

**Panel 3 – "Who watches the watchmen"**  
**Johanna Svantesson**  
**June 2, 2017**





# Agenda

- **National perspective**
  - **Swedish proposal to go towards an administrative model – reasons**
  - **Criticism**
  - **Concluding thoughts/personal reflections**
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# National competition authorities in EU

- ▶ Most countries have an administrative model

Who imposes the fine	Member States
NCA (Administrative fines)	BE, BG, CY, CZ, EL, ES, FR, HR, HU, IT, LT, LU, LV, MT, NL, PL, PT, RO, SK, UK
Civil Courts	AT, FI, SV
Criminal Courts	DK, IE, EE (Art. 101), DE (in case of appeal when the case is reassessed according to criminal standards)
NCA but applying misdemeanour (quasi-criminal) standards	EE (Art. 102), SI

- ▶ \*Source: SWD(2017) 114 final, p. 21.



# Proposal to go from judicial model to administrative model in Sweden – reasons

- ▶ Efficiency
    - Increased incentives to interact with first decision-maker
    - Increased incentives for fast high-quality decision-making
    - More efficient leniency program
    - Strengthened role for competition authority
    - Strengthened role in ECN
  
  - ▶ Harmonisation
    - Close co-operation with other authorities in EU
    - Advantage to have the same decision-making powers
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## According to report – compatible with ECHR/EU Charter of Fundamental Rights

- ▶ **ECtHR (Menarini-case)**
    - Italian system not found to violate Article 6 of the ECHR
    - Not limited to a pure examination of legality
    - Not prevented from monitoring misuse of powers/used authority inappropriately
    - Competent to amend fine
    - Report does not mention Judge Pinto de Albuquerque's dissenting opinion
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## According to report – compatible with ECHR/EU Charter of Fundamental Rights (cntd.)

- ▶ **CJEU (KME etc.)**
    - Article 263 of the TFEU means that the EU courts control both legal and actual circumstances
    - Competent to examine evidence, annul the appealed decision and change level of fine
    - Does not violate Article 47 of the Charter
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# Criticism – Swedish Bar Association

- ▶ Efficiency arguments vague
  - ▶ Harmonisation arguments do not outweigh the rule of law reasons for keeping the current order
  - ▶ Might not be contrary to the ECHR/EU Charter, but not a clear cut conclusion (cf. intense debate)
  - ▶ Does not mean a change is appropriate
  - ▶ Relevance of Jussila ./ Finland may be questioned
  - ▶ Article 6.3 d of the ECHR – requirements re. right to examine witnesses?
  - ▶ No proposed organisational changes (remain a Director-General governed agency) – checks and balances?
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## Attorneys'/legal counsels' responses

- ▶ Majority of attorneys/legal counsels interviewed before the Report replied that a judicial model is better from a rule of law perspective
  - ▶ The fact that the EU Commission/other ECNs have another model is not a sufficient argument for changing the system
  - ▶ *"Police, prosecutor and judge"*
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## ECN+

- ▶ "the proposed Directive also ensures that the choice of those Member States which have opted for a judicial model of competition enforcement is fully respected."
  - ▶ "powers will either have to be given to NCAs to adopt such decisions directly or Member States will have to ensure that such decisions can be taken by a court in non-criminal judicial proceedings. The need for change will thus be kept to a minimum."
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## ECN+

▶ Article 12:

“Without prejudice to national laws of the Member States which provide for the imposition of sanctions in criminal judicial proceedings, Member States shall ensure that national administrative competition authorities may either impose by **decision in administrative proceedings**, or **request in non-criminal judicial proceedings** the imposition of effective, proportionate and deterrent pecuniary fines on undertakings and associations of undertakings when, either intentionally or negligently, they infringe Articles 101 or 102 TFEU.”

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## Concluding thoughts

- ▶ Appropriate to go from a judicial model to an administrative model?
  - ▶ Increased incentives for “follow-on” civil actions? Damages directive – decisions are binding
  - ▶ Stigma breaching competition law
  - ▶ Exclusion from procurement
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## Concluding thoughts (cntd.)

- ▶ In Sweden, not criminalised to breach competition law
  - ▶ ECN+ (draft directive)
  - ▶ Lawyer's role now and following changes
  - ▶ Question of legitimacy
  - ▶ Presumption – good governance?
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