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## **OECD Global Forum on Competition**

**THE OBJECTIVES OF COMPETITION LAW AND POLICY  
AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY**

-- SWEDEN --

*This note is submitted by Sweden under Session I of the Global Forum on Competition, to be held on 10-11 February 2003.*

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## SWEDEN

### OBJECTIVES OF COMPETITION LAW AND POLICY

In addition to the answer to the questionnaire on “objectives”, sent to the Secretariat last November 29, the Swedish Competition Authority wants to give the following contribution concerning the *development of competition policy objectives* in the Swedish competition legislation.

The earlier competition acts, dated 1953 and later and preceding the act now in force, were mainly built on the abuse principle. Action could be taken against restrictive business practises that had harmful effects. The general abuse clause pointed out restrictions to competition that distorts price formation, impedes efficiency or obstructs the business of other undertakings. An overall criterion for establishing harmful effects was that these restrictive practises were not justified *from the public interest point of view*. The ground for this was mainly that different circumstances of public character that could excuse or justify a restriction to competition should be taken into account. So an adjustment between the interest of competition and other public interests was to be made. Different kinds of state regulations were excluded. The wording also implied that restrictions to competition without appreciable interest from the public point of view were excluded from action.

The Antitrust Ombudsman could bring a case where he found harmful effects before a special council that later developed into the Market Court. If the council/court shared the views of the Ombudsman there was a negotiation procedure, aiming at removal of the harmful effects. In 1965 there was added a possibility for the council to impose a fine in some kinds of cases if the negotiation procedure failed.

Consequently there was a wide scope for taking into account other public interests than pure competition policy objectives. Those other interests could be for example employment or regional policy, the supply situation or the international competitiveness, but also some kinds of economic advantages that could be a result of restrictions to competition in certain cases. However, in most of the cases before the council/court, where the criterion *public interest* were discussed, the main point was if the economic effects of the restrictions were wide enough to be of public interest. There have been only a few cases where other public interests have been taken into account by the council/court in a way that was different from the view of the Antitrust Ombudsman.

In 1982, some amendments was made to the Competition Act but the general abuse clause presented above was kept until 1993. The most important amendment was that provisions concerning a merger control system (*acquisitions of undertakings*) were added. These provisions contained a similar criterion for action as the general abuse clause, namely the criterion that the acquisition should be *harmful to the public interest*. Furthermore the Government had to confirm a prohibition by the Market Court against the acquisition. This gave the Government an extra possibility to consider other interests than competition policy. The criterion *harmful to the public interest* was kept in the merger control rules also in the new act of 1993 when the Swedish Competition Act in other material respects was adapted to the competition rules of the European Community (then art. 85 and 86 of the EC Treaty).

The new competition act based on the prohibition principle applies in Sweden since July 1993. With this construction there is no need for establishing detrimental effects to the public interest, as these aspects have been considered already when the prohibitions were formulated. Nor are there now any provisions in the prohibition articles that make it generally possible to take into account other public interests than pure competition policy objectives. As for state regulations only those based upon laws

(decided by the Parliament) can make restrictions by undertakings fall outside the prohibition, because such restrictions do not arise from voluntary decisions by undertakings. In comparison to the earlier law this is supposed to widen the possibilities to take action against undertakings that carry out such restrictions to competition that have a connection to a regulation. Those restrictions that are not a necessary or intended effect of the regulation can now be prohibited. Restrictions of minor importance that used to be included in the criterion *public interest* are in the new act excluded from the prohibition by the wording *restriction or distortion of competition in the market to an appreciable extent*.

In the merger control rules in the 1993 act the governmental confirmation of a prohibition was abolished. The rules still contained a criterion for prohibition with the meaning that the acquisition *takes place in a manner that is detrimental to the public interest*. In the explanation for this was mentioned that the acquisition could enhance a more rational production or a structure that is necessary for a company to reinforce its competitiveness on the international market. It was also said that an acquisition that restricted the competition in Sweden could in the long run have positive effects on the development of competition and economy in Sweden. This should be taken into account in the adjustment that should be made in acquisition cases between competition effects and other interests. Also public interests such as protection of life, health, security and food supply should be taken into account but not employment effects.

The Market Court has in one case (Optiroc/Stråbruken 1998) confirmed that in the assessment of a merger shall be considered not only the effect on competition but also other important public interests. Among other factors the court took into account the need for structural rationalisation and the increased international competition pressure. Unlike the Competition Authority the Market Court did not find that the criteria for prohibition against the acquisition were fulfilled.

In 2000 also the merger control rules in the Swedish act were amended in order to adapt them to EU rules. The system now in force is purely judicial, the Market Court being the final instance of appeal. The only remaining consideration of other public interests than competition is now specified to *if a prohibition can be issued without significantly setting aside national security or essential supply interests*, similar to what is included in Art. 21 of the EC merger regulation. This also corresponds well with comments made by the Antitrust Ombudsman already when the proposal for the new competition act was sent out for consideration in the early 90ies.

So far, the Swedish Competition Authority has not brought any merger case before the court, where this remaining “public interest” clause has played a role for the assessment of the case.