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## **OECD Global Forum on Competition**

### **HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT**

**Contribution by Claes Norgren (Lead Discussant)**

-- Session IV --

*This contribution is submitted by Lead Discussant Claes Norgren (Director General, Swedish Competition Authority) under Session IV of the Global Forum on Competition to be held on 12 and 13 February 2004.*

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## HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

*Contribution from Lead Discussant Claes Norgren,  
Director General, Swedish Competition Authority*

1. This paper briefly discusses some aspects of how the effectiveness of enforcement against anticompetitive conduct can be measured and evaluated. There is no doubt that this topic involves major methodological difficulties. At the same time questions about effectiveness are often raised by politicians, lawmakers, researchers and not least by business people who call for amendments to existing laws or abolition of provisions restricting their freedom of movement to engage in certain practices.

2. The Secretariat has proposed a number of issues for our discussion, *inter alia*:

- Is there a need to develop methods for the evaluation of such effects that could be used by competition authorities or independent researchers?
- Is there a need for international co-operation aiming at joint studies of effects and efficiency of competition law enforcement?

3. Sweden has proposed that the OECD Competition Committee take up studies on how effectiveness of enforcement could be measured and evaluated on its work programme for 2005 and 2006. We believe that a comprehensive approach to this topic is fundamental in order to support competition authorities in their work and to ensure that competition policy is designed in the most efficient possible way.

### **1. Avenues of evaluation**

4. In recent years, and in most countries around the world, there has been an increasing awareness of the importance of policies that promote long-term growth. Sound structural policies in general, and sound competition policies in particular, are seen as fundamental for achieving long-term growth.

5. In practice, evaluations of the effectiveness of competition policies and enforcement are rarely done. This is not unique for the competition area. The difficulties involved may be one of the explanations for that.

6. With regard to competition policy, it may be also be difficult to isolate effects stemming from liberalisation and other structural reforms and those stemming from competition law enforcement, which is the topic for the discussion in this session. Other complications are that effects on competition as a result of interventions from competition authorities may be indirect or only possible to appreciate in the long term.

7. A number of possible avenues for measuring and evaluating the effectiveness of competition enforcement can be suggested. First, competition enforcement at one competition authority can be benchmarked against other similar authorities, or compared over time. This approach measures and evaluates productivity of the authority, although, arguably, it tends to do so in a very simplistic manner. Second, the effectiveness of competition enforcement can be measured by evaluating the quality of individual decisions or of decisions in general. Much of the academic literature of law scholars focus on the quality of

individual decisions, while “Gallup” surveys of the perception of competition authorities can be seen as attempts to measure overall decision quality. Third, competition enforcement can be evaluated by looking at the impact of the regulatory interventions on the functioning of the market.

## **2. Benchmarking bureaucratic productivity**

8. The simplest measure of the effectiveness of a competition authority’s law enforcement would be to measure the number of cases handled per staff member, i.e., total number of cases handled per year divided by (average) staff enrolment. Naturally, this is a very crude measure.

9. Because of differences in national legislations, the average complexity of cases varies between different competition authorities. For example, if the merger control system has very low thresholds for compulsory merger notifications, the authority will handle a large number of relatively uncomplicated cases. If the thresholds are high, there will be fewer cases, but the average complexity will be higher. Finally, if merger notifications are not compulsory and if, instead, the authority can open merger investigations at its own discretion, there will be few – or no – uncomplicated merger cases. If, in an international comparison, productivity is measured as the number of cases per staff member, a competition authority will automatically appear to be more productive with a low notification threshold and less productive if notifications are not compulsory. As a simple illustration, the Swedish Competition Authority handled approximately 1600 merger cases during the period 1993-2002, while the EU Commission made 1990 final decisions in merger cases during the same period. The resources used by the Authority during a typical year in merger cases corresponds to approximately 6 person-years, while the size of European ‘Commission’s Merger Task Force, which handles only slightly more cases per year, was several times larger. Naturally, this is due to the much higher average complexity of merger cases examined at the European community level and, consequently, this comparison says very little about relative productivity.

10. Another important problem with a simple comparison of bureaucratic efficiency is that the *quality* of the decisions taken may vary greatly – and the quality of the decisions taken is likely to be at least as important as the number of decisions taken. However, it may still be possible to draw some conclusions from such measures. It may be possible to design more clever measures of bureaucratic output than just the raw number of cases handled. Possible measures would be the number of prohibited mergers, the number of cases with fines for anticompetitive behaviour or where a party has been ordered to terminate an infringement of the law and the number of cartels that have been identified and prosecuted. Data-envelopment analysis or similar techniques may be used to handle the fact that the tasks faced by a competition authority are multi-dimensional.

11. There are still many problems with these measures. The resource requirement depends on whether the authority has the right to make a decision that binds the parties, or whether it has to go to court to get such a decision. The number of cartels detected depends on, i.e., the prevalence of cartels in the domestic market and the sanction system.

## **3. Assessing the quality of decision-making**

12. Certainly, the academic law literature plays an important and influential role when it discusses the quality of the authorities’ decision-making. It can contribute to the development of best practice and safeguard against poor decision making. However, the academic literature gives only a fragmentary picture of the overall quality of decision making. Hence, it is difficult to use this literature for comparison *between* authorities.

13. Naturally, the court system has a fundamental role in maintaining decision quality. Potentially, the courts’ case-by-case quality check can be aggregated into a single measure of the quality of the

authority's decision-making quality. For example, the share of cases won in court can be used as a measure of quality, although differences in legal systems may make international comparisons of this number less useful.

14. The "Gallup-style" surveys that compare a number of competition authorities may be more useful for bench-marking. Such surveys suffer from a number of methodological problems, but some, such as the survey made by Global Competition Review, are given much attention in the media. The surveys are based on the stated opinions of competition lawyers and other practitioners and on factual data from the authorities about staff and enforcement. In 2002, Sweden scored 3.5 out of 5 stars overall, putting it on a par with Canada, Denmark, Finland, Ireland, New Zealand, Japan and the Netherlands.

15. The evaluations of competition-enforcement regimes undertaken in the OECD Competition Committee and now also in this Global Forum on Competition are in many respects unique. These peer reviews are prepared with the specific intention of facilitating the implementation of best-practices in competition policy. The peer reviews may not easily allow direct cross-country comparisons but they offer a thorough analysis of competition law and enforcement in a certain country that may be used as a reference and input for others.

#### **4. Assessing the impact of competition policy**

16. Another aspect of interest is the effect of competition policy (law and enforcement) on the efficiency of the economy at large and its ability to increase consumer welfare. Ideally, we would like to know the answer to at least a couple of questions: How much better off are consumers (if at all), because of the current competition policy, relative to a hypothetical situation without competition policy? How much better off would consumers be, relative to the present situation, if a best-practice competition policy was enacted? And how effective is a given country's competition policy, compared to the corresponding policies in other countries?

17. There are two principal ways to address such questions. One can be called a top-down strategy and the other a bottom-up strategy. A top-down strategy would look at the whole of the economy and would try to infer the benefits that accrue from competition law and enforcement, for example by comparing markets or countries which are subject to different forms of competition rules, or by comparing the same country over time, in order to identify the effect of policy reforms. A bottom-up strategy would look at individual cases, attempting to quantify the effect of particular decision or action, and then estimating the aggregated effect of all decisions.

18. The problem with a top-down strategy is that it is very difficult to isolate the effect of competition policy from other factors that influence welfare and economic growth, such as the business cycle, tax policy, educational policy *et cetera*. The problem with a bottom-up strategy is that the most important effect of competition policy is that market participants abstain from anticompetitive actions in the first place. If competition laws and enforcement are effective, firms will not enter into cartel agreements or attempt to abuse their dominant positions, and they may not even try to get approval for anticompetitive mergers.

19. In 1966, George J. Stigler published a study entitled *The Economic Effects of the Antitrust Laws*, in which he reached the conclusion that the economic effect was likely to be quite small. In particular, he analysed the effect of the prohibition against interlocking directorates under US antitrust laws, by comparing the composition of directorates in the USA and in the UK. Stigler's study is an example of a top-down analysis.

20. Later studies have drawn more favourable conclusions as to the effectiveness of competition policy. Virtually all economists would agree that competition is fundamental for generating welfare and that effective competition will only result in an institutional context in which the firms' degrees of freedoms are to some extent circumscribed. However, the views on *how* competition rules should be designed vary more and some would perhaps argue that competition policy is in fact detrimental to welfare, although it appears that this view is quite uncommon.

21. A more recent attempt to evaluate competition policy is George Symeonidis (2002), who compares the evolution of a sample of British industries that were or were not affected by the introduction of a prohibition against cartel agreements. One of his key findings is that cartel policy *was* effective, in the sense that competition became more intense in industries where cartels were prohibited, leading to lower prices and more innovation. In the long run, however, the increased level of competition appears to have led to a higher degree of concentration in these industries, partially offsetting the effect of the stricter competition rules.

22. At an even more aggregate level, one can assess the effect of competition on growth, GDP and price levels. In line with the consensus view of economists, referred to above, the empirical evidence seems to confirm that competition increases growth and GDP, while reducing price levels. In a series of studies, the Swedish Competition Authority has analysed the relation between Sweden's general price level and a number of its likely determinants. The results suggest that the price level is higher than it should be, considering, i.e., Sweden's GDP per capita and taxes. This, in turn, suggests that the Swedish economy may be less competitive than that of the average EU member. However, it appears far-fetched to attribute the relatively high price level in Sweden to ineffective enforcement of the competition law. For example, a legacy of product-market regulations may contribute to a lower average degree of competition.

23. Bottom-up analyses are primarily made in the context of merger control – so called merger simulations. Such simulations provide an estimate of what the price effects of a merger will be. Hence, price-effect simulation of mergers that were prohibited can be used as estimates of the benefits generated by competition law enforcement.

24. In principle, it would be possible to systematically evaluate the effect of other types of enforcement, such as interventions against anticompetitive agreements or against abuse of dominance. In such cases, it would be possible to evaluate the effect of enforcement by analysing the actual effects on the market. However, analysis of this type is rarely done by the authorities themselves, but is sometimes made by academics. As regards Sweden, there appears to be a widespread consensus that the introduction of an EU-style competition law in 1993 has contributed towards more effective competition, providing benefits for consumers. As mentioned above, the Swedish Competition Authority has scored relatively well in an international "Gallup" survey on competition authorities.

25. More anecdotal reports suggest that prices may fall substantially in markets where cartels have been detected and prosecuted. Another example is the detection of a major cartel case in Sweden last year concerning bid-rigging in the asphalt business that resulted in a price fall by 25% in some regions. A wide range of examples on price decreases and other beneficial effects on competition are demonstrated in the contributions for this session..

26. However, as stated also in the Secretariat paper, one major difficulty in demonstrating the beneficial effects of competition law enforcement is to show that the observed short term effects lead to economic growth in the longer term. In the long run a lower price does not necessarily lead to more economic efficiency than a higher price would have done. Cases concerning abuse of a dominant position may be examples of such situations.

27. There are a number of methods that can be used to evaluate the effectiveness of competition enforcement. All of these methods have weaknesses, although one particular method may be the best choice in response to a particular question. There are few studies that allow for an international comparison of effectiveness of enforcement.