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Leniency and criminalisation

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It is a pleasure to be here today to discuss current issues in competition policy from a Swedish and a European perspective. Criminalisation and leniency are related issues that should be seen in the context of the regime of sanctions that countries implement in order to effectively combat cartels. I will give you my view on how sanctions should be designed and share my experiences on the subject. Before doing so I would like to start by setting the context and define the problem that we are facing.

Cartels is not only an economic but also a moral problem

As I understand, in this room, we have a gathering of experiences from varieties of anti-trust legal systems: criminal systems, administrative systems and mixed system. When advising business on how to deal with contacts between companies, I suppose you meet different kinds of good arguments why cooperation in certain cases might be justified.

On the other side of this coin we face the problem of contacts between competitors. This exposes society to risks of collusive behaviour which might evolve to become an outright cartel. Still in many cases there is a grey-zone between good co-operation and bad co-operation that needs to be highlighted. In other cases it's simpler; the cooperation is bad and constitutes violation of competition rules.

The arguments for why cartels are bad are both economic and moral. It is moral in the sense that cartels can be seen as theft that not only includes a transfer of money from consumers to companies in a market. It also involves economic harm

to society since effects in terms of less efficiency will take place. In the end we are all losers in collusive markets where prices are set up and markets divided.

Overcharges in theory and practice

When companies engage in collusive behaviour and fix prices and divide markets the effect can be seen in terms of a price overcharge. This overcharge is the mechanism by which money is transferred from consumers to companies. There has been a debate on how big this overcharge is and there seems to be a consensus among competition authorities that it lies in the range of 15 – 25 per cent.

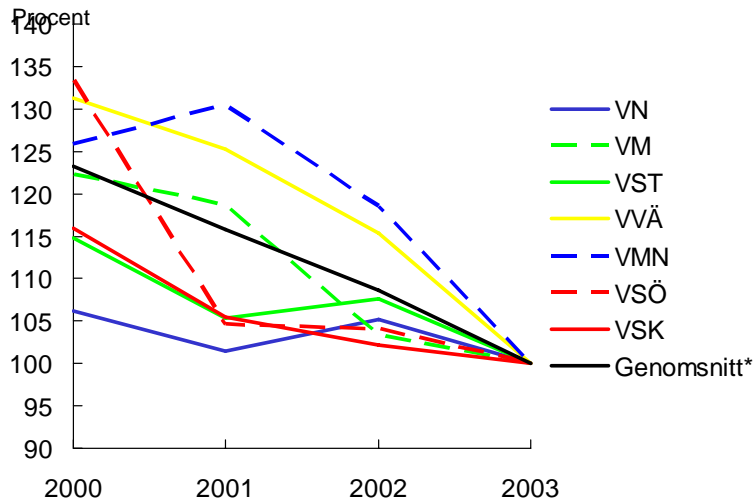
Recent research¹ shows that the average overcharge imposed by cartels approximately is around 22% with a median of 20 percent. This measure is based on a study of 406 cartel episodes in different parts of the world. Interestingly enough the study concluded that overcharges imposed in international cartels were higher than in domestic cartels. Furthermore overcharges were lower in the US and in the European markets than in the Asian markets and the rest of the world.

In terms of how different cartel structures affect the overcharge, the study showed that the longer a cartel operates, the higher the overcharge it tends to achieve. Also the overcharges tend to fall as the number of cartel participants increases. The most promising result in the study, however, was that overcharges tend to decline as antitrust enforcement regimes have become stricter.

This level of overcharges is in line with our experiences in Sweden. Let me turn to one example from one of our biggest cartel cases. This case concerned a cartel between the major producers of asphalt, a product which to a great extent is bought by municipalities and the state through public procurement. The alleged cartel participants were engaged in bid rigging and market sharing. As you can see from the graph, prices fell rapidly approximately 25 per cent after the cartel was revealed in 2001.

¹ Yuliya Bolotova, CARTEL OVERCHARGES: AN EMPIRICAL ANALYSIS (2006).

Utveckling av indexerat genomsnittligt beläggningspris per region 2000-2003



* Viktat utifrån genomsnittlig volymandel för åren 2000-2003

Källa: Vägverket

On top of harmful overcharges cartels may also have negative impact on innovation and efficiency. Moreover, customers may be out-priced from markets where they would like to interact which will affect other markets.

Public procurement markets

The fight against cartels is not only a question for consumers and companies that are hit by the effects of collusion. Also the public sector is affected. In many countries public procurement markets are important. In Sweden e.g public procurement alone accounts for about 20 per cent of GDP.

Effective procurement can be seriously harmed by colluding bid-rigging companies, as the asphalt cartel example clearly shows. Cartel enforcement and supervision of procurement markets are integrated activities. It is therefore an interesting development that the Swedish Competition Authority as of September 1 will be assigned the task of monitoring compliance with the Public Procurement Act. Both Articles 81 and 82 of the Treaty and the EU Directives on public procurement aim at fostering well functioning markets by using the forces of competition. This will give us the possibility to take a more comprehensive approach to enforcing cartels and to make markets work.

In this context I would also like to add when liberalising markets it is of great importance to fight against cartels. When new markets are created by reforming former public sector services, they are especially sensitive to cartel behaviour. The credibility of the whole liberalisation process could be jeopardized if we would find collusion instead of well functioning markets.

Sanction systems

As was shown in the study of cartel overcharges effective sanctions and enforcement of cartels can not only reduce the overcharges but also eliminate problems in markets. For that matter it is encouraging that countries develop their competition rules and enforcement regimes. In the EU harmonisation has come a long way and with the enlargement of the European Union competition enforcement develops in a number of new member states.

In Sweden, competition legislation in the form we are used to is a rather new phenomenon dating back to the 1990's. This means that we have built up new institutions that deal with these issues, such as the Swedish Competition Authority and the Market Court. Although legislation now is more or less fully harmonised with the rest of the European Union, enforcement still is in a developing phase, in many respects. This is not unique for Sweden, most EU states are in a similar situation. In this developing process experiences from other legal systems, as well as the own, have to be taken into account.

Criminalisation

The ambitions to stem cartels have led to the situation where criminal enforcement of antitrust laws is on the reform agenda. The question is if administrative sanctions are deterrent enough or if they have to be combined with criminal sanctions against individuals. The argument for individual sanctions is that they are not possible for a company to foresee as is the case with administrative fees.

This debate has been going on in Sweden as well. The issue of criminalisation has been raised in parliament on a number of occasions the last couple of years and the issue has been studied in several governmental committees. The point made was both moral and economic in nature. Administrative fines were by the proponents regarded as a too weak sanction and they were of the view that cartels were criminal acts in nature.

My view is that corporate sanctions can effectively be paralleled by sanctions against individuals. A better deterrence is both possible and desirable. Individual sanctions can strengthen the incentive to resist corporate pressure to engage in unlawful activity and effectively enhance the level of deterrence.

Individual sanctions may under certain circumstances also increase the incentives for individuals to reveal information about existing cartels and to cooperate in enforcement authorities. This is where the problem with criminalisation comes in. In Sweden there is an absolute duty to prosecute a criminal violation. This means that if there is an informer that comes forward and receives leniency in the administrative system this cannot lead to amnesty in the criminal system. The effect of this is that the leniency system would be made redundant since nobody would come forward and give information to the Swedish Competition Authority under such circumstances.

The conclusion that the Swedish Competition Authority, as well as many others has drawn, is that criminalisation is not an option here in Sweden. It is fair to say that this option is not any more on the agenda. However, this does not mean that the issue of individual sanctions is over – on the contrary. A new proposal is being prepared in government. Let me elaborate on this.

Swedish proposal for individual sanctions

In November 2006 a Legal Review Commission regarding the Swedish Competition Act presented its proposals for modernisation of the Competition Act. The Commission rejected the idea of criminalisation but proposed to extend the possibility of sanctions for certain serious infringements by introducing individual sanctions.

The proposed individual sanction would give the Competition Authority not only the possibility to sue companies for fines, but also to claim disqualification orders on people who exercise legal or actual management of undertakings that enter into, or apply, agreements that are forbidden under the Swedish Competition Act or the EC Treaty. According to the current Swedish Disqualification Order Act, a prohibition may be imposed if the person in question has grossly disregarded his or her obligations in his or her business operations. A prohibition must be required in the public interest.

In contrast with criminalisation disqualification orders do not meet problems with how the leniency system would work. The way the new draft law is constructed there would not be any obligation to issue disqualification orders if a company or an individual comes forward with evidence and receives leniency in the administrative system.

I welcome this proposal. It can help strengthen enforcement and deterrence. Although it cannot be compared to individual sanctions as imprisonment I am sure that it will have a considerable effect and contribute to make sanctions more effective.

Fines

Individual sanctions of course work in parallel with corporate fines. Let me say some words about how fines in the administrative system are developing.

The level of fines applied by authorities and courts is the most important factor that determines the deterrent effect. Fines must therefore be set at a level that is so costly for companies in order to ensure sufficient deterrence. The Swedish Competition Authority has proposed levels of fines that are congenial with the EU Commission practice. Until now the Swedish jurisprudence shows that there is a problem of delivering fines in our courts that are of sufficient magnitude. Another problem is that the Swedish Market Court has offered no or very little guidance in its decisions on how fines should be argued and structured.

Also this is addressed by the Legal Review Commission. It proposes a scheme of reasoning to give guidance to how courts should proceed when determining the size of penalties. This scheme would according to the proposal be in line with the European Commission's guidelines – seriousness and duration of the infringement would be decisive when deciding the fine.

- I welcome also this proposal. Explicit rules concerning fines will increase the predictability and encourage consistency.

Leniency

Leniency is an effective tool in the fight against cartels. It provides enforcers with information about violations that are otherwise very difficult to get. The practices in the US and in the EU Commission have been working very well and shows that this is the most important method to use in order to destabilise cartels.

The Model Leniency Programme

In the EU most countries have a leniency programme. However, in the Nordic countries we have had different regimes where Denmark for a number of years lacked a leniency system. Now Denmark took the decision to introduce a leniency model which means that the Nordic countries now face similar regimes.

There are a number of conditions that must be met in order for a leniency program to be effective. First of all it must be applied with great generosity. If not, there will be no sufficient incentives for participants to come forward. Secondly, there must be a real threat of discovery and deterrent sanctions in terms of high fines or individual sanctions. Thirdly, the leniency system must be transparent so that those who enter into it can assess how they should act.

In the European Union, guidance for leniency programs has been developed in the form of a Model Leniency Programme. This is a soft harmonisation of

practices and the Swedish Competition Authority has issued new guidance as a result of the model programme. Furthermore we are engaging in information activities to raise the awareness among companies and legal advisors in order for them to better understand the leniency program and how they can benefit from it.

In order to fully make the Swedish leniency programme compatible with the Model Programme, we have asked the Government to make the necessary modifications in the Swedish Competition Law and explicitly implement a “marker system”.

Experiences and trends in Sweden

I think it is fair to say that the start of the leniency programme in Sweden has been sluggish. We have not had a hoard of applicants ringing on our door. I think this is the case in a number of member states in the EU. One extreme exception is the Netherlands where as a result of threats of the Minister of Public Construction companies came forward to confess. The threat was to ban those who were found in cartels from public procurement if they had not applied for leniency before a specific date. This threat led to a formidable rush from companies in the building sector to confess.

One might ask why we have not received more leniency applications. First of all one should keep in mind that there are reasons to believe it is more difficult to destabilise a cartel in smaller countries.

Another reason is that the Swedish Competition Authority was not sufficiently generous at the start of the programme and that awareness among lawyers and companies was not sufficient. Furthermore the discussion about a possible criminalisation in Sweden might have had effect.

Now there are reasons to believe that we will receive more leniency applications in Sweden. The main reasons for this are the following.

- We apply a more generous attitude when companies apply for leniency.
- We have increased transparency by implementation of the EU model leniency programme in Sweden. This also contributes to creating more security for foreign companies who would apply for leniency in Sweden.
- The debate on criminalisation is over. Instead there are reasons to believe that new individual sanctions such as disqualification orders are to be expected. The expected level of sanctions can be assumed to rise and the

clarification of criteria for courts to set administrative fines will also increase deterrence.

- We are now carrying out an awareness building effort. The 15th of June we will have a seminar for lawyers in Stockholm on this topic. This will be followed by more activities after the summer.
- The task of also managing supervision of public procurement will greatly complement our contacts in procurement markets which can be expected to add to information to the authority and awareness among parties involved in procurement.

We have during the last years seen clear signs of a greater awareness and willingness to use the leniency programme in Sweden. We have seen companies wanting to leave the collusive behaviour behind and not expose themselves to the risk of being detected. This had added important information to our investigations.

The fact that more companies have realised that they can gain significantly by exiting a cartel is not only an expression that they have understood that they can avoid sanctions. It is also a way to avoid losses in reputation and goodwill. This shows that how leniency programmes can destabilise cartels. Nobody knows what the other participants in the cartel might do. And in that situation it is totally different to be first than to be second. The winner takes it all.

With this in mind we look forward to co-operate with the legal community in order to secure the interests of clients. As I have already mentioned we will host a seminar the 15th of June to further discuss and raise awareness about the leniency programme. It is time for those directly involved and their legal counsellors to carefully analyse the possibility to apply for leniency.

Let me sum up. Cartels have negative impact on society. Consumers deserve better and should not suffer from overcharges. Therefore consumers should demand not only effective enforcement, but also high moral standards in business life. There is an important task for enforcers as well as for the legal community to address these issues. In fact I claim – it is not all a matter of economics but also a matter of moral. Thank you for the attention.