

## **CRIMINAL ENFORCEMENT OF ANTITRUST LAWS**

*Intervention by*

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Enforcement of competition rules are in many countries in a state of development and transformation. In this process different jurisdictions have to take the experiences from their own legal systems and jurisprudence into account as well as the experiences of others. The ambitions to stem cartels have led to the situation that criminal enforcement of antitrust laws is on the reform agenda in many countries with administrative systems. The introduction of criminalisation in such systems leads to dual systems of sanctions and raises the question whether a parallel application of the two systems is the optimal solution for antitrust cases.

My experience from the situation in Sweden suggests that a dual system might work but only under certain conditions. My thesis is that if those conditions are not fulfilled a dual system might even be counterproductive to the overall objective of creating an optimal enforcement system. I will try to explain this and also what other measures might be contemplated as alternative measures if the ambition is to strengthen administrative systems.

I will discuss criminal enforcement and administrative sanctions only in relation to the most serious horizontal violations of competition law such as price fixing, market sharing and reductions of supply. Some might argue that also other offences of anti-trust law should be criminalised. My view is however, that criminal enforcement if applied should focus on the most serious violations.

### ***Fighting cartels***

In some jurisdictions, primarily in the US, criminal enforcement seems to be a very successful instrument to combat cartels. In other countries, such as Sweden, Finland, Spain and Italy administrative sanctions are imposed on the companies for breaches of competition laws. In those jurisdictions the sanction systems have not been in place as long as in the US. At the same time there are in some jurisdictions parallel criminal and administrative systems with a possibility to use the criminal system in particularly serious cases. The experiences of parallel application are very interesting and often serve as an inspiration for those countries that have pure administrative systems and would like to develop the fight against cartels further.

Before entering into this discussion just let me state the obvious. The purpose of sanctions against cartels is twofold: to bring about justice and to deter parties from entering into unlawful behaviour that would hurt markets and consumers. An efficient system of sanctions leads to a fulfilment of these objectives at a reasonable cost for society.

The deterrence created in any system is a function of the cost of sanctions and the probability of detection. The cost of the sanctions could either be fines for companies or the costs incurred in a criminal system in terms of individuals having to bear the personal cost of imprisonment.

The justice brought about has to do with taking proportional measures against unlawful behaviour. It has to do with the balance between the violation of the law and its consequences for society on the one hand and the severity of the sanction for the party that carries out the violation on the other. To a certain extent this is a moral question where the deterrence and the economics of crime and punishment play a secondary role.

The case for expanding a pure administrative system into a system with both administrative sanctions and criminal ones relies on two important assumptions. The first one is that the introduction of criminal sanctions adds a proportional response to the problem. The second one is that criminal enforcement is an efficient measure and amplifies the deterrence in the system. I will discuss these issues based on my experiences of the Swedish antitrust system.

### ***Conditions for efficiency in a dual system***

What are then the conditions for efficiency in a dual system and could a country like Sweden benefit from adding criminalisation to our toolkit?

#### **Proportional sanctions**

The first condition is that developing an administrative system into a dual system would lead to more proportional sanctions.

Under the administrative system the “perpetrator of the crime” is the company and the sanction in terms of fines is directed to that subject. It is the company’s behaviour that is condemned and it is the company that has to pay a price. When adding criminal sanctions against individuals to the system, new issues of a moral nature will emerge. The perpetrator of the crime is still a company, but the individual sanction is applied to an employee that is held responsible for the company’s unlawful activities. Violations of antitrust laws may be looked upon as a kind of theft from consumers and society – but the thief who goes to prison might be only one part of all those individuals carrying out the trespassing of the antitrust rules. If so, the system would inhere the risk of merely finding scapegoats and the proportionality could be questioned.

Introducing criminalisation on top of an administrative system would send a clear signal to market participants that collusion is not an acceptable behaviour and that there is a personal moral responsibility. The general public would probably view this as a proportionate measure. However, even if the criminalisation would be perceived as a proportionate response it also must lead to convictions. Otherwise a gap between general public’s expectations and the deliveries from the courts might be a problem. To what extent that would happen depends i.a. on jurisprudence and the standards of proof in complicated competition cases.

## **Deterrence**

The second condition is that developing an administrative system into a dual system would lead to a more efficient system since it would add to increasing the costs for perpetrators and therefore improve deterrence.

The *level of sanctions* applied by authorities and courts is the most important single factor that determines the deterrent effect. What the level of fines is varies from one country to another due to i.a. cultural and legal traditions. In Sweden our current jurisprudence shows that there is a problem of delivering fines in our courts that are of sufficient magnitude. This is partly a cultural question but also due to unclear guidance from legislators. Currently a governmental committee is looking into this matter and my conclusion is that deterrence might be increased considerably by clarifying legislation in this regard.

The current system with administrative fines also plays an important role for how the leniency programme works. The single most important incentive for companies to reveal their participation in illegal market conduct is, I believe, that high fines are imposed on the companies. Thereby the probability of detection is improved, leading to improved deterrence.

The degree of deterrence in a system also depends on the *probability of detection*. From this perspective an interesting observation is that in several countries where this twofold system is applied, nobody, or at least very few, have ever been sent to prison for engaging in cartel behaviour. The reason for that may differ between jurisdictions but the deterrent effect is certainly undermined if this is the case in the long term.

Deterrence also depends on if the law is applied in a predictable manner. This leads me to the issue how an introduction of criminalisation would interact with the leniency system.

## **The interaction with the leniency system**

Under administrative as well as criminal enforcement systems, leniency programs are applied in many countries as a means to detect cartels. There is a concern among competition authorities how to strengthen the incentive for companies to come forward and cooperate with the authorities. This is partly due to the experience that only very few cases have successfully been brought to court based on economic evidence alone. Information gained by leniency programmes is an important source for detection.

Sweden, as well as other EU countries, is now striving at refining our leniency system. First of all we have taken some measures to improve our national leniency programme within the framework of the administrative system with the purpose of making it more attractive to companies. We have thus taken a more generous attitude to applicants. Furthermore we are working in order to further harmonise our national leniency programmes in the European Union. This will lead to more legal certainty for companies and thus to more incentives to come forward.

No doubt, criminal enforcement could strengthen the incentive for individuals to cooperate with competition authorities. The US experience is in this regard a clear example. The risk for detection and individual sanctions do have an impact on the efficiency of the system.

Criminal enforcement systems, like in the US, often includes a crown witness system whereby the suspected company representative may get amnesty if sufficient information and cooperation is provided, not only about own involvement in the alleged cartel but also about the other cartel members. Evidence provided by the cartel members themselves of course facilitates the investigation.

The crown witness system is an intrinsic and important component of the US enforcement system. A system which allows the accused to obtain relief by presenting evidence about other individuals or companies could, however, in other jurisdictions be put into question. In Sweden the issue of introducing a crown witness system has been raised several times during the last decades. It has always been rejected, the main reason being that such a relief under criminal law cannot be accepted on legal and moral grounds. Another ground for rejecting the idea has been that the system would give the police and prosecutors the right to grant the relief. Such a power outside courts is seen as non-acceptable.

In Sweden the issue of introducing a criminalisation of cartels was considered by a governmental committee. The committee came to the conclusion that the benefits from criminalisation would be uncertain. This was an opinion shared by the Competition Authority and the conclusion relied mainly on the analysis of how the proposal would interact with the leniency programme.

The effectiveness of the leniency programme applied by the Competition Authority would be in danger since there is no crown witness system and prosecutors in Sweden are obligated to prosecute crimes. There is no discretion for prosecutors in this regard. If the Competition Authority cannot guarantee leniency, the system does not give incentive for companies or individuals to come forward. Therefore we came to the conclusion that a dual or parallel system would damage rather than improve the possibilities to effectively intervene against cartels. Although sanctions would be amplified this would be countered by a loss in detection which would make enforcement and deterrence less effective.

All in all, a dual system in Sweden would under present circumstances add to the deterrence by increasing sanctions but it would also reduce the probability of detection. In my view the net effect is likely to be a reduction of deterrence.

### ***Other measures to make administrative systems work***

The question then is if something else would be possible to do in order to amplify an administrative system without entering into criminalisation. Let me just highlight some measures that have been taken or are being contemplated in Sweden.

*Private enforcement* could of course be a very efficient complement and is in practice today in some countries. The US is here the outstanding example, with a long tradition of high damages. My view is that this is an important complement to public enforcement. All good forces must join the fight against cartels. In Sweden however, like in many other European countries, private enforcement of antitrust laws is by tradition not used very frequently. One reason for this is no doubt that the level of compensation is considered by the companies to be very low. Here again, the level of sanctions plays a very important role for the efficiency of any enforcement system.

*Administrative sanctions on individuals* is one alternative. However, I do not believe fines that are imposed on company employees could be effective if not combined with more forceful corrective measures. It is not farfetched to imagine that those individual fines would in the end be paid by the companies involved and the cost for the companies involved would be marginal.

Another measure that has been discussed in Sweden and which is practised in some countries is that companies convicted of infringements should not be allowed to participate in *public procurement* processes. Setting adequate limits in time and scope may prove difficult but such a measure could certainly have an impact in countries with a big public sector like Sweden.

Improving *transparency* regarding companies engaged and convicted in cartels might stimulate investor reactions in financial markets. The effects on company goodwill and on the Stock Exchange are important. In Sweden at least one of the most important institutional investors has adopted a policy not to invest in companies that have been convicted for serious violations of the competition law. This sends a clear signal that involvement in illegal restrictions of competition is not accepted in the marketplace.

## **Conclusions**

Effective enforcement of the antitrust laws in order to eliminate restrictions on competition is the prime objective for every competition authority. And our focus is constantly on the most serious violations, such as horizontal agreements and concerted practices between competitors. The harm done to consumers and society of such activities is undisputable.

Before an administrative system is extended into a dual one, including also criminal sanctions, the risk of detection and the overall deterrent effect must be considered carefully. Under certain circumstances a dual system might be preferable but under others it is not. One important element to consider is how an introduction of a criminal sanction system affects the leniency system. If it undermines the leniency system the net effect might be counterproductive. We arrive at a paradox: strengthening the sanction system might make it harder to detect cartels.