

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Advantages and Disadvantages of Competition Welfare Standards – Note by Sweden

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<https://www.oecd.org/competition/advantages-and-disadvantages-of-competition-welfare-standards-in-competition.htm>

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1. Background

1. Recent economic and political developments in Europe and beyond have shaken up international economic relationships and necessitated renegotiation of previously established frameworks. The United Kingdom has withdrawn from the European Union. Former US president Trump renegotiated the North American Free Trade Agreement and withdrew from the Trans-Pacific Partnership that his predecessor had helped create and signed up to. CETA, the EU-Canada free trade agreement, was almost vetoed by the Walloon parliament. Covid-19 triggered hoarding of medical supplies in several jurisdictions (sometimes even within countries) and exposed vulnerabilities in global supply chains. The recent energy crisis has tested the functioning and acceptance of the EU's increasingly integrated energy markets, not least in the Nordics. The challenge to meet emissions targets and transit to fossil-free economies in light of climate change triggered controversy over state aid and commitments to level playing fields between the EU, the US and China, but also within the EU. Finally, in light of geopolitical upheaval, notions of strategic autonomy have gained prominence both between and, alarmingly, within trading blocs.

2. Competition policy, meanwhile, faces its own challenges. On the one hand, concerns about increased corporate power have led to calls for reinvigorated enforcement and renewed discussions about welfare standards as intervention thresholds.¹ Climate change and sustainability concerns have triggered discussions on the proper scope of mandates for competition authorities. The notion of competition itself, while resonating positively with citizens in the role of consumers,² still triggers negative connotations when seen through the lens of international relations, evoking fears of job loss or downward wage pressure, rising inequality, poorer product quality and safety, among others.

3. Taken together, then, market mechanisms and global integration face a degree of skepticism and concerns. These need to be taken seriously, and externalities, geopolitical aspects as well as distributional concerns addressed. At the same time, the benefits of level-playing field competition on open markets as a source of productivity, innovation and thus long-term prosperity should not be forgotten and must be robustly argued (communication), but also realized (enforcement). We will touch briefly on the communication issue before turning to enforcement aspects concerning the role of a consumer welfare standard.

2. Communication

4. Sweden's current European Council presidency names competitiveness as one of its priorities,³ in line with the European Commission, and presents a co-operative, positive-sum narrative of international economic relations, based on competition, innovation, and a

¹ See for instance Tim Wu, "After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice," *Columbia Public Law Research Papers* 14-608, 2018.

² Eurobarometer, "Citizens' perceptions about competition policy," January 2019.

³ European Council Working Document WK 1852/2023 INIT

skilled workforce. This is important as the notion of competitiveness can be approached from different strategic premises. Some views emphasize zero- or even negative-sum aspects motivating targeted interventions such as subsidies, exchange rate or wage suppression, or the creation of national/regional champions. A co-operative perspective instead focuses on the potential benefits to *both* domestic *and* foreign consumers and industries of openness and level-playing-field approaches to trade and regulation. A key catalyst in this narrative is effective competition, as it generates surplus through efficiencies as well as innovation, and distributes that surplus among market participants. National and supranational competition authorities can help credibly communicate these effects to both domestic and international audiences by leveraging their expertise.⁴

5. A research report commissioned by the Swedish Competition Authority discusses competition's many benefits.⁵ We submit that vigorous competition law enforcement, as well as promotion of pro-competitive and non-discriminatory regulation, are instrumental in realizing the large potential mutual benefits of economic integration. Three mechanisms deserve special consideration in an international context:

1. Effective competition, where companies vie for customers' business on the merits, i.e. by offering superior quality and/or the most favorable terms (including, but not only, price), incentivizes efficiency-enhancing investments and product innovation whose fruits accrue to both consumers and producers – or, to the extent that consumers directly or indirectly own equity, prosumers.⁶
2. Open domestic markets offering level-playing-field access to foreign firms ensure that efficiency gains brought about by competition are shared with trading partners and other economies, through at least three channels:
 - a. Competition on the merits forces *all* companies active on that market to become more efficient and innovative, including foreign ones. The latter can transfer those efficiency gains as well as resulting profits to their respective domestic economies.
 - b. To the extent that effective competition generates surplus, that surplus also spreads beyond borders, either directly to foreign holders of domestic equity, or indirectly by additional domestic spending on foreign goods and services.
 - c. Innovation often comes with a degree of non-excludability, meaning some of the ideas generated domestically quickly become globally available. (Additionally, even excludable innovations will eventually spread given sound patent laws and licensing regimes.)
6. Competitively neutral or pro-competitive innovation-oriented economic policy, along with sound competition enforcement, promotes competition between firms also on labor markets with increasingly high-skilled labor, leading to better jobs over time, rather than more precarious ones. Wage suppression becomes an inferior strategy if workers have alternatives and innovativeness replaces labor cost as firms' primary concern.

⁴ OECD, 2014, Competition and macroeconomic outcomes factsheet

⁵ Konkurrensverkets forskningsrapport 2021:1, "Konkurrensens positiva effekter".

⁶ The prosumer aspect may be particularly relevant in jurisdictions where citizens directly or indirectly hold equity, such as countries with fully funded pension plans.

3. Enforcement

7. The Swedish Competition Authority’s primary statutory task since at least 2007 has been to pursue “effective competition ... to the benefit of consumers”.⁷ This suggests a focus on consumer, rather than total, welfare, in line with EU priorities. A focus on consumers is also reflected in Swedish competition law, which is derived from and applied in parallel with EU competition law.⁸ Official statutes give no exact definition of consumer welfare or consumer harm, though, and consumer benefit or harm is not the only intervention criterion, leaving room for interpretation by the SCA and the courts, who act in close alignment with EU jurisprudence and case law.

8. A particular feature of the Swedish competition law, meanwhile, is the law’s paragraph (Ch. 3, § 27) on “anticompetitive public sales operations”, which is aimed at preventing crowding-out of private-sector undertakings on a market by public-sector commercial activity on that market. As such, it may seem to present a departure from the focus on consumer welfare, striving more directly to reserve potentially competitive markets to private-sector activity. However, to the extent that it helps promote effective long-run competition on a level playing field, the paragraph ultimately also serves the interests of consumers (as well as taxpayers).

9. A focus on consumer welfare may disregard some types of surplus generated by firms’ conduct unless such surplus is at least partly passed on to consumers. For instance, in merger reviews, the SCA attaches little weights to fixed-cost savings when presented by merging parties, deeming those unlikely to benefit consumers, and focuses on potential marginal-cost savings instead. Advocates of a total welfare standard consider such neglect of surplus a shortcoming of the consumer welfare standard, arguing that antitrust should not take a stand on how surplus generated by firm conduct is to be distributed.

10. How do the aforementioned challenges to international economic relations, and the narrative of competitiveness through competition, affect a discussion of the consumer welfare standard? That depends on how one defines consumer welfare, and what role one considers for it in competition policy. We will briefly discuss this touching on aforementioned subjects of climate change and sustainability, innovation, and labor markets. Rather than presenting a final answer, however, the exposition below should serve more as a conceptual framework reflecting an ongoing thought process. It should also be noted that while enforcement priorities and competition problems frequently figure in the ongoing public debate, there are currently no policy initiatives in Sweden to replace the focus on consumer welfare with some other intervention standard.

11. Economic policy as a whole can be conceptualized as attempting to maximize a social welfare function, with weights on future welfare reflecting society’s intergenerational preferences, subject to some distributional constraints that reflect a contemporary consensus on social justice. The resulting objective function will be considerably more complex than a one-period partial-equilibrium price-quantity diagram depicting a representative consumer and a representative firm. Yet competition policy is only one branch of economic policy. The very idea of delegated government through expert agencies implies a degree of specialization, and restriction of each respective agency’s objective(s) to those dimensions it is most capable of addressing. Problems of second-best, including climate and sustainability externalities, are addressed within this framework by

⁷ Förordningen (2007:1117) med instruktion för Konkurrensverket. According to the same instruction, the SCA’s other main task is to ensure efficient public procurement.

⁸ Konkurrenslagen (2008:579)

assuming that all agencies simultaneously strive to satisfy necessary conditions for efficiency within their limited remit, while trusting all other agencies to act likewise. Competition authorities, consequently, focus on safeguarding a feasibly conceptualized notion of competition.

12. That said, any such notion is arguably much more encompassing than the canonical single-period price-quantity candidate is, and too complex to capture in a single function or diagram. Still, in terms of observed or predicted effects of a firm's conduct, the latter might serve as a useful *indicator* for a likely deterioration of the competitive situation. However, it needs to be complemented by further analysis. Absence of short-run (or predicted) price effects need not imply a green light from the vantage point of long-term effective competition, while presence of such effects can be consistent with preserved or even improved competition under some circumstances. In more complicated cases, simplified notions of consumer welfare are likely to mislead or may not even be applicable, as for instance when judging the competitive implications of changes in price discrimination where the impacts on different consumer groups have to be weighed against each other. In short, a “dashboard” of indicators combined with a case-by-case analysis, as commonly practiced, seems an advisable approach to protecting competition.⁹ The analysis will typically not only consider the immediate terms that end users face, but also look at impacts on wholesale customers if the investigated firm(s) operate further upstream, as well as buyer power on input markets.¹⁰

13. Looping back to other ingredients for positive-sum competitiveness, innovation and good jobs, the natural question is whether and how these should figure as targets for intervention or at least indicators in the analysis of competition. Both are obviously related to competition, in ways described above, but at least innovation seems ill suited as a target variable, as it is rarely directly contracted upon, and is difficult to directly steer with the instruments of competition policy. Rather, being a positive by-product of effective competition, it may in some market analyses serve as another possible indicator, in the sense that reduced levels of innovation may – but need not – indicate softening competition.

14. The case for paying more attention to labor markets and potentially including them as targets for intervention appears to be stronger. For one, they are well-defined input markets in which buyer power can, and in some sectors of the economy does, exist, and can be strengthened by coordinated horizontal conduct or strengthened by vertical agreements. Recent discussions of and regulatory action on non-compete and no-poaching agreements in other jurisdictions than Sweden bear witness to this. Such conduct can be analyzed with standard tools of economic analysis, and properly designed remedies or interventions derived. Moreover, corporate power on labor markets may have direct implications for competition further downstream, as with non-compete agreements which make it more difficult or impossible for competitors to attract skilled workers who would allow them to improve their products or services and hence compete more effectively for customers. Of course, these aspects would need to be weighed against concerns of free-riding on competitors' training investments, and poaching of hard-to-enforce intellectual property. Yet that, too, is standard fare in competition analysis.

⁹ The extent to which a dashboard approach could be summarized in some measure extended measure of consumer welfare is an interesting question but risks being too semantic, as the simple price-quantity diagram still wields particularly strong influence on economic teaching and thinking.

¹⁰ Cf. Carl Shapiro, *Antitrust: What went wrong and how to fix it*, *Antitrust* 35 (3), 2021.

15. An important restriction, though, is to refrain from including labor market outcomes in themselves as target variables of competition policy, as these should only matter insofar as they indicate or result from anticompetitive conduct.

4. Conclusion

16. Recent events on the international stage, and academic contributions on the proper scope of competition policy, underscore the importance of clear communication and comprehensive enforcement by competition authorities. Competition authorities can leverage their specific expertise to communicate the positive-sum benefits that competition generates in combination with level-playing-field international market access. Enforcement can be based on comprehensive assessments of competitive conditions along the entire value chain rather than narrowly defined short-run consumer welfare, and this should be feasible within existing mandates.