992). The EEA deal would expose both countries to EU competition law, either as EEA or EU members. From Norwegian and Swedish, as well as Danish, perspectives there

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<sup>8</sup> Norges Offentlige Utredninger, *Konkurranse for effektiv ressursbruk*, (NOU 1991:27), includes English summary, titled “Competition for Economic Efficiency”, p.25.

were therefore considerable incentives to adopt the EU model if they were moving to a prohibition-based regime anyway. These incentives consisted largely of allowing industry to face a single set of rules at national and EU level, introducing a degree of predictability into a new regime by invoking established patterns and operational norms, and facilitating future national enforcement of EU competition policy. In short, once any alleged advantages associated with national abuse-based or mixed approaches designed to accommodate special national circumstances were given up, the costs of alignment with the EU system were likely to exceed the benefits.

Likewise, the second element of the international dimension, ideas on and experience with economic and competition policy in Western Europe, represented a more or less unified shock to the Scandinavian economic policy regimes. Although most West European competition policy regimes after WWII were based on abuse-control, developments in post-war Germany and the USA came to exert heavy influence on European thinking about competition policy in the second half of the century. Gerber ascribes much of this to the German *ordo-liberal* approach providing a ‘new intellectual framework’ for competition law, which drew on classical liberalism combined with the need to protect society from abuse of economic power.<sup>9</sup> Hence the relationship between the legal and economic system, where the free market economic order is based on the legal system and a strong state. This proved a central force behind both the German approach to European integration and, more specifically, the formulation and development of both EU and German competition law. Combined with the increased focus on free market competition inherent in the Single European Act and the single market programme, this legal approach became the focus when the post-war roles of West European governments were “increasingly called into question by economic changes, rival conceptions of competition law and the process of European integration.”<sup>10</sup> The OECD’s reviews of and debates on competition policy were particularly influential.<sup>11</sup>

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<sup>9</sup> Gerber, *Law and Competition in Twentieth Century Europe*, chapter seven.

<sup>10</sup> Gerber, *Law and Competition in Twentieth Century Europe*, p. 231.

<sup>11</sup> G. B. Doern, “The Internationalization of Competition Policy”, in G. B. Doern & S. Wilks (eds.), *Comparative Competition Policy: National Institutions in a Global Market*, (Oxford, Clarendon Press, 1996).

In other words, European integration and developments in European economic ideas reinforced each other.

### *Domestic Drivers of Competition Policy Reform*

The central variables that have shaped *variations* in competition policy reform in Scandinavia are therefore found at the domestic macro level, in the shape of political parties, interest groups and the competition authorities, rather than at the international or institutional level. Although similar shocks hit the three systems in terms of European integration, changing economic policy and problems associated with the post-war economic models, these were translated into reform by a combination of governments, industry and regulators.

First, both social democrat and conservative parties have developed ambiguous stances on competition policy as a tool for economic regulation. While social democratic parties have traditionally been keen on restraining business, which drove centre-left governments in inter-war Norway to establish one of Europe's toughest competition laws, some have proved ambivalent on the desirability of competition as such. Likewise, while the free-market wings centre-right parties generally favour strengthening competition (particularly if drawing on the *ordo-liberal* approach), traditional (and some 'new right') conservatives have proven reluctant to impose constraints on big business.<sup>12</sup> The central question regarding the parties in office is therefore not simply whether they are centre-right or centre-left, but rather, does the government favour tightening competition policy? In Scandinavia, this will as a rule entail moving away from the more politically driven post-war regimes towards a more market-oriented, legal approach influenced by *ordo-liberalism* and a more legally based prohibition model. The reverse is advocacy of more relaxed competition law, either in the form of administrative discretion or sector-specific exemptions.

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<sup>12</sup> Gerber, *Law and Competition in Twentieth Century Europe*, p. 425-426.

Second, on aggregate, industry has generally favoured relatively lax competition policy regimes, although more predictable and consistent regimes inspired by and compatible with the EU model may be desirable. In the Scandinavian cases the rule has been that industry generally opposes tightening competition policy, but favours European integration. Although its stances on competition policy reforms therefore tend to be predictable, the Swedish experience from 1993 indicates that there is room for a trade-off with the broader goal of (free-market) European integration.

Third, the competition authorities are allocated a form of ‘gatekeeper’ role inasmuch as proposals for policy reform are generated by commissions or committees on which they are represented. They should therefore be in a position to shape policy reform to a considerable extent, and to drive Europeanisation of competition policy unless facing opposition from the government. However, the competition authorities in Sweden, Norway and Denmark have tended to take on board more or less the same lessons regarding developments in competition policy. As the quote from the Norwegian report above illustrates, this is of course no coincidence. Moreover, their recommendations for mixed, gradual reform fits a broader pattern of consensual decision making on economic policy.<sup>13</sup> Therefore, despite their considerable potential role, in the Scandinavian cases consensual politics indicates that they may in fact play a secondary role to political parties in driving reform.

### *Competition Policy Reform*

In what follows the reform of Scandinavian competition policy is therefore analysed in the light of five key variables. Two of these operate more or less similarly across the three cases inasmuch as all featured challenges to their traditional regimes and this took place in the context of exposure to European Competition policy and changing West European economic policy and competition ideas. The three variables central to the differences in Scandinavian competition policy reform are therefore i) the political parties

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<sup>13</sup> On consensualism, see e.g. N. Elder, A. H. Thomas & D. Arter, *The Consensual Democracies? The Government and Politics of the Scandinavian States*, (Oxford, Basil Blackwell, 1988), chapter 5.

that make up the government (or parliamentary majority) of the day and their approach to tightening competition policy; ii) the national competition authorities' views and recommendations for reform in terms of focus on a nationally distinct system or alignment with the EU regime; and iii) whether industry prioritises European integration over resistance to tightening competition law (in turn a matter of whether a membership debate is under way or imminent or not).

## **2. SCANDINAVIAN COMPETITION POLICY REFORM**

Although the three Scandinavian states' approaches to regulating competition in the early Twentieth Century differed considerably, they converged after the WWII and have gone through broadly similar stages of reform. All started as ad hoc efforts to deal with monopolies or specific problems after WWI, building on the traditional administrative systems. After WWII price controls made up the central building bloc of the competition regimes, which were increasingly challenged over the last two decades of the century as all three states moved toward the EU model. This has involved three key changes. First, the shift from price-regulation toward regulation of competition; second, the shift from the 'abuse' approach toward the 'prohibition' approach; and third, closer alignment with the EU regime. A possible fourth step includes more explicit alignments in policy terms, i.e. at the micro level. This includes both questions as to whether EU guidelines, practices and precedence should guide national competition law and the broader question of concurrent powers of competition authorities and regulators in other sectors.

### *Step One – Beyond the Old Regimes: From Price Control to Competition Regulation*

Outside Germany, Norway features one of the oldest competition law regimes in Western Europe, featuring an initially strong regime that was diluted after WWII. An extensive debate followed the establishment of price controls during WWI, with the control authorities advocating stronger legislation, and despite strong opposition on the conservative right, a centre-left coalition was in a position to impose Europe's strongest

competition law in 1926.<sup>14</sup> The price authority was transformed into a Control Office with broader powers against anti-competitive behaviour and subject to final decision making by a Control Council, both of which were independent of government ministries. The line pursued by price director Thagaard has been described as a balance between “preventing abuses of economic power, but also defusing political pressure for more intrusive state involvement in the economy”.<sup>15</sup> It did, however, draw heavily on corporatism.<sup>16</sup> Sharing this approach, the Labour Party saw price regulation as an integral part of its economic policy. After WWII, the party drove through the 1953 price law along these lines (the ‘Lex Thagaard’ principle), shifting the focus of competition policy to price regulation.<sup>17</sup> However, the Price Directorate, which had replaced the Control Office in 1940, was placed under ministerial control, while the Price Council (which replaced the Control Council) remained an independent semi-judicial institution to which certain decisions could be appealed. The ministry constituted the final body for appeals of sorts inasmuch as it could intervene and overrule the Price Council, but only on its own initiative.<sup>18</sup> Measures prohibiting vertical and horizontal price regulation followed in 1957 and 1960. Although the result was a strong regime on paper, and one of the more prohibition-oriented of Western Europe’s mixed regimes, post-war Norway proved far less competition-oriented in practice.<sup>19</sup>

This shift from price regulation toward greater concern for competition began in the 1980s, announced by the Brundtland’s Labour government in 1981 in its programme for 1982-85, building on economic and legal new thinking on competition policy in the late 1970s and drawing on the Chicago school.<sup>20</sup> Reforms began under Willoch’s

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<sup>14</sup> Gerber, *Law and Competition in the Twentieth Century*, p.156-157; A. Haaland, “Den Norske Trustloven 1913-1939: Trustlovens historie frem til 1926”, (Bergen, SNF Arbeidsnotat 06/1992).

<sup>15</sup> Gerber, *Law and Competition in the Twentieth Century*, p.158.

<sup>16</sup> (In 1934 the Norwegian fascists even accused him of stealing their programme!) T. Kili, *Den borgerlige sosialisten: Wilhelm Thagaard 1917-1945*, (University of Oslo, TMV Report Series 15/1996).

<sup>17</sup> L. A. Bue, *Nasjonale konkurranseregimer under press: En komparativ studie av europeisering av det norske og svenske konkurranseregimet*, (Bergen, LOS Rapport R0007, 2000).

<sup>18</sup> Norges Offentlige Utredninger, *Konkurranse for effektiv ressursbruk*, (NOU 1991:27). Includes summary in English, titled “Competition for Economic Efficiency”, p.46.

<sup>19</sup> H. Espeli, *Fra Thagaard til Egil Bakke: Hovedlinjer i norsk konkurransepolitikk 1954-1990*, (Bergen, SNF Report 39/1993), p. 162-164.

<sup>20</sup> E. Bakke, “Markedsøkonomi og konkurransepolitikk”, in *P2-akademiet* (Oslo, Kulturredaksjonen NRK, 1998).

conservative and centre-right governments (1981-86), including the appointment of Bakke as Price Director in 1983, and were followed up by Brundtland's 1986-89 government. Under Bakke's leadership the Price Directorate played down its focus on price control in favour of broader competition policy geared to efficient use of resources.<sup>21</sup> Despite the Brundtland minority government's objections, the 1988 merger regulation instituted a shift away from ministerial control by making the Council the appellate body in merger cases.<sup>22</sup> Moreover, the merger debate generated wider debate on competition policy, and the parties on the right have since continued to pursue extension of this independent regime to all competition policy. Both criticism of the existing regime and questions regarding the need to adapt to the EU regime therefore lay behind the establishment of the Royal Commission when the centre-right returned to power in 1989. Its report would eventually recommend a mixed prohibition and abuse system, with an independent Competition Appeals Board.<sup>23</sup>

The Swedish regime established in 1925 was relatively weak compared to its Norwegian counterpart, and developed in the face of strong opposition from industry. Throughout the inter-war period Sweden's approach to competition policy was based on compromise and negotiation with industry, justified partly on the grounds that transparency and publicity could promote competition.<sup>24</sup> Legislation strengthening the regime came in the wake of WWII, in 1946 and 1953, based on the 'abuse' principle of intervention only in the case of proven damaging effects. This regime, amended in 1982, remained more or less intact until 1993, with gradual strengthening of the Competition Ombudsman's remit and power. It developed greater independence than the Norwegian regime inasmuch as the final court of appeal was the Market Court (before 1973 the Competition council), a specialised legal subsystem rather than a ministry. A general clause permitted intervention against anti-competitive measures that affected prices or distorted

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<sup>21</sup> Espeli, *Fra Thagaard til Egil Bakke*.

<sup>22</sup> Espeli, *Fra Thagaard til Egil Bakke*, p.140-141.

<sup>23</sup> NOU 1991:27, p.28.

<sup>24</sup> Gerber, *Law and Competition in the Twentieth Century*, p.155.

commercial activities or efficiency, but sanctions consistently took second place to publicity and negotiated settlements.<sup>25</sup>

The system came under heavy criticism in the 1980s, which centred on the problems associated with allowing anti-competitive behaviour until explicitly forbidden by the authorities. Although the system had become more juridical in operation by the late 1980s, its enforcement regime was found lacking.<sup>26</sup> The initial moves toward reviewing competition policy therefore focussed primarily on domestic concerns and the potential for a new mixed Swedish model, but the focus soon shifted to accommodation of EU rules. Concerns about the potential cost to industry of dealing with different EU and Swedish laws prompted the government to include accommodation of the EU regime in the remit for competition law review.<sup>27</sup> In the event, the commission established in 1991 to investigate competition policy recommended a prohibition-based regime, going somewhat further than its Norwegian counterpart.<sup>28</sup> Reform was therefore driven partly by acceptance of ideas behind EU regulatory change, including liberalisation.<sup>29</sup> Moreover, the conservative Bildt government (1991-94) explicitly invoked harmonisation with the EU to win support from industry, which resistance to tightening competition law was outweighed by its commitment to joining the EU.<sup>30</sup> In short, although Sweden and Norway were in comparable situations in terms of both prospects for EU membership and negotiations towards the EEA, the Swedish government and commission therefore went considerably further in invoking the EU regime as a politically and economically desirable model.

Denmark's competition policy followed somewhat later than its Scandinavian neighbours. As in the Swedish case, much was made of the desirability of negotiated settlements. Although the WWI Extraordinary Commission's call for a provisional act in 1919 was blocked in parliament, it laid the basis for an approach based primarily on

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<sup>25</sup> U. Bernitz, *Den svenska konkurrenslagen*, (Stockholm, Juristförlaget, 1996), p.19-20.

<sup>26</sup> Gerber, *Law and Competition in the Twentieth Century*, p.204-206, 410-413.

<sup>27</sup> Bue, *Nasjonale konkurranseregimer under press*, p.59.

<sup>28</sup> *Konkurrens för ökad välfärd*, (SOU 1991:59), as per Bue, *Nasjonale konkurranseergimer under press*.

<sup>29</sup> B. Jacobsson, *Europa och staten: Europeiseringens betydelse för svensk statsförvaltning*, Rapport til Förvaltningspolitiska kommissionen, Stockholm 1997 (SOU 1997:30), p.71.

supervision and which involved industry in legislating on competition.<sup>31</sup> Accordingly, a prohibition-based act as passed by a liberal government in 1929, but this was aimed primarily at organised labour, and was revoked by a labour government eight years later.<sup>32</sup> Subsequent developments drew on the work of the Interparliamentary Union conference on competition policy in 1930 and the Norwegian 1926 law.<sup>33</sup> The 1937 law focused on efforts to reach negotiated settlements, but provided for recourse to price regulation and orders to cease and desist.<sup>34</sup> The law was strengthened somewhat during the war, and in 1955 the Monopolies and Restrictive Practices Act focused on price regulation and supervision of monopolies and restraints on trade along similar lines.<sup>35</sup> However, an effort was made to shift away from price-based remedies, from regulation to market forces, by way of improved transparency and information.

The 1990 act continued this shift toward relying on the market, focussing on transparency as the main tool of competition policy. As the (government-appointed) Competition Council moved to focus on barriers to entry, the political debates developed over the effectiveness of transparency as a tool.<sup>36</sup> Severe criticism by an OECD report in 1993 prompted the establishment of a commission on competition policy.<sup>37</sup> The central problems included the limited effectiveness of self-regulation by the market, the burden of proof in abuse-based competition policy, and limited incentives for compliance due to ineffective sanctions.<sup>38</sup> These were compounded by limits in the law, which, although it applied regardless of ownership, did not apply sanctions to public undertakings or activities governed by other legislation.<sup>39</sup> This implied considerable problems of applying

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<sup>30</sup> Gerber, *Law and Competition in the Twentieth Century*, p.409-413.

<sup>31</sup> S. Albæk, P. Møllegaard & P. B. Overgaard, "The Danish Competition Act and Barriers to Entry", in S. Martin (ed.), *Competition Policies in Europe*, (Amsterdam, Elsevier, 1998), p.77.

<sup>32</sup> M. Wise, "The Role of Competition Policy in Regulatory Reform", *OECD Review of Competition Law and Policy in Denmark*, OECD 2000 (also in *Regulatory Reform in Denmark*, OECD 2000).

<sup>33</sup> Albæk, Møllegaard & Overgaard, "The Danish Competition Act and Barriers to Entry"; I. W. E. von Eyben, *Monopoler og Priser*, (Copenhagen 1980), p.7-13, cited in Gerber, *Law and Competition in the Twentieth Century*, p.163n.

<sup>34</sup> Wise, "The Role of Competition Policy in Regulatory Reform", p.12.

<sup>35</sup> Albæk, Møllegaard & Overgaard, "The Danish Competition Act and Barriers to Entry".

<sup>36</sup> Albæk, Møllegaard & Overgaard, "The Danish Competition Act and Barriers to Entry".

<sup>37</sup> *1992-93 Annual Review: Denmark*, OECD Economic Development and Review Committee, 1993; H. Stemshaug, "Ny dansk konkurranselov – prinsippskifte til inspirasjon", *Konkurransen*, 1 (1998), 33-36.

<sup>38</sup> Wise, "The Role of Competition Policy in Regulatory Reform".

<sup>39</sup> Albæk, Møllegaard & Overgaard, "The Danish Competition Act and Barriers to Entry".

competition policy to public or regulated firms in the absence of help from the European Commission. In short, the moderate extent of competition law reform in Denmark left the country subject to considerable criticism at home and abroad over ineffective regime.

*Towards Prohibition: the New Regimes of the 1990s*

All three Scandinavian states moved toward ‘prohibition’ approaches in the 1990s, albeit a very different pace. The processes of revising competition policy that grew out of the 1980s produced a ‘prohibition’ regime in Sweden that entered into force in 1993 and a mixed regime in Norway a year later. The more moderate reforms that had been adopted in Denmark three years earlier drew heavy criticism from the OECD about the same time, and would give way to a prohibition based regime only in 1998. In the Swedish and Danish cases the shift to prohibition based regimes were combined with accommodation of the EU regime, although the Swedish case went somewhat further on this score. By contrast, the Norwegian reform was less focussed on EU accommodation, partly because it centred on a mixed approach.

The Swedish competition policy regime introduced in 1993 has been described as a complete copy of the EU rules (although it permits exemptions based on the ‘Swedish market situation’, i.e. the small size of the market).<sup>40</sup> However, this was driven more by the government than the recommendations of the commission set up to report on reform. Although the commission had recommended a break with the past by way of introducing a prohibition regime, it did so as an effort to build on the previous Swedish regime and retaining some abuse-control measures.<sup>41</sup> Yet the government pressed for more extensive reform, based on both the political and economic desirability of alignment with the EU regime. In Gerber’s analysis, the conservative Bildt government overcame opposition from (pro-EU) industry by linking competition policy reform to its bid for EU membership. The old principles of negotiation and publicity were dropped together with the ‘abuse’ approach. The new regime centres on Articles 81 and 82, combining the Price

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<sup>40</sup> Jacobsson, *Europa och staten*, compares different approaches in different sectors, p.75.

<sup>41</sup> Bernitz, *Den svenska konkurrenslagen*, p.21.

and Cartel Authority and Competition Ombudsman in a Competition Office that “has virtually the same authority and operational principles as does the Competition Directorate [General of the EU]”.<sup>42</sup> The legal appeals system even permits the courts to invoke European Court of Justice interpretations. This shift therefore represented a radical break with the past, completely dumping the historical heritage in favour of not only EU-based law, but also of institutions ‘specifically tailored to that law’.<sup>43</sup>

The changes to the Norwegian competition regime followed a year after Sweden’s changes, and grew out of a very similar process. Both rejected the previous focus on price regulation, but in Norway the result was a less restrictive mixed system, which combined elements of prohibition and abuse-control.<sup>44</sup> Moreover, while the Swedish government shifted the regime further toward the EU model than its report had envisaged, a compromise between the Labour and (agrarian) Centre parties in Norway restricted reform. The role of the Ministry of Employment and Administration was expanded to include an explicitly political appeals function, partly reflecting concerns for protection of culture and agriculture.<sup>45</sup> Like its Swedish counterpart, the new Competition Authority was formed by merging price and competition authorities in the context of new legislation. However, although the Authority would adapt organisationally to the new context of the European Economic Area, its ‘Europeanisation’ was far less radical than in the Swedish case.<sup>46</sup> In this mixed regime the prohibitions cover only sale (not purchase) of goods and services, and do not prohibit abuse of dominant position. As in the review of Danish competition law a few years earlier, changes were circumscribed by continuity.<sup>47</sup> The predictable result has been continued debate over competition policy reform, centring on alignment with the EU, reform of the appeals process and moves to a full ‘prohibition’ regime. Pressure for further alignment with the EU has been compounded by developments towards decentralisation in the EU/EEA system,<sup>48</sup> as well

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<sup>42</sup> Gerber, *Law and Competition in the Twentieth Century*, p.412.

<sup>43</sup> Jacobsson, *Europa och staten*.

<sup>44</sup> Bue, *Nasjonale konkurranseregimer under press*.

<sup>45</sup> E. Solberg (Conservative MP), Norwegian Parliament Debate, 14 May 1998.

<sup>46</sup> Bue, *Nasjonale konkurranseregimer under press*, p. 65-79.

<sup>47</sup> Stemschaug, “Ny dansk konkurranselov – prinsippskifte til inspirasjon”.

<sup>48</sup> J. W. Myhre, “Konkurransetilsynets rolle i håndhevingen av EU/EØS-konkurranseregler”, *Konkurranse* No. 1, 1998.

as high profile cases such as the uncertainty over which authorities would rule on the possible Telia-Telenor merger (the Swedish and Norwegian former telecoms monopolies).<sup>49</sup> In parliament the centre and right have maintained pressure for increasing the Competition Authority's independence and removing ministerial interference by way of the appeals process.<sup>50</sup>

The Danish competition law reform of 1998 was designed to meet the twin objectives of increased efficiency and accommodation of the EU system. This was carried out with a view to facilitating Commission delegation of cases to Denmark, for which an EU compatible system was required, and it therefore adopted articles 81 and 82 of the EU Treaty on prohibitions of vertical and horizontal restraints and abuse of dominant position.<sup>51</sup> The 'one-stop-shop' principle was adopted as the law does not cover undertakings exempt under EU law, and further exemptions are based on the same conditions as article 81. Although the law is geared towards socially efficient use of resources, it is assumed that the prohibitions be interpreted in the light of the European Commission and the ECJ's practice.<sup>52</sup> Addressing the problem of public sector regulation identified by critics, it also provided for full equality of the public and private sectors.<sup>53</sup> However, the new law drew criticism in terms of institutional design, as a 'half-hearted and ineffective' effort at harmonisation with the EU regime, which maintained corporatist traditions, levelled insufficient fines and featured weak law enforcement.<sup>54</sup> Further changes would follow within two years.

These changes suggest that Europeanisation accompanied (or even followed) the shift to a prohibition approach rather than drove this shift. The Swedish reform was driven first by the pressure for reform and only adopted the EU model once reform was on the

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<sup>49</sup> P. Bjørklund, "Tilpasningen til EU: Konkurranseloven bør revideres" (interview with E. Hope, Norwegian Director General of Competition), *Stat & Styring*, 1 (1999), 28-30.

<sup>50</sup> Norwegian Parliament Debates, 14 May 1998, 2 May 2000.

<sup>51</sup> Stemshaug, "Ny dansk konkurranselov – prinsippskifte til inspirasjon".

<sup>52</sup> H. Stemshaug, "Ny dansk konkurranselov – prinsippskifte til inspirasjon", *Konkurransse*, 98(1): 33 – 36, p.34.

<sup>53</sup> *Konkurrence Nyt* No. 4, 1998.

<sup>54</sup> N. Blomgren-Hansen & H. P. Møllgaard, "The Ineffective Harmonisation of Danish Competition Law", *European Competition Law Review*, 5 (1999), 287-291, p.290.

agenda. Despite similar circumstance, the Norwegian move to a mixed model included even less reference to the EU or EEA. The similarity of the two reports (the Swedish one being somewhat more EU oriented) suggests that Sweden was more receptive to Europeanisation than Norway, largely due to the Swedish centre-right government's combined commitment to EU membership and domestic economic reform. In the Danish case, the critical 1993 OECD report played the key role of catalyst for change, and the focus on the European model came after the need for change toward a prohibition regime was on the agenda. Further accommodation of and adaptation to the EU regime has followed.

### *Towards the EU Model?*

The processes of Scandinavian competition policy reform in the 1990s indicate that Europeanisation has been a means to an end rather than an end in itself, i.e. it has followed or been attached to reforms rather than driven them. However, once the reform effort is under way, and if the envisaged reforms are inspired by the same logic as the EU regime, there are strong incentives to aligning the national regime to that of the EU. Reduction of the uncertainty and costs to industry that two systems with different rules and procedures entail has played a central role in arguments for alignment with the EU competition policy regime. Indirectly, this carries further benefits by way of making the national regimes more compatible with each other. Currently, for example, measures that are prohibited in Sweden may remain legal in Norway. Moreover, as the EU Commission moves toward decentralisation of competition policy enforcement a further prize is attached to having systems that are capable of enforcing EU policy. The main disadvantage of adopting the EU model wholesale even when the basic principles are shared lies in the desirability of protecting some domestic commerce from competition law, e.g. through the Swedish law's provisions for exemption in terms of 'competition in a small country'. This last point is taken up below.

While Europeanisation of competition law was by and large accomplished in Sweden in 1993, the Danish debate on Europeanisation continued after the 1998 reform. The debate

centred on the gaps left by this reform compared to the EU model, and produced a further round of reform in May 2000 (which entered into force in October). The key issues included the lack of fines for first-time violations of abuse of dominant position, the lack of measures against government-sponsored anti-competitive action (along the lines of the EU's article 86), and the lack of merger control.<sup>55</sup> The latter was justified explicitly in terms of EU politics, inasmuch as merger control was seen as redundant given that EU law would deal with big merges, either directly or by referral, given limited resources and the possibility of using abuse of dominant position rules to regulate mergers. Further problems included the continued corporatism in appointments to the Competition Council, the danger of agency capture and weak law enforcement.<sup>56</sup> The 2000 reforms addressed most of these criticisms by way of closer harmonisation with the EU regime. The new merger provisions built on both the Swedish experience in the 1990s and the EU regime.<sup>57</sup> Fines were included for first-time offenders, provisions made for intervention against state aid (unless mandated by legislation), and for decentralisation and Danish enforcement of EU articles 81 and 82. However, proposals to change the appointment to the Competition Council were dropped, and 10 of its 19 members remain interest-group representatives (business, local government, consumers).<sup>58</sup> The 2000 reforms thus answered the three principal criticisms of the OECD: direct application of EU law, merger control and strengthening the fines.<sup>59</sup>

The pressure for further competition policy reform in Norway has been driven by a combination of learning from the Danish example, the EU's decentralisation of competition law and desirability of harmonisation with EU law.<sup>60</sup> The 2000-2001 Labour government's reform effort has centred on adaptation to EU as part of wider review of competition policy, launched in November 2000 and currently underway with a view to new legislation within two years.<sup>61</sup> Its remit includes the possibility of full adoption of EU's prohibition approach, and the Director General has indicated that he expects "a

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<sup>55</sup> Wise, "The Role of Competition Policy in Regulatory Reform".

<sup>56</sup> Blomgren-Hansen & Møllgaard, "The Ineffective Harmonisation of Danish Competition Law".

<sup>57</sup> *Konkurrens Nytt*, No. 8, 2000

<sup>58</sup> *Kunkurrence Nytt* No. 6, 2000

<sup>59</sup> *Kunkurrence Nytt* No. 3, 2000

<sup>60</sup> Bjørklund, "Tilpasningen til EU: Konkurranseloven bør revideres" (interview with E. Hope)

harmonised [with the EU] act within a few years” but adding that “how far harmonisation will go is of course an open question.”<sup>62</sup> Finally, the current Norwegian debate includes two elements that draw on similar debates elsewhere – the independence of the competition authorities with respect to ministerial discretion, and the question of concurrent powers between competition authorities and other regulatory agencies.<sup>63</sup> The last part of this section therefore turns to the problems involved in operationalising the EU-oriented prohibition model.

### *Making the Prohibition Model Work: Current Debates*

Although the shift to a competition policy regime based on prohibition represents the single most significant step in the Europeanisation of Scandinavian competition law, several potential problems remain even if the new regimes are based explicitly on the EU regime. First, the relationship between the competition authorities and executive and judiciary institutions is linked to the national institutional set-up, and cannot be expected to mirror the somewhat special relationship between the Competition Directorate General and other EU institutions. This question is related to a wider debate about the relationship between competition authorities and other regulators – the ‘concurrent powers question’ – across Europe. Both issues are pertinent not only at the national but also at the EU level. Moreover, changes to a national competition regime towards the EU model need not entail adopting all its elements, as the Danish lack of merger control in the 1998 law illustrated. This issue is particularly relevant to the public sector and the utilities that used to be part of it. Finally, changes in the EU regime represent a further set of potential problems inasmuch as the national regimes may need to be changes to accommodate or adapt to these reforms, or in anticipation of such reforms.

The issue of political discretion versus operational autonomy of regulators is of course not specific to competition policy, but is reflected across sectors as well as states. In the

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<sup>61</sup> *Kunkurrence Nyt* No. 1, 2001

<sup>62</sup> K. Eggum Johansen (Director General of Competition), “The EEA and Norwegian Competition Law”, speech to the Confederation of Norwegian Industry, 19 January 2001.

<sup>63</sup> Press release no. 58/2000, 24 November 2000, the Ministry of Labour and Government Administration.

Scandinavian cases this has been more controversial in Denmark and Norway than in Sweden, partly due to the latter's administrative model accommodating independent agencies more easily. Its post-war regime "was conceived and operated as a separate legal subsystem", reflecting the "Swedish ombudsman tradition of establishing independent administrative bodies outside the regular bureaucracy" subject to a special Market Court.<sup>64</sup> This independence was maintained after the 1993 changes. Likewise, the Danish 1998 reforms maintained much of the traditional administrative set-up dating back to the inter-war period, including the corporatist Competition Council (frequently criticised for political interference), a strengthened Authority serving as its secretariat, and subject to the Competition Appeals Tribunal (technically an administrative body).<sup>65</sup> Although the Council is an independent body, the corporatist system limits its independence inasmuch as trade, consumer and municipal organisations are directly represented in the form of ten of its nineteen members. Moreover, the Authority is part of the ministry, and its staff may move back and forth between the two, making it "obvious that the organisational design does not constitute an inviolable shield against influence" from the ministry or minister.<sup>66</sup> This was not changed in the 2000 reform. Finally, the Norwegian regime has generated the strongest controversy over ministerial control, based on the traditional of ministry control and its constituting the body of appeal for competition decisions. The proposal for an independent Competition Appeals Board set out by the commission reviewing competition law in 1991 was not adopted, and remains controversial. In May 2000, Minister of Labour and Government Administration Kosmo (Labour) stated that he has "little appreciation of the problem, because competition policy is policy [politics] and cannot be enforced by a non-political institution alone."<sup>67</sup> This is one of three central elements in the review under Royal Commission established in November 2000, in the context of adapting to the EEA regime.<sup>68</sup>

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<sup>64</sup> Gerber, *Law and Competition in the Twentieth Century*, p.201.

<sup>65</sup> Wise, "The Role of Competition Policy in Regulatory Reform", section three.

<sup>66</sup> Blomgren-Hansen & Møllgaard, "The Ineffective Harmonisation of Danish Competition Law", p.51.

<sup>67</sup> Kosmo, Norwegian Parliament Debate, 2 May 2000, author's translation (the ambiguity that arises from lack of different words for 'politics' and 'policy' is significant here).

<sup>68</sup> Press release no. 58/2000, 24 November 2000, the Ministry of Labour and Government Administration.

On a somewhat related topic, the relationship between competition authorities and other regulatory authorities represent a potential problem for competition policy enforcement. Again, this is not unknown at the EU level, e.g. in conflicts between the Competition and Energy directorates over energy liberalisation in the mid-1990s. In all three Scandinavian states the issue of concurrent powers has been raised in the context of competition policy reform, and it remains salient. The OECD has criticised the Danish regime over this repeatedly, although it is recognised that this is a problem in several OECD states.<sup>69</sup> In the current Norwegian review, the relationship between sector regulators and competition authorities is a central question. The Swedish Competition Authority's review of competition in the 1990s emphasised lack of competition in sectors formerly characterised by monopolies. It recommended separation of infrastructure, prohibition of unreasonable deals tying consumers to a supplier, and extension of competition policy to all sectors, including e.g. the media.<sup>70</sup> Specific problems due to lack of separation of networks and services have been identified in the telecoms and energy sectors.<sup>71</sup>

A series of broader questions arise from limited or partial adoption of the EU regime. This includes a series of sensitive questions, notably regarding the scope for exemptions and coverage of the public sector or merger control. The latter was dealt with in Denmark in 2000, as, to a lesser extent, was extension of competition law to the public sector.<sup>72</sup> Amendments to Swedish competition regulations during the second half of the 1990s continued to bring the regime closer in line with the EU in the form of reflecting EU changes to bloc exemptions and harmonisation of merger control rules (e.g. adopting the EU definition of 'concentrations').<sup>73</sup> A government's proposition on competition policy in 2000 set the scene for investigation of the scope for further competition policy reform in this context, including stronger anti-cartel measures and a review of competition rules as applied to the public sector.<sup>74</sup> The Norwegian debate has seen left – right divisions

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<sup>69</sup> Wise, "The Role of Competition Policy in Regulatory Reform", section four.

<sup>70</sup> *Konkurrens Nytt* No.1, 2000.

<sup>71</sup> Swedish Competition Authority Press Releases Nos. 4 and 7, 2000.

<sup>72</sup> *Konkurrens Nytt* No.8, 2000.

<sup>73</sup> *Annual Reports on Competition Law and Policy in OECD Countries: Sweden 1999* (supplied by the Swedish Competition Authorities).

<sup>74</sup> *Konkurrens Nytt* No.5, 2000.

over exclusion of sensitive sectors (agriculture and culture, with implications for regional policy) from competition.<sup>75</sup>

Finally, Europeanisation of national competition policy regimes raises questions about how to accommodate changes in the EU regime. To be sure, this is a broader issue relevant to all policy areas that is ‘Europeanised’, and it may be somewhat less problematic in competition policy than economic sectors that undergo radical change, e.g. agriculture. Nevertheless, the Commission’s proposed amendment of the system for implementing EU Treaty articles 81 and 82 (restrictive practices and abuse of dominant position) by way of decentralisation to member state competition authorities has prompted changes in competition law in all three Scandinavian states. Sweden passed legislation to this effect in November 2000, which entered into force in 2001 and envisages that the national authority will rule on matters that principally affect Sweden.<sup>76</sup> The Danish 2000 legislation included similar provisions, but was part of a wider package of competition law reform. Likewise, this issue is part of the Norwegian review currently under way, although it has to await reforms at the EEA level (which should copy the EU reforms).<sup>77</sup> In the last two cases this reform was thus linked to a wider agenda of competition policy reform, indicating that adaptation to changes at the EU level may have wider implications than the immediate amendments required to accommodate these changes.

### **3. CONCLUSION – THE EUROPEANISATION OF SCANDINAVIAN COMPETITION POLICY REFORM**

At the close of 2000 the three Scandinavian cases still represented three different outcomes from relatively similar starting points – rapid and complete alignment with the EU model in Sweden, gradual but increasing accommodation of pressure for

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<sup>75</sup> Norwegian Parliament Debates 14 May 1998; 2 May 2000.

<sup>76</sup> *Konkurrens Nytt* Nos. 9, 2000 and 1, 2001.

<sup>77</sup> K. Eggum Johansen (Director General of Competition), “The EEA and Norwegian Competition Law”, speech to the Confederation of Norwegian Industry, 19 January 2001.

Europeanisation in the Danish case, and more partial Europeanisation in Norway where a mixed regime is retained. Although the three systems face similar pressure for a considerable degree of convergence in terms of adapting their competition policy regimes to a European model, and may be expected to accommodate this model further, the pace and scope of Europeanisation appears to be determined largely by the strategies of the governing coalitions at national level.

In terms of the direct influence from the EU and the impact of changing ideas about economic policy making and regulation in Europe, there is little or no evidence to support or reason to suspect great variation among the three cases. On the contrary, the competition authorities are in contact with each other and have all made explicit reference to both the need to accommodate the EU regime and to the EU and other West European regimes as relevant experience to be taken into account when reforming the domestic competition policy regime. The question is therefore largely how receptive the actors at the national level are to influence from the EU and developments in West European competition policy, particularly in terms of lesson-drawing.

At the national level, three potentially central actors were identified – political parties, competition authorities and industry. In the three countries industry has generally taken a sceptical view towards radical tightening of competition policy, in line with expectations, although in the 1990s Norwegian industry did not oppose or resist reforms to the extent that its Danish and Swedish counterparts did. Only in Sweden did this matter substantially, because the government embarked on a more radical reform programme than that proposed by the commission on competition policy and it therefore sought and obtained the reluctant support of industry as part of a wider move toward European integration. Likewise, the competition authorities and the commissions investigating options for reform have tended to take a moderate stance in the early stages of the moves away from the abuse-control regimes, although they have been more open to Europeanisation (accommodation of the specifics of the EU model) once the move to a prohibition approach had been determined or consolidated. All have allowed the existing institutional set-up to shape specific features of the new regime, notable the make-up and

independence of the competition authorities. The central factor in the variation in the three Scandinavian cases has therefore been the party or coalition in office – accelerating the reforms in Sweden in 1993 and decelerating them in Norway in 1994. In the Danish case the government by and large followed the recommendations of the commissions – moderate in 1990 and more radical by 1998 – perhaps the clearest evidence of external influence in the form of the highly critical OECD reports.

Finally, the adoption of the EU-oriented prohibition regimes may have provided similarities in form, but as the questions regarding the relationship between competition authorities and other branches of central government, between the authorities and other regulators, and broader questions of exempted sectors illustrate, even Europeanised competition policy may be national in content to a considerable degree. The Scandinavian cases suggest that after the prohibition approach has been adopted, there are strong incentives for complete Europeanisation of substantial law in terms of industry facing a single set of rules and the competition authorities' option to draw on the EU-level experience and guidelines. The question therefore becomes how to balance this pressure against policy priorities in terms of exempting special sectors from competition or accommodating the competition regime into existing administrative structures. Hence the suggestion that Europeanisation is leading to limited convergence – regimes that are to some degree 'European in form but national in content'.

The Europeanisation of national competition policy regimes in Scandinavia is still very much a process in progress. As the reforms in the first half of the 1990s illustrated, the three states adopted significantly different approaches to reform in general and adaptation to the European regime in particular. In all three cases, the move to reform preceded the debate on Europeanisation, although once reform was on the agenda the EU model represented an obvious option of considerable attraction. If anything, the reforms in the late 1990s and 2000 suggest that the incentives for Europeanisation increase as the shift from abuse to prohibition is undertaken, although they are counterbalanced by policies geared toward special national circumstances. In the short to medium term, the term

Europeanisation therefore appears to apply as much to the reform process itself as the competition policy regimes.