

Chicago-Kent College of Law

Scholarly Commons @ IIT Chicago-Kent College of Law

All Faculty Scholarship

Faculty Scholarship

January 1984

Antitrust Law and Economic Analysis: The Swedish Approach

David J. Gerber

IIT Chicago-Kent College of Law, dgerber@kentlaw.iit.edu

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/fac_schol



Part of the [Antitrust and Trade Regulation Commons](#), [Comparative and Foreign Law Commons](#), and the [Law and Economics Commons](#)

Recommended Citation

David J. Gerber, *Antitrust Law and Economic Analysis: The Swedish Approach*, 8 *Hastings Comm. & Ent. L.J.* 1 (1984).

Available at: https://scholarship.kentlaw.iit.edu/fac_schol/207

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

Antitrust Law and Economic Analysis: The Swedish Approach

By DAVID J. GERBER

B.A., Trinity College, 1967; M.A., Yale University, 1969; J.D., University of Chicago, 1972; Associate Professor, IIT/Chicago-Kent College of Law.

I. INTRODUCTION

Antitrust regimes are mixtures of law, economics and administrative action. Such mixtures are intended to implement basic policy decisions favoring competition and thus can be viewed as separate normative systems. Antitrust law systems have unique characteristics because they are instituted to protect complex economic processes rather than individuals or the state.¹

The issues facing antitrust systems are similar in different countries. The potential value of comparative analysis in the area of antitrust law has, however, rarely been exploited. Lawyers and legal scholars tend to view competition laws solely within the context of a particular system without utilizing the perspective derived from a comparative analysis.² The tendency to look at antitrust solely from a national perspective has been particularly pronounced in the United States.³

The need for comparative perspectives in antitrust law has become especially critical in the United States where there is widespread confu-

1. The term "antitrust law" is used here to describe laws designed specifically to provide sanctions against anticompetitive conduct. It is used because of its familiarity and convenience. Terms widely used in other countries are likely to appear misleading, clumsy or unclear to United States readers, e.g. "cartel law" (Germany), "competition law" (France), and "restraint of competition law" (Sweden). For a description of all of the major competition law systems, see *WORLD LAW OF COMPETITION* (J. van Kalinowski ed. 1983).

2. There have been, of course, notable exceptions. See, e.g., C. EDWARDS, *CONTROL OF CARTELS AND MONOPOLIES* (1967) and *TRADE REGULATION OVERSEAS: THE NATIONAL LAWS* (1966); see also R. JOLIET, *THE RULE OF REASON IN ANTITRUST LAW IN COMPARATIVE PERSPECTIVE* (1967) and *MONOPOLIZATION AND ABUSE OF DOMINANT POSITION: A COMPARATIVE STUDY OF THE UNITED STATES AND EUROPEAN APPROACHES TO THE CONTROL OF ECONOMIC POWER* (1970).

3. In the United States, antitrust law is considered natural, even constitutional, in significance. Yet many foreign nations view the United States antitrust system as being a "radical" solution to the problem of protecting competition. See, e.g., U. AF TROLLE, *STUDIER I KONKURRENSFILOSOFI OCH KONKURRENSLAGSTIFTNING* 19 (1963).

sion and doubt about antitrust law, its goals, values, structures and processes and even the reason for the law's existence.⁴ Recent criticism of United States antitrust law has, however, tended to lack depth because of the lack of comparative perspectives.⁵ Comparative study is also critical for the practicing attorney due to the increasing number of countries with antitrust systems and the increasing severity of their respective laws.

From a comparative perspective the Swedish antitrust system is of particular interest.⁶ Sweden utilizes antitrust law to achieve the same basic goals that are pursued under United States antitrust law, but it does so in a significantly different manner. In particular, Sweden has a vastly different conception of the respective roles of law and economics in the antitrust context. A comparison of the two systems thus highlights aspects of the United States system which otherwise tend to escape notice.

The economic context of Swedish antitrust law is also significant in this regard. Sweden's economy is largely in private control, and the Swedish government has generally avoided interference with market mechanisms.⁷ The Swedish economy is also highly industrialized and dependent upon its international competitive strength for its continued well-being.⁸ As a result, the Swedish antitrust system is designed to foster international competitiveness.⁹ In the United States the need for international competitiveness has only recently been perceived and this perception has sharpened the controversy relating to United States antitrust laws.¹⁰

The objectives of this Article are threefold. The first is to describe and analyze the Swedish antitrust law system. The second is to view this system from a comparative perspective which will contribute to im-

4. Central works in the current controversy include R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1977) and R. POSNER, *ANTITRUST: AN ECONOMIC PERSPECTIVE* (1976); see also Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 *CORNELL L. REV.* 1140 (1981); Pitofsky, *The Political Content of Antitrust*, 127 *U. PA. L. REV.* 1051 (1979); and Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 *CALIF. L. REV.* 1 (1980).

5. The one foreign antitrust law system which has been the subject of substantial comparative study in the United States is the cartel law of the European Economic Community. See, e.g., B. HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST* (1979).

6. The most thorough recent description in English is Nerep, *Sweden*, in 7 *WORLD LAW OF COMPETITION* (J. van Kalinowski ed. 1983).

7. The ownership and control of the Swedish economy are reviewed periodically by the Organization for Economic Co-operation and Development (O.E.C.D.). See, e.g., O.E.C.D., *SWEDEN* (1982).

8. A. LINDBECK, *SVENSK EKONOMISK POLITIK* 40 (1970).

9. See *infra* text accompanying note 18.

10. See Fox, *supra* note 4, at 1143.

proved understanding of the phenomenon of antitrust law. The third is to provide insight into the controversy in the United States and elsewhere about the goals, values and methods of antitrust law. The framework of analysis centers on the concept of an "antitrust system," an approach which provides a basis for understanding and evaluating the complex interrelationships between legal, administrative and economic factors in a government's efforts to protect competition.

There is a great deal of controversy in the United States about antitrust law, but most participants in the controversy would probably agree that United States antitrust law should be analytically clearer, less restrictive of economic development and less costly. In each of these areas a review of the Swedish experience with antitrust law provides valuable insights.

II. THE DEVELOPMENT OF SWEDISH ANTITRUST LEGISLATION

The basic structure of Swedish antitrust law was created by the enactment of the Law Against Restraints of Competition (LRC) in 1953.¹¹ This statute was the first antitrust law in Swedish history and, although segments of it have been modified, the basic structure of the 1953 Act remains unchanged.

A. The 1953 Law Against Restraints of Competition

1. Background

Sweden first seriously considered the enactment of legal measures to control anticompetitive practices after the end of World War II.¹² The measures were directly related to economic developments resulting from the war. Although Sweden was a neutral country, the war drastically affected its economy.¹³ Wartime shortages and economic disruptions forced the government to control virtually the entire economy. In most branches of the economy enterprises were forced to join government-regulated cartels. Additionally, most goods and services were rationed, and

11. Lag den 25 September 1953 om motverkande i vissa fall av Konkurrensbegränsning inom Näringslivet, *Svensk Forfattnings Samling (SFS)* 1953:603.

12. For a brief review of the prewar developments, see Wetter, *Swedish Antitrust Law*, 10 AM. J. COMP. L. 19 (1961).

13. A factor which made Sweden's situation almost unique in Europe was the uneven impact of World War II. Because Sweden supplied both sides with certain types of industrial products, those portions of industry which produced such goods often operated at full capacity and some reaped significant profits.

there were strict price controls.¹⁴

The situation that prevailed during the immediate postwar period was not conducive to reducing these anticompetitive forces.¹⁵ Consumer goods remained subject to severe shortages and, in many cases, price controls. Moreover, because of the destruction of much of European industry, many branches of Swedish industry were not subjected to serious foreign competition for many years. Existing cartels sold all they produced and were shielded from the competitive market forces which would have tended to weaken them and to limit their profitability. In addition, the reduced effect of market forces supported the continued existence of other anticompetitive practices and arrangements.

These circumstances gave organized groups of competitors the power to keep prices above competitive levels. Only the existence of price controls restricted the use of this power. In addition, these circumstances tended to create industrial structures which were unresponsive to technological and economic pressures. Such structures threatened to undermine the long run effectiveness of Swedish industry and its ability to compete with rebuilt European industry.¹⁶

The Swedish government thus faced a situation similar to that of many other European countries whose economies had been subjected to the anticompetitive distortions of both the 1930's and World War II.¹⁷ In attempting to restore a market economy, the government focused on two main economic policy goals: the reduction of inflationary pressures and the improvement of economic efficiency.¹⁸

It was in furtherance of these goals that the government decided to seek procompetition legislation. According to one commentator, "it was deemed advisable to have hard competition which would not only exclude forms of economic activity and companies which were less profitable, but would also result in a rapid redistribution of resources to where they could be expected to be most effective."¹⁹ The introduction of procompetition legislation was part of the government's general economic policy.²⁰ The impetus for the procompetition legislation was a strategic governmental decision based on considerations of economic welfare. It was not supported, as was the introduction of antitrust law to

14. U. BERNITZ, *MARKNADSRÄTT* 160 (1969).

15. See generally A. LINDBECK, *supra* note 8, at ch. 2.

16. See Sandberg, *Antitrust Policy in Sweden*, 9 *ANTITRUST BULL.* 535, 538-40 (1964).

17. See Thorelli, *Antitrust in Europe: National Policies After 1945*, 26 *U. CHI. L. REV.* 222 (1959).

18. See A. LINDBECK, *supra* note 8, at 40.

19. U. BERNITZ, *supra* note 14, at 161.

20. U. BERNITZ, *KONKURRENS OCH PRISER I NORDEN* ch. 4 (1971).

the United States, by a hotly debated, populist political movement directed against specific types of big business activity. The considerations behind the Swedish legislation were almost solely those of national economic policy.²¹

In creating a legal regime to protect competition, the Swedish government was influenced by its own legal tradition and political situation as well as by the experience of other states with procompetition laws. The Swedish government borrowed ideas from other antitrust systems, but created a unique system for Sweden. The decision to enact an antitrust law represented a significant departure from previous policy.²² Swedish law had traditionally been unconcerned with competition-related issues. Unlike some other European countries, Sweden had failed to develop contract law principles limiting the validity of anticompetitive agreements and had steadfastly held to the principle of freedom of contract.

When Sweden examined the experiences of other states with antitrust laws, it found no models which were sufficiently appealing to either adopt or follow.²³ The United States was seen as the home of antitrust law, and its experience was carefully studied, but the United States model was not considered appropriate to Swedish circumstances. The Swedish government considered it unthinkable, for example, to even consider criminalizing behavior which had always been considered legal.²⁴ Moreover, the experience of other European states with competition laws was more limited and did not provide a basis for judging their effectiveness. Nevertheless, Sweden was clearly influenced by the solutions which were being devised in other countries during the postwar period.²⁵ It was against this background that the LRC was enacted.

2. Goals and Basic Principles of the LRC

As part of a general package of economic policy measures intended to reorient and deregulate the postwar Swedish economy, the LRC was designed to affirmatively use competitive processes to attain fairly specific economic goals.²⁶ Whereas in the United States the Sherman Act²⁷ was aimed at combating specific existing business practices, the aim of the

21. See L. WERIN, *EKONOMIC OCH RÄTTSYSTEM* 333-36 (1982).

22. See Sandberg, *supra* note 16, at 543-44.

23. See generally Statens Offentliga Utredningar (SOU) 1951:27 at 483.

24. S. HOLMBERG, *MOT MONOPOLISERING? NO'S VERKSAMHET UNDER 25 AR* 27-30 (1981).

25. See AF TROLLE, *supra* note 3, at 21-37.

26. A. MARTENIUS, *LAGSTIFTNING OM KONKURRENSBERGRÄNSNING* 26 (1965).

27. Sherman Act, 15 U.S.C. §§ 1-7 (1976) (original version at 26 Stat. 209 (1890)).

LRC was to promote competition as an economic policy tool. Promoting competition was intended to reduce inflationary pressures and to maintain an internationally competitive industrial structure. The two goals overlap but have been viewed separately.

The most immediate goal of the new statute was to create a mechanism to combat inflationary pressures. Competition in the marketplace was to act as a price regulator.²⁸ Curiously, therefore, Swedish antitrust law was created as part of a package of measures which included stringent price controls. Although ideologically inconsistent, both served the same goal—limiting price increases.

The issue of how competition would combat inflation was addressed by focusing on the reduction of costs, particularly distribution costs, in accordance with the dominant economic theories of the day.²⁹ Swedish economic policy makers placed strong emphasis on rationalizing industrial structures and distribution channels. This cost reduction emphasis has left its imprint on Swedish antitrust law. The goal of reducing costs permeates the legislative history and, therefore, the case law.³⁰

The statute was designed to promote “effective competition,” *i.e.*, competition which would reduce costs to the consumer and which would make Swedish goods more competitive internationally. The concern was not with restraints of competition *per se*, but rather with their economic effects. As stated by the commerce minister on presentation of a revision of the LRC to Parliament in 1956:

[The effort to control competition] does not aim at the free competition of the classical economic model but rather at the competition which is from society's standpoint the most effective competition, *i.e.*, a competition which directs development in that direction which in the long run can be expected to involve the best utilization of the society's resources. Certain limitations on competition are without question not only acceptable but valuable and actually necessary from the standpoint of society.³¹

Swedish antitrust law is highly pragmatic.³² Competitive processes are not seen as good in and of themselves, but rather as means to particular economic and social ends. Consequently, the law tends to be less abstract, and its approach less absolute, than United States antitrust law. The political values which United States antitrust law has generally been

28. A. MARTENIUS, *supra* note 26, at 27.

29. *See generally id.* at 28; LINDBECK, *supra* note 8, at 40.

30. *See infra* text accompanying notes 105-06.

31. *Proposition (Prop) 1956:148* at 41, *cited with approval in Prop. 1981/82:165*, at 43.

32. U. BERNITZ, *supra* note 20, at 98-101.

considered to protect play little, if any, role in Swedish antitrust law. In part this is a reflection of the fact that Sweden has been ruled by the Social Democratic Party since the mid-1930's (with the exception of 1976-82).³³ The Social Democratic Party has used the market system to provide the economic well-being necessary to support its social welfare goals. On the ideological level, however, the Social Democrats have been forced to reject the notion of competition as a goal in and of itself.

3. The Scheme of the Legislation

The legislative scheme created in 1953 forbids two narrowly defined restraints of competition and authorizes governmental action to eliminate others where the restraints have certain effects. The prohibited restraints are collusive bidding and resale price maintenance. Violations are prosecuted in the regular courts and violators are subject to criminal penalties. Other restraints are subject to governmental intervention only where the effects are "contrary to the public interest." In the 1953 legislation, only cartels and monopolies were subject to this so-called "general clause."³⁴

The statute also created a new government agency called "The Office of the Competition Ombudsman" to enforce the LRC.³⁵ In cases involving prohibited restraints, this office was to recommend prosecution in the regular courts. With respect to other violations, the ombudsman was to attempt to negotiate with potential violators and, if unsuccessful in eliminating the restraint, to prosecute the case in a newly formed court whose sole function was to hear such cases. From the beginning, therefore, the law and the process of applying it were conceived as a separate legal subsystem. By 1956 the government believed that the antitrust system was capable of standing alone in the fight against inflation, and it therefore eliminated most price controls. At the same time the general clause of the LRC was expanded to apply to all restraints of competition other than those specifically prohibited under this Act.³⁶

B. The Competition Act of 1982: Mergers, Enforcement and Modernization

For nearly two decades the system created by the LRC worked well,

33. See generally S. HOLMBERG, *supra* note 24, ch. 3.

34. In generally refusing to criminalize anticompetitive behavior, the Swedish government was following the lead of other European countries. See Thorelli, *supra* note 17, at 220-33.

35. See *infra* text accompanying notes 80-90.

36. Lag angående ändring i lagen av den 25 September 1953 (No. 603) om motverkande i vissa fall av Konkurrensbegränsning inom Näringslivet (SFS 1956:244).

and there was little serious dissatisfaction with it. In the early 1970's, however, serious attention was focused on rapid increases in the concentration of Swedish industry and the potential negative effects of such concentration.³⁷ The government responded to this concern by establishing several commissions to study concentration and its effects. One of these commissions was directed to review the overall effectiveness of the LRC in light of general economic trends and, in particular, to review the possibility of applying the LRC to mergers and acquisitions.³⁸ This commission, appointed in 1974, released a book length report in 1978 which recommended no changes in the basic structure of Swedish antitrust law.³⁹ It did, however, make three major recommendations: (1) that several types of anticompetitive practices be forbidden; (2) that new rules be introduced to deal specifically with mergers and acquisitions; and (3) that the sanctions available to both the competition ombudsman and the market court for enforcing the statute be strengthened.

The report of the commission created substantial controversy in both government and industry,⁴⁰ with the industrial sector strongly opposed to many of the recommended changes. It was against this background that the Competition Act of 1982⁴¹ was passed. Although the substantive provisions of this new statute are generally identical to those of the LRC, some of the statutory language was "modernized" to clarify the old statute. Moreover, new provisions were included to cover acquisitions and mergers.⁴² The changes reflected governmental recognition of the fact that the conceptual framework of the LRC was inadequate to regulate mergers. The most far reaching changes, however, may well have been those which dealt with the process of application of the law.⁴³ The new act gives the market court and the competition ombudsman the power to impose significant new sanctions to support their respective functions.⁴⁴

37. See S. HOLMBERG, *supra* note 24, at 46-48.

38. See *Prop. 1981/82:165*, *supra* note 31, at 10-11.

39. See Statens Offentliga Utredningar (SOU) 1978:9. For a discussion of the role of the SOU, see *infra* notes 78-79 and accompanying text.

40. For a summary of the various positions, see *Prop. 1981/82:165*, at 329-554.

41. Konkurrenslagen (*SFS* 1982:729). For a translation, see Nerep, *supra* note 6, appendix.

42. See generally L. HARDING, *KONTROLL AV FÖRETAGSFÖRVARV I SVERIGE* 10-12 (1983).

43. For a review of these changes, see Sandstrom, *Den Nya Konkurrenslagen*, 1 *PRIS OCH KONKURRENS* 5 (1983).

44. See *infra* text accompanying note 92.

III. THE STRUCTURE OF SWEDISH ANTITRUST LAW

From its inception Swedish antitrust law has divided anticompetitive activities into two categories: those which are forbidden (*i.e.*, resale price maintenance and collusive bidding) and those whose effects must be evaluated under the terms of the so-called "general clause." These two categories are conceptually and procedurally distinct.

A. The General Clause—The Basic System of Swedish Antitrust Law

Except for resale price maintenance and collusive bidding, all potentially anticompetitive conduct is judged under the statute's general clause. This clause therefore provides the conceptual structure of Swedish antitrust law. According to this provision:

If a restraint of competition has a harmful effect within the country, the market court may, in accordance with this statute, adopt measures to prevent such an effect. . . .

A harmful effect shall occur where, in a manner which is contrary to the public interest, the restraint of competition

- (1) unduly affects the formation of prices,
- (2) impairs efficiency in business, or
- (3) hinders or prevents the business activities of another.⁴⁵

The statute poses three questions: 1) Does the conduct constitute a "restraint of competition"? 2) is there a "harmful effect" on society? and 3) is the effect "contrary to the public interest"?

1. Restraint of Competition

The first step in applying the general clause is to determine whether there is a restraint of competition. This concept was intended to encompass "every condition which . . . has as its result that competition is not completely free and unrestrained."⁴⁶ How the restraint of competition came into being is irrelevant, as is the intent of the parties. "Restraint of competition," which is not defined in the statute, is so broadly construed that virtually any restriction on the freedom of economic activity falls within the clause.⁴⁷ The abuse of a market-dominating position, for example, constitutes a restraint of competition under the statute,⁴⁸ as does

45. SFS 1982:729, § 2 (formerly SFS 1953:603, § 5).

46. A. MARTENIUS, *supra* note 26, at 43.

47. See generally SOU 1978:9, at 94.

48. See Lidgard, *Missbruk av Marknadsdominerande Ställning och Möjligheterna till Fusionskontroll enligt Svensk Rätt*, 42 TIDSKRIFT FOR SVERIGES ADVOKATSAMFUNDET 333 (1981); Otteryd, *Missbruk av Marknadsdominerande Ställning*, *id.* at 242.

an anticompetitive merger or acquisition.⁴⁹ Because the term is so broadly construed, it plays a relatively minor role in analyzing a potential antitrust violation.

The minor role played by the concept of restraint reflects the "effects" orientation of the statute. Restraints of competition are not necessarily seen as negative; their legal status depends solely on their effects. It also reflects recognition of the fact that defining the concept of restraint of competition in operative terms is difficult, if not impossible.⁵⁰

2. The "Harmful Effects" Criteria

Given the broad definition of the concept of restraint of competition, the main issue to be decided in applying the statute is whether the restraint causes "harmful effects" within the contemplation of the statute. Fortunately, the statute includes criteria for determining whether such harmful effects are present. A restraint is a violation only if it meets one of the three so-called "effects criteria." It must either affect the setting of prices, impair efficiency, or hinder or prevent another's business activities.

a. *The Price Criterion*

The LRC was conceived primarily as a price regulating statute. Accordingly, the first of the effects criteria finds harm where a restraint affects prices. The price criterion has been the most important criterion, as was intended. The concept is not, however, as broad as it appears, nor is its method of application self-evident. It is essentially an antiinflationary measure. Consequently, the provision has been interpreted to refer not to every effect on prices, but only to "every effect on price level which tends to increase or maintain prices."⁵¹ Moreover, this provision is not only applicable to cases in which an actual upward effect on prices can be shown, it is also applicable to cases in which a substantial *risk* of such an effect is shown.⁵²

The basic method of determining whether the criterion has been met is the application of price theory analysis.⁵³ This analysis determines the likelihood that the practice has led, or will lead, to upward pressure on prices. The purpose of the analysis is not to determine the *nature* of the restraint for purposes of categorization, as is the case in the United

49. See L. HARDING, KONTROLL AV FÖRETAGSSAMMANSLUTNINGAR ch. 9 (1982).

50. SOU 1951:27, at 517.

51. A. MARTENIUS, *supra* note 26, at 102.

52. U. BERNITZ, SVENSK MARKNADSRÄTT 58-59 (1983).

53. *Id.* at 50.

States, but rather to determine whether in a particular situation the restraint has led to price increases or can reasonably be expected to do so. Although cartels inherently tend to increase prices, for example, a specific cartel in a particular situation may not have such a price-increasing effect.⁵⁴ Swedish antitrust law looks to the overall situation and asks whether the requisite effect exists.

In addition to economic theory, however, price/cost comparisons may also be used in applying the price criterion.⁵⁵ Where prices in a particular market appear high in relation to costs, the law countenances the application of price/cost comparisons which may indicate that the restraint tends to increase prices.

b. *The Efficiency Criterion*

The second harmful effects criterion includes restraints on competition which impair efficiency in business. This criterion is closely related to the price criterion because a reduction in efficiency generally involves an eventual increase in prices. It was included as a separate criterion in the statute in order to emphasize the importance of efficiency and to address situations in which a restraint of competition reduced efficiency without, at least in the short run, affecting prices.⁵⁶

As used in the Swedish antitrust law, "efficiency" does not refer to the economic efficiency of the neoclassical model. This concept of efficiency was specifically rejected as being an inadequate measure of the social harm resulting from restraints on competition. According to the drafters of the legislative proposal,

to the extent a restraint of competition is, on balance, harmful from the standpoint of society, it is not clear that the harm rests with the fact that it negatively affects economic distribution—*i.e.*, that [monopoly power] improperly secures profits at the expense of consumers. This can certainly occur, but it seems likely that even more often the harmful effects result from the fact that the restraint of competition in various ways impedes rationalization or contributes to waste of resources.⁵⁷

The concept of efficiency was thus defined in reference not to a theoretical model, but rather in reference to the process of economic development.

The efficiency concept focuses on incentives to actual and potential

54. See *infra* text accompanying notes 94-95.

55. SOU 1978:9, at 96.

56. A. MARTENIUS, *supra* note 26, at 103.

57. SOU 1951:27, at 59.

market participants to reduce costs, compete "on the merits" and develop new or improved methods of production and/or distribution. According to the official explanation of the LRC, a restraint on competition impedes efficiency where it hinders technological or organizational progress or generally reduces competitive incentives. This includes situations where, for example, inefficient companies are given artificial protection by contract, or where prices in a cartel are set to protect the least efficient producer.⁵⁸

A restraint is thus inefficient where it interferes with the process of economic development by reducing incentives for firms to improve their economic performances. The establishment of a cartel, for example, will generally have this effect because it eliminates incentives for cartel members to compete. Vertical restraints such as resale price maintenance may have this effect by reducing pressures on distributors to develop less costly means of distribution.⁵⁹ This concept of efficiency is less theoretically precise than that of microeconomic price theory. By focusing on obstacles to economic development, however, it relates the impact of antitrust law to both consumer price levels and the international competitiveness of the Swedish economy. The relationship between the efficiency concept and the issue of international competitiveness also establishes a broad base of political support, for international competitiveness is of paramount concern to both consumers and producers in Sweden.

c. Impeding Another's Business Activities

According to the third criterion, harmful effects occur when a restraint of competition "hinders or prevents" the business activities of another. On its face this criterion does not fit easily with the other two, for it appears to be aimed at protecting the individual enterprise rather than society as a whole. Protecting the individual enterprise from the effects of such conduct is, however, seen as a benefit to society in general and to consumers in particular.⁶⁰

According to the official explanation of the LRC,

If a restraint of competition impedes new business from entry or restricts already existing companies in their development, this must in the long run tend to maintain existing business structures and hinder the development of new, more effective forms of enterprise. In the

58. *Prop. 1953:103*, at 118.

59. For further discussion of the treatment of resale price maintenance under Swedish law see *infra* text accompanying notes 108-115.

60. A. MARTENIUS, *supra* note 26, at 104-6.

long run this can lead to inflexibility in business.⁶¹

Where an enterprise is prevented from competing in the market altogether, or is prevented from operating on the same terms as other companies, long run efficiency and competitiveness are likely to suffer. The official explanation cites examples of restraints likely to have the prohibited effect: group boycotts, exclusive dealing among a group of buyers and/or sellers and discrimination in prices or other terms by a market-dominating enterprise.⁶² Each of these practices is likely to lead to that rigidity in market structures which the statute is designed to combat.

The main themes of the three effect criteria are cost reduction, mobility of resources and economic development. The objectives are long-term effectiveness and international competitiveness. Sweden's well-being has been based on its international competitiveness for many years, and its antitrust laws are designed to maintain and improve that competitiveness by eliminating restraints of competition which prevent its development.

The harmful effects criteria refer to the *existence* of particular effects. They do not, however, determine the intensity of the required effects. Whether a particular effect on prices or a particular hindrance to competition is enough to constitute a violation is determined by application of the final basic component of the statutory structure.

3. The Public Interest Criterion

The third component of the test of legality under the general clause is the public interest criterion. In order for a restraint of competition to violate the statute, it must not only meet one or more of the harmful effects criteria, but it also must do so in a manner which is "contrary to the public interest."⁶³ This part of the test makes it clear that state intervention is authorized only where a restraint of competition would be detrimental to society as a whole.⁶⁴ "Harmful effects" are not sufficient in and of themselves to justify such intervention. Intervention is only to occur where, on balance, the designated harmful economic effects of the restraint are not substantially outweighed by other economic or social benefits which may result from the restraint.

61. *Prop. 1953:103*, at 119.

62. *See id.*

63. The Swedish term is "pa ett ur allmänn synpunkt otillbörligt sätt." Translated more literally, it reads "in a manner which is improper from the standpoint of society in general." It is, however, clearly intended to represent a public interest standard. *See, e.g.*, SOU 1978:9, at 98.

64. *See U. BERNITZ, supra* note 52, at 58.

The government's explanation of this criterion, expressed in conjunction with extension of the LRC in 1956, recognized that this provision allowed a "certain amount of room for subjective evaluation."⁶⁵ The government argued, however, that in the overwhelming majority of cases application of the concept of societal harm would not present a significant problem. The government stated, for example, that it "was obvious that societal harm will not be considered to exist where the imperfections in competition are a direct result of natural scarcity of resources, legislation or governmental controls."⁶⁶

This provision therefore serves two functions:⁶⁷ First, it eliminates state interference in cases of limited importance, allowing intervention only in cases of "general interest." A particular restraint may be of general interest either because of the magnitude of the economic effects involved or the precedential value of the case in deterring future restraints. Second, the provision is intended to take into account public interests other than the harmful effects specified in the statute. The drafters emphasized that there might be other interests of society which were more important in a particular situation than those specific economic effects represented by the harmful effects criteria. They therefore required that there be a balancing of interests. Only when the specified harmful effects are not outweighed by other societal benefits—economic or otherwise—is governmental intervention allowed.

Long run structural economic factors play an important role in this context.⁶⁸ The act is not to be applied, for example, to arrangements whereby small producers cooperate with each other in order to compete more effectively with larger producers. Other factors which have been found important in this context include the potential effects of anticompetitive arrangements on the availability of medical equipment⁶⁹ and on employment in a regional labor market.⁷⁰

B. Prohibited Conduct: The Per Se Rules

The "general clause" does not apply to resale price maintenance and collusive bidding; these restraints are per se illegal. They were considered so serious that they were dealt with more harshly than other types

65. *Prop. 1956:48*, at 39.

66. *Id.*

67. *See generally Prop. 1981/82:165*, at 50-51.

68. *See, e.g., A. MARTENIUS, supra* note 26, at 97; *Prop. 1981/82:165*, at 31.

69. *N.O. v. AB Gambro, Marknadsdomstolens Avgöranden 1976-77* 89,112 (No. 1976:10).

70. *See, e.g., Prop. 1981/82:165*, at 51.

of restraints.⁷¹ Accordingly, in addition to being per se illegal, these prohibited practices are subject to separate procedural provisions. They are treated as ordinary criminal violations and are prosecuted in the regular courts by the public prosecutor (although the competition ombudsman in such cases must first recommend prosecution).

The method of analysis in such cases is one of characterization—does the conduct fit within the terms of the statute? If yes, there is a per se violation. The economic and social analysis called for under the general clause does not apply to these situations. The market court may grant special permission to violate either of these provisions, but it has seldom done so.

IV. APPLICATION AND ENFORCEMENT OF THE LAW

Swedish antitrust law is applied pursuant to a particular legal process and can be understood only in relation to that process. In Sweden competition law is not subject to the general rules and processes of the legal system. Instead, it is recognized and treated as a distinct subsystem within the Swedish legal system.⁷²

This recognition of the special character of antitrust law is related to the historical circumstances under which antitrust law was introduced into the legal system. Due to the lack of prior legal sanctions against anticompetitive behavior, the LRC was not seen as part of a continuum but rather as a sharp break with existing legal practices.⁷³ Consequently, the drafters were unwilling to criminalize violations and thereby subject violators to the processes of the ordinary courts. In this respect the situation was fundamentally different from that surrounding the creation of the antitrust laws in the United States, where antitrust law was considered to be an extension of the common law on restraints of trade.

In Sweden, competition law ideas were new and different and therefore had to be handled very carefully. It was considered politically unacceptable to penalize conduct which had always been protected by the principle of freedom of contract. In particular, the business community vigorously opposed criminalization.⁷⁴ Therefore, in order for the government to secure the cooperation of the Swedish business community, antitrust law had to be enforced by means other than criminal sanctions.

71. For a more detailed discussion of the area, see Nerep, *supra* note 6, at §§ 3.01(3)(a), 3.01(3)(b).

72. For a more detailed discussion see Nerep, *supra* note 6, ch. 4.

73. See, e.g., U. BERNITZ, *supra* note 14, at 421-22.

74. See S. HOLMBERG, *supra* note 24, at 27-31.

This required creating a legal subsystem based on a specialized conception of law. Under this subsystem, private rights of action are very limited. A government agency is primarily responsible for the application and development of antitrust principles. Moreover, adjudication of antitrust cases is in the hands of a specialized court rather than the ordinary courts.

The Swedish antitrust process is built upon the principle of negotiation, which is in turn based on the belief that publicity and public pressure will generally serve as sufficient enforcement mechanisms.⁷⁵ The theory has been that enterprises will comply with the law in order to avoid the negative publicity which would result from legal proceedings. This negotiation-based system is supported by a widely accepted belief that such a system allows more flexibility and is more likely to achieve compliance and secure the necessary cooperation of the business community than would a system of prohibitions and penal sanctions.⁷⁶

The effectiveness of this system depends on the relationship between the process of applying the statute and the structure of the statute itself. The drafters did not seek to fit new legal principles into an existing system or to use a new process to apply rules developed in another procedural context. The legal structure and the process of application were created simultaneously as part of the same system and with the same objectives.⁷⁷ This fact is central to an understanding of the Swedish system. The relationship between the structure of the law and the process created to apply it can best be understood by looking at the major institutions responsible for applying these provisions.

A. The Role of Legislative Commissions

For major legislative measures the Swedish government generally appoints an independent public commission to investigate a particular problem and, often, to recommend legislation. These commissions are generally composed of both experts in the relevant area and politicians. There has traditionally been a significant effort to keep these commissions nonpartisan.

75. See, e.g., SOU 1951:27, at 492-7.

76. See S. HOLMBERG, *supra* note 24, at 58-67.

77. "Application" refers to the process by which the law is used in the legal process. United States usage would be likely to speak of "enforcement" of the law in referring to this process. The term "apply" more accurately reflects, however, the statute-oriented approach to the law which is common in civil-law countries (e.g., the German "Rechtsanwendung"), and it is a literal translation of the Swedish term, "rättstillämpning," which is generally used in this context in Sweden.

A commission investigates the designated problem and issues a book length report known as an "SOU"⁷⁸ which generally contains an expert analysis, a comparative survey of the treatment of the problem in other selected countries, the commission's recommendations and, often, proposed legislation. The SOU is then submitted to the government, which generally holds hearings and asks for comments from interested parties. The final step in the legislative process is for the government to decide on a particular course of action, generally issuing a full report (the "legislative proposition") which summarizes the entire legislative procedure, including the hearings and comments, and suggests recommendations for legislation. Because of the authority of the legislative commissions, the SOU's generally have a significant impact on the relevant legislative propositions.⁷⁹ Although political factors may force the government to modify the recommendations of the commission or abandon them altogether, the commission's analysis of the problems discussed is often treated as authoritative.

Legislative commissions have played a major role in the development and application of Swedish antitrust law. A legislative commission drafted the LRC, and most of the changes brought about by the Competition Act of 1982 were analyzed and recommended by a subsequent legislative commission. The SOU's written by these commissions thus contain extensive material describing the problems perceived by them and the ways in which particular legislative proposals were intended to apply to these problems. The importance of these commissions lies primarily in the fact that their findings are accorded great weight in decisions of the competition ombudsman and the market court.

B. The Role of the Competition Ombudsman

The legislature placed primary responsibility for enforcement of the antitrust laws on a newly established governmental office called the Office of the Competition Ombudsman.⁸⁰ The functions of this office have

78. "Statens offentliga utredningar," which means literally "the state's public investigations."

79. See generally J. SUNDBERG, *FRON EDDAN TO EKELÖF* (1978), where it is suggested that legislative commissions may have too much importance in the process of applying Swedish statutes.

80. The Swedish term is "Näringsfrihetsombudsman," which means literally "ombudsman for business freedom." The term refers to both the individual who is the ombudsman and the semi-independent government agency which that individual heads. The office of the ombudsman was originally designed in Sweden in the eighteenth century in order to oversee the actions of state officials. See generally Jägersköld, *The Swedish Ombudsman*, 109 U. PA. L. REV. 1077 (1961).

not changed over the years, although the size of the office—as well as its budget—have been increased.⁸¹

1. Composition of the Office of the Competition Ombudsman

The composition of this government office is of particular importance.⁸² The staff is quite small, consisting of less than fifty full-time staff members. The ombudsman must be qualified to be a judge, but the statute establishes no other qualifications for officials in the office. In fact, the office tends to have more economists than lawyers in leading positions. The predominance of economists in the ombudsman's office reflects a belief that antitrust law is supposed to avoid narrow legalism and be administered in a practical and flexible manner. Antitrust law has not been seen as law in the traditional sense, and the extensive use of economists in its administration reflects this fact.

The large number of economists in the Office of the Ombudsman affects the way in which the office functions. The opinions of the ombudsman, for example, tend to avoid citation of precedent and generally minimize traditional civil law legal analysis. This is due in part to the conceptual structure of the law, which focuses on the determination of harmful effects rather than on their characterization.

The attendant flexibility of the Swedish approach is generally considered to be a positive attribute of the system. Flexibility, however, is recognized as having negative consequences as well. A flexible approach reduces consistency and inhibits the development of principles of construction which a greater concern for precedent and legal analysis may be expected to produce.

Another important factor in this context is the central role of negotiation and informal pressure in securing compliance with the law. Business economists are expected to be better at understanding business problems and better at negotiating with businesspersons than lawyers would be. Moreover, because of their educational and other ties to the business community, such officials can be expected to maximize informal compliance pressure.

2. The Investigation Function

The Office of the Ombudsman is the institutional center of the anti-trust system. Legal proceedings must start there, and they generally end there. Enforcement of the competition law is almost entirely in the

81. See S. HOLMBERG, *supra* note 24, at 38-40.

82. For a description of the office and its activities, see Nerep, *supra* note 6, at § 4.01(2).

hands of the ombudsman, and legal steps can generally be taken only by the ombudsman. Technically, an aggrieved party may take his or her case directly to the market court if the ombudsman refuses to do so, but this has seldom been done.⁸³ The antitrust system is thus a closed system where access to enforcement of the law is through the Office of the Ombudsman.

Many investigations by the office begin as a result of private complaints, usually from injured parties.⁸⁴ The office generally undertakes an independent investigation of such complaints. If it believes that a violation is occurring, it will contact the offending companies in an effort to end the practice.

The Office of the Ombudsman also commences investigations on the basis of information from other formal and informal sources. A key source is the Price and Cartel Office.⁸⁵ This office is a separate governmental unit comprised largely of economists which carries out, often in conjunction with the Office of the Ombudsman, industry-wide investigations. The results of these industry-wide investigations often reveal anticompetitive conduct and serve as the basis for action by the ombudsman. The independence and high reputation of the Price and Cartel Office make its reports important elements of evidence.

3. The Enforcement Function

The drafters of the LRC believed that the very fact that an investigation was conducted by the ombudsman's office would cause many firms to eliminate anticompetitive conduct for fear of negative publicity.⁸⁶ If, upon investigation, the ombudsman's office believes that conduct violates the statute, it negotiates with the parties involved in order to persuade them to abandon the practice. With few minor exceptions,⁸⁷ the office cannot itself order compliance with the statute, nor can it punish a firm for improper conduct which has ceased. The office attempts to convince

83. The system discourages such action by allowing an individual to proceed to the market court only where the competition ombudsman has found that the action complained of does not constitute a violation and by not providing damages to an injured party.

84. Statistics covering the activities of the competition ombudsman are published annually in *Pris och Konkurrens*. For a statistical description of the investigative function of the ombudsman's office, see S. HOLMBERG, *supra* note 24, at ch. 6.

85. See generally U. BERNITZ, *supra* note 52, at 60-61.

86. See SOU 1951:27, at 17.

87. The most significant exception is found in section 11 of the Competition Law of 1982. It had no counterpart in the LRC. According to section 11, the competition ombudsman may, in cases "which are not of major importance," order enterprises to take or refrain from taking specified actions.

the parties that it is correct in its analysis, that it would be likely to succeed at the market court and that the publicity arising from formal action at that level would be adverse. In a large proportion of the cases this process leads to abandonment of the practice at issue.⁸⁸

An enforcement system based largely on persuasive rather than compulsory mechanisms presupposes strong cultural and societal respect for administrative agencies. Its success also requires a high level of business ethics and a strong sense of cooperation within the business community. These conditions are, to a large extent, present in Sweden, and consequently compliance with the statute is generally good.⁸⁹

Only where the ombudsman's informal compliance efforts are unsuccessful is the case taken to the market court, where the ombudsman serves as prosecutor in the formal court proceedings. It is not unusual, however, for defendants to agree to end the practices involved after the case has been submitted to the market court. If this is done, the ombudsman must withdraw his complaint. For a variety of reasons, including limited financial resources, the ombudsman generally tries to avoid going to the market court except in particularly strategic cases. This reluctance may have been increased by the market court's general tendency during the 1970's to establish high requirements of proof. As a result, very few cases are heard by the market court each year.⁹⁰

In addition to carrying out these official functions, the ombudsman's office is also in constant contact with the business community, explaining its position with respect to various types of practices and informally working to assure compliance with the law. This informal procedure is seen as being of great importance to the success of the ombudsman's efforts.

4. The Law Development Function

Because most violations are eliminated at the level of the ombudsman, the office also plays a central role in the development of antitrust law. Much of the law in the area is, in effect, made by that office, which handles some four to five hundred cases per year, publishing written opinions in many of them.

A written opinion of the ombudsman is not legally binding on the office in future decisions and has no authoritative weight for the market

88. See, e.g., NO - Verksamheten 1982 (Annual Report of the Competition Ombudsman for 1982), 2 PRIS OCH KONKURRENS 48, 66 (1983) (hereinafter cited as Annual Report 1982).

89. See, e.g., Wetter, *supra* note 12, at 48; S. HOLMBERG, *supra* note 24, at 167.

90. For statistics, see Annual Report 1982, *supra* note 88, at 66. In recent years there have been, on the average, about five cases per year.

court. This now extensive body of decisions is important, however, for two main reasons. First, the Office of the Ombudsman considers itself bound to strive for consistency in application of the law, and since the ombudsman's office is the main enforcement institution, its previous opinions provide the best guide to its likely future actions. Second, the fact that there are few market court decisions means that in many cases the ombudsman's opinions represent the only authoritative interpretation of the statute.

The Office of the Ombudsman considers itself bound by decisions of the market court, and it appears to follow the authority of those decisions. Nevertheless, it seldom cites market court opinions. It generally refers for authoritative guidance only to the legislative history, in part, one suspects, because the economists on the staff are opposed to too much legalism.

C. The Role of the Market Court

The third central institution of the Swedish antitrust system is the market court.⁹¹ It is composed of a president and a vice-president, both of whom must be qualified to be judges in the regular court system. The other members of the court generally are not lawyers. Among these other members there must be at least three "experts" (in competition cases two of them must be professional economists) as well as three consumer and labor representatives and three representatives of industry.

The market court has two main functions. First, it determines through trial proceedings whether there has been a violation of the statute. If it finds such a violation, it negotiates with the parties through "negotiation proceedings" to eliminate the unlawful activity.

Proceedings before the court in the trial phase are formal and adversarial, with the ombudsman acting as prosecutor. The rules of procedure applicable to market court proceedings are, however, more flexible than the rules applicable to proceedings before the ordinary courts. Upon reaching a decision, the court issues an often lengthy written opinion which in form is similar to the opinions of the regular courts.

If the court determines that there has been a violation, it proceeds to the negotiation phase. At this phase the court, or in some cases its president alone, meets with the parties and attempts to work out a solution to the problem. Until the passage of the Competition Act, the court had

91. This court was originally responsible only for cases involving the LRC. In 1971 it was reorganized and acquired jurisdiction over cases brought by the then newly created consumer ombudsman. For a general description of the court, see U. BERNITZ, *supra* note 52, at 20-23.

very limited power to force compliance with its decisions. Although the court had generally secured compliance even without compulsory tools, the legislature considered that the court's negotiating position would be improved if it had more extensive sanctioning power. It therefore gave the court important additional power to issue injunctions and levy fines.⁹² In general, however, this power is used only where negotiations have proved unsuccessful.

The market court is specifically charged with a law-creating role. Its function is not only to resolve conflicts, but also to create precedent which will give further definition to the law. Nevertheless, the court has been hesitant to act too much like an ordinary court.⁹³ For example, the court generally does not cite either prior cases or scholarly commentaries in its opinions, and it relies for authority almost exclusively on the legislative history of the statute. The market court is thus left in a difficult position, for it is supposed to fulfill the guidance-providing role of a court and yet minimize the use of legal techniques in its operations.

These three institutions (the legislative commissions, the competition ombudsman and the market court) function together as part of a cohesive process. All have well-developed roles which are intentionally integrated and serve a common set of goals. Moreover, the law which they apply is specifically designed for utilization by such institutions.

The legislative commissions provide authoritative guidelines for interpretation of the statute and thus serve to clarify the law. The existence of these guidelines also reduces political and practical pressures on the ombudsman and the market court in conjunction with the application of the law.

The competition ombudsman is given virtually sole access to the market court, thus allowing him to largely control the development of the law and the implementation of enforcement policy. The ombudsman's office has the legal competence to ensure that it functions in a principled, quasi-judicial manner capable of developing consistency and maintaining respect for the law. It also has the functional economic competence to enable it to effectively interpret the economic processes with which it must deal, carry out the required negotiations with the business community and exert the informal enforcement pressure necessary to ensure compliance without sacrificing the cooperative basis of the system.

92. These powers are summarized in Nerep, *supra* note 6, at § 4.01(3)(b).

93. For comments of the former Chief Judge of the market court on this function, see Westerlind, *Tio Ars Praxis i Marknadsdomstolen — Erfarenheter och Värderingar*, SVENSK JURIST TIDNING 401 (1981).

The market court is led by lawyers trained and qualified to be judges, and therefore it is fully functional as a judicial institution. Other judges are experts in economics and thus give the court the competence to grasp and deal with the law's economic issues. Moreover, a third group of judges represents the interests of the various social groups primarily affected by the law. This third group of judges internalizes the perspectives of the groups they represent and ensures that the statute is applied in a manner which is consistent with the goals of society as a whole.

Finally, the statute is structured so that the functions of these various competences are specified and their relations defined. It contains specific legal issues and specific economic issues, and the relationship between them is kept clear. The statute asks each institution questions which the institution has the competence to understand and answer.

V. SWEDISH ANTITRUST LAW IN ACTION

The response of a legal system to a particular situation depends upon the structure of the law being applied and the process by which it is applied. This section reviews the ways in which the Swedish antitrust system has dealt with specific types of anticompetitive conduct. The practices discussed in this section are noteworthy because of their practical significance as well as because of what they reveal about the system. The cases referred to are market court decisions, which are the only decisions considered to have authoritative precedential value.

A. Horizontal Restraints

Agreements between competitors—especially cartel agreements—were among the main targets of the LRC.⁹⁴ They are not, however, considered per se illegal because it is believed that they can be justified under certain circumstances. When the antitrust legislative commission recommended in 1978 that they be forbidden, there was virtually no legislative support for such a prohibition, and cartel arrangements therefore remain subject to the general clause.⁹⁵

The competition ombudsman has attacked a large number of cartels and succeeded in eliminating many of them. As a general rule, both the ombudsman and the market court agree that such arrangements constitute violations of the Swedish antitrust law. There have, however, been a number of cases in which such agreements have been condoned. Two

94. See SOU 1951:17, at 520.

95. *Prop. 1981/82:165*, at 131-38.

decisions of the market court illustrate the analysis of this issue under Swedish law.

In *Brukens Bag Systems*⁹⁶ six domestic companies agreed to establish a joint sales corporation which would sell all paper garbage bags manufactured by them for sale in the domestic market. These six firms had a combined market share of approximately seventy-five percent, with the other twenty-five percent being held by another domestic company. The arrangements between these six enterprises constituted a cartel agreement in which production quotas were assigned and prices fixed by the competitors through the sales agency.

The market court found that the arrangement constituted a restraint of competition, but it held that none of the criteria for establishing harmful effects had been met. The court agreed that under most circumstances this type of arrangement would have an upward effect on prices and therefore would meet the price criterion. It found no evidence, however, that the arrangement had in fact increased prices. Its conclusion was based on the observation that increases in the price of paper bags had not been greater than price increases for the raw materials used.

The court then turned to the question of whether there was a substantial risk of such upward price pressure. It found that this was unlikely because there was substantial competition from another manufacturer of paper garbage bags as well as from manufacturers of plastic bags and other types of trash removal systems. The court, looking at the total economic situation, concluded that the existence of a substantial competitor and effective substitutes was sufficient to negate the price effects which would otherwise result from the cartel agreement.

The court also found that these two factors prevented the arrangement from meeting the efficiency criterion. It held that although the arrangement would normally reduce incentives to increase efficiency and reduce costs to consumers, the existence of a formidable competitor and reasonable substitutes made such a result unlikely. The cartel would continue to have sufficient incentive to improve efficiency and there would be no harmful effects. According to the court:

The market court can conclude only that the existing situation created sufficient incentive for defendant companies to hold the prices for its trash bags as low as possible, which in turn should have a corresponding effect on the desire to rationalize the enterprises. In such a situation the disadvantages which cooperation of this type bring with them relative to the efficiency of the industry cannot be seen as having suffi-

96. N.O. v. Billeruds AB, Marknadsdomstolens Avgöranden 1976-77 467 (No. 1977:15).

cient importance that the arrangement for that reason can be seen as having a harmful effect.⁹⁷

Moreover, as the court pointed out, the arrangement itself produced significant cost savings, primarily as a result of standardization and distribution efficiencies.

The court also found that the third criterion—the prevention or hindering of business activities of others—was not met because the nonparticipating competitor had actually prospered under the umbrella of the cartel. Thus, the court held, the cartel could not have hindered outside competitors.

The *Brukens Bag System* opinion exemplifies the pragmatic approach of the market court and of Swedish antitrust law in general. The court accepted the general proposition that price-fixing cartels ordinarily have harmful effects. The court carried its analysis one step further, however, and asked whether under the specific circumstances of the case such effects were to be found. The availability of substitute products and the existence of a powerful competitor outside the cartel clearly limited harmful effects. The court then noted that such a cartel may yield cost savings to society through the creation of more rational production and distribution methods. Since some cost savings resulted and there were no specific harmful effects in this particular situation, the court did not consider the cartel to be a violation of the statute.

Under United States antitrust law such a price-fixing cartel would be considered a *per se* violation because it has the purpose of raising prices and has an effect on the market relationships which determine prices.⁹⁸ A United States court would not consider the factors considered by the Swedish court. The United States approach looks at the *nature* of the conduct in *per se* cases, whereas Swedish law looks at the total effect of a restraint in a particular case.

Boras Wall Coverings,⁹⁹ a recent case which has received much attention, further exemplifies some of these issues. This case is one of the first major cases decided by the market court under the leadership of its new president, Lars Jonson. In this case, the competition ombudsman attacked, *inter alia*, a horizontal agreement to divide markets. The defendants were Boras Wall Coverings (Boras), a major manufacturer of wall coverings, and T-Konsortiet, an association of wall covering retailers which owned fifty percent of the shares of Boras. The remaining

97. *Id.* at 487.

98. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

99. *N.O. v. Borastapeter AB* (No. 1983:2) (stencil not yet published).

stock in Boras was privately owned, and there was a stockholders agreement which provided that this 50/50 relationship would be maintained.

Boras sold approximately ninety percent of its production to members of T-Konsortiet. By far its most important product was a collection of wall coverings called the Borosan Collection. T-Konsortiet's charter provided that "a member of the consortium has no right to sell Borosan to resellers outside of its territory in any area where there is another consortium member." The court found that this arrangement possessed "a nearly horizontal character" as a result of the ownership relationship between T-Konsortiet and Boras, but it clearly indicated that even if the arrangement had been viewed as vertical, the analysis would have been essentially the same.

In addressing the legality of this market division, the court looked for guidance to the legislative history of the LRC. According to the court,

The bill contained, *inter alia*, a provision that socially harmful effects would be presumed to result where cartels divided markets. This presumption was not introduced into the act, but in the legislative report on the act it was asserted that cases of this type appeared particularly likely to lead to harmful effects.¹⁰⁰

The court further relied on the analysis of such conduct contained in the 1978 legislative commission report, which stated that,

[market division] sometimes leads to indirect efficiency gains by virtue of the fact that participants achieve sales stability or by virtue of reductions in distribution costs. For example, inflationary cross transportation costs can be avoided. Such occasionally-arising efficiency gains cannot, however, be accorded great significance in considering a general prohibition of such practices. Of clearly superior importance is rather the elimination of competition for purchasers among the participants, at least where such market subdivisions include an entire market or a substantial part thereof. As a result, they acquire a protection which also protects inefficient enterprises and this in turn causes the efficient enterprises to lose their incentives for maintaining a high level of rationalization. Here there is the risk . . . that the business structures will become inefficient, at least in the long run. Such horizontal market divisions are, as a result of this, generally associated with harmful effects on economic efficiency. They can, therefore, also have a price increasing effect.¹⁰¹

100. *Id.* at 59.

101. SOU 1978:9, at 231, *quoted in* N.O. v. Borastapeter AB (No. 1983:2) at 60.

Thus the economic analysis of the legislative commission created a framework of analysis which the court specifically held to be controlling.

Defendants argued that these disadvantages were outweighed by the fact that rational production at low prices was conditioned upon having dependable sellers and that market division was necessary to make Borosan sufficiently attractive to earn the loyalty of these sellers. They argued that if this system were forbidden, rational production with low costs "would be replaced by production under uncertain sales conditions and where marketing would consume increased resources."¹⁰²

Notwithstanding defendants' argument that distribution costs would be increased, the court focused on the reduction of intrabrand competition. The court found that,

[such] competition has, as a result of the division of markets, been unable to develop where there has been only one reseller. Significant for evaluation of market divisions is that they have prevented competition between resellers in various areas and have thus had the effect of preserving the existing competitive situation. . . . This means that the industry's structure has been preserved and improvements in efficiency have been prevented. . . . Construction companies and other large buyers with nationwide activities, for example, cannot buy Borosan through a central purchasing program, which is obviously not rational.¹⁰³

The court then discussed other negative effects of the system and concluded that the justifications presented for the system "cannot outweigh the negative effects which have been established. These are therefore to be seen as against the public interest."¹⁰⁴

This portion of the case provides an example of the central role played by legislative history in the application of the statute. The court referred to the legislative commission report in identifying the problem. This report provided the basic evaluation of the fact pattern in that it determined that such arrangements were "particularly likely to lead to harmful effects."¹⁰⁵ The court also turned to the commission report for further clarification of the dimensions of the problem and elaboration of the factors to be considered in evaluating the effects of the arrangement. In short, the legislative preparation process yielded an authoritative framework for analysis of the situation.

The case also exemplifies the use of the concept of efficiency in

102. No. 1983:2 at 62.

103. *Id.* at 63.

104. *Id.*

105. *Id.* at 59.

Swedish antitrust analysis. As discussed above,¹⁰⁶ the concept of efficiency in Swedish antitrust law differs significantly from the concept of efficiency currently used in United States antitrust law. Whereas efficiency in United States antitrust law is currently a static concept of microeconomic price theory, efficiency in Swedish antitrust law is an economic process concept which asks whether private arrangements tend to preserve existing market structures.

In *Boras*, the division of markets eliminated virtually all intrabrand competition. In so doing, it eliminated important incentives for distributors to improve their services and reduce their costs. A critical element in the resulting harm was the fact that the arrangement tended to preserve existing market structures. The lack of incentives for intrabrand competition tended to "stiffen" the market and reduce the likelihood of adaptation and change in the market. A related factor was the fact that the division of markets made it impossible for national organizations to purchase on a national level. The court found that this arrangement hampered the development of the markets involved and was, therefore, inefficient within the meaning of the statute.

B. Vertical Restraints

Swedish antitrust law is also applicable to vertical restraints, *i.e.*, restraints involving more than one level in the chain of distribution. The severity of Swedish antitrust law in this area has not diminished in recent years, whereas United States antitrust law has recently become increasingly tolerant of some types of vertical restraints.¹⁰⁷ This Article reviews three types of vertical restraints which have been important concerns of Swedish antitrust law and which highlight particular characteristics of the system. These restraints are resale price maintenance, exclusive dealing and unilateral refusals to deal.

1. Resale Price Maintenance

As previously mentioned,¹⁰⁸ resale price maintenance, also called "vertical price fixing," is one of two types of restraints which are specifically forbidden under Swedish law. Resale price maintenance cases are prosecuted in the ordinary courts, which have only to determine whether resale price maintenance has actually occurred.¹⁰⁹ The courts are not

106. See *supra* text accompanying notes 56-59.

107. See, e.g., R. BORK, *supra* note 4, ch. 14.

108. See *supra* text accompanying note 71.

109. For a review of some of the case law, see Nerep, *supra* note 6, at § 2.01(3)(a).

asked to engage in economic analysis.

The case law concerning resale price maintenance has been limited. What is of interest here is the analysis which dictates statutory treatment of resale price maintenance as a per se violation. The reasons for singling out resale price maintenance for this per se treatment center on promoting efficiency and international competitiveness. According to the report of the commerce minister in 1953,

The most serious disadvantage of the resale price maintenance system is that it deters rationalization and thus potential price reductions at the retail level. This is based primarily on the fact that in this system the sales price of a good is basically determined by the retail merchant with the highest costs. In distribution the incentive is lost which is provided by free price formation.¹¹⁰

The government was concerned with the structure-preserving and thus inefficient effects of resale price maintenance.

The drafters of the LRC were particularly concerned with resale price maintenance because it had been very widely practiced in Sweden during the postwar period, especially with branded goods.¹¹¹ Resale price maintenance was, in fact, so widespread that it excluded all retail level competition in large areas of the economy. Resale price maintenance was made a per se violation in order to break this pattern and generate price reductions.¹¹² The generally harmful and inefficient effects of the system appeared clear, and there seemed to be no offsetting advantages.

This attitude has not changed. The prohibition against resale price maintenance was not even contested in the recent legislative investigation of the antitrust laws. According to Sweden's foremost antitrust expert, "[t]he prohibition against resale price maintenance constitutes the basic legal requisite for the extensive price competition which has developed throughout much of business life."¹¹³

In the United States resale price maintenance is also illegal per se, but the reasoning on which the prohibition is based differs significantly from Swedish doctrine. The basis for the United States position has been the questionable analogy between vertical price fixing and horizontal price fixing.¹¹⁴ This analogy has been strongly criticized.¹¹⁵ Under

110. *Prop. 1953:103*, at 169.

111. See U. BERNITZ, *supra* note 52, at 72.

112. A. MARTENIUS, *supra* note 26, at 65-66.

113. U. BERNITZ, *supra* note 52, at 73.

114. The leading case is *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911).

Swedish antitrust law, however, resale price maintenance is deemed inefficient because it eliminates intrabrand price competition at the retail level and freezes market structures. Such practices are particularly harmful where they involve a high percentage of the sellers in a particular market. This was the case in Sweden after World War II because price controls had facilitated widespread reliance on set prices. Today the potential for harm from resale price maintenance is associated with the phenomenon of increasing concentration, a phenomenon which is occurring in both the United States and Sweden.

2. Exclusive Dealing Arrangements

Recently, Swedish antitrust law enforcement has also focused on exclusive dealing arrangements. In general, exclusive dealing arrangements of the most common type, *i.e.*, exclusive sales agencies, have not been attacked by the ombudsman. The ombudsman's main concern has been with those areas of the economy in which small retailers are dependent upon strong sellers. Both the ombudsman and the market court have found harmful effects primarily where exclusive dealing arrangements were widespread in a given market.¹¹⁶

A leading decision on exclusive dealing is *Scan Väst*.¹¹⁷ Scan Väst (Scan) is a leading producer of meat products in western Sweden. Its legal character is that of an economic association, and it was created by the merger of several producers of certain meat products. In this case the ombudsman attacked Scan's exclusive arrangements involving "street kitchens."¹¹⁸ Three major producers in western Sweden sold to such kitchens, with Scan and one other producer each having between thirty-five and forty percent of the market, and a third producer having approximately twenty percent. Scan had a variety of arrangements for its kitchens, including arrangements by which it owned the kitchens and leased them to independent operators, and others in which it provided financing to independent owners. Such arrangements often included provisions re-

115. See, e.g., R. BORK, *supra* note 4, at 32-33, 285-91. Viewed from the price-theory perspective, resale price maintenance may in fact create distributive efficiency. According to Bork, "[w]hen a manufacturer wishes to impose resale maintenance . . . or any other restraint upon the rivalry of resellers, his motive cannot be the restriction of output and, therefore, can only be the creation of distributive efficiency." *Id.* at 289.

116. U. BERNITZ, *supra* note 52, at 83.

117. N.O. v. Scan Väst ek för (No. 1982:10), 1981 PRIS OCH KARTELLFRAGOR 82 (hereinafter cited as Scan).

118. Street kitchens are sidewalk or park stands which generally sell food products such as hamburgers and sausages. They are common in Swedish cities. The street kitchens sometimes also provide enclosed seating areas.

quiring that the kitchens buy all of their meat products from Scan. Scan operated in a geographic area in which it had approximately 600 kitchen customers and about 150 contracts containing exclusive dealing requirements.

The market court held that these arrangements eliminated a significant amount of competition. According to the court:

Through these exclusive provisions and their counterparts, purchase obligations, which other street kitchen suppliers have also secured from their customers, long-run ties have been created between suppliers with a strong market position and numerous street kitchens which must limit themselves to one supplier. . . . Competition at the supplier level is, therefore, eliminated in a significant part of the present market.¹¹⁹

As a result, these arrangements met the effects criteria.

The price criterion was met because the arrangements reduced both intrabrand and interbrand price competition. Regarding interbrand competition, the court said, “[t]he fact that competing suppliers are prevented from selling to contractually bound kitchens means that for these suppliers a sector of the direct kitchen market cannot be affected by particular means of competition, and this is intended to weaken price competition.”¹²⁰ The court also found that intrabrand price competition was prevented because the individual kitchens could not purchase at lower prices in order to compete against each other.

According to the court, this system also hindered the business of both the sellers and the kitchen owners, and thus it met the third of the effects criteria. The kitchen owners were prevented from making the most advantageous purchases and thus from operating efficiently; the suppliers lost their freedom of action by being precluded from competing for customers. Moreover, the exclusive dealing arrangement increased barriers to entry into the market.

The court also discussed the problem of “impaired development opportunities.” According to the court, “[l]imiting [the kitchens] to a particular supplier’s particular assortment also reduces their capacity to adjust to consumer demand. . . . Exclusiveness thus has an impact on the developmental opportunities of the kitchens . . . and hinders the development of assortments which are well adapted to consumer wishes.”¹²¹ The harm was again found in the reduced capacity of the

119. Scan, *supra* note 117, at 96.

120. *Id.*

121. *Id.*

market as well as of the individual enterprises to adapt and develop to meet changes in consumer demand.

When the court looked to possible justifications for this system, it found none which were of sufficient weight to counteract the system's negative effects. Scan argued that this type of arrangement was necessary for it to provide financing to many kitchens. The court found, however, that there was no indication that this financing had a positive effect on competition by improving the conditions for market entry. Scan also argued that if it were not allowed to have such provisions, it would need to open its own kitchens in order to achieve the advertising advantages made possible by exclusivity. In the court's view this would not be a sufficient basis for justifying the system, even if it were a necessary result of prohibiting exclusivity. The court emphasized that "from a general competition perspective an important principle would be violated if suppliers with a strong market position could apply anticompetitive provisions of this kind against certain customers which are dependent on them as a result of financial support or rental agreements."¹²²

3. Unilateral Refusals to Deal

Refusals to deal constitute the largest category of cases brought under Swedish antitrust law, both at the ombudsman and the market court levels.¹²³ In the United States, a unilateral refusal to deal may establish a violation of the Sherman Act¹²⁴ where it constitutes exclusionary conduct by a monopolist or would-be monopolist, or where it enforces some other anticompetitive arrangement. If, for example, a manufacturer terminates a dealer as part of a program to coerce adherence to specified prices, the refusal may be a central element in a resulting violation based on resale price maintenance.¹²⁵ The analysis is directed to the purpose behind the refusal to deal, and intent becomes an important element in the analysis.

Under Swedish law, a refusal to deal is deemed to be a restraint of competition.¹²⁶ Whether it constitutes a violation of the statute depends on its effects. As in the United States, an individual refusal to deal may constitute a violation where it is used to enforce a proscribed anticompetitive arrangement. More important for this discussion, however, are cases in which a violation is found on the basis of the *type* of enter-

122. *Id.* at 98.

123. *See* S. HOLMBERG, *supra* note 24, at 99.

124. Sherman Act, 15 U.S.C. §§ 1-7 (1976) (original version at 26 Stat. 209 (1890)).

125. *See, e.g.*, *United States v. Parke-Davis & Co.* 362 U.S. 29 (1960).

126. For a discussion of cases in this area, see Nerep *supra* note 6, at § 3.02(2)(c).

prise to which delivery is refused. In such cases the question of intent is eliminated. If delivery is refused to an enterprise which has certain characteristics, the refusal itself may be deemed to bring about the harmful effects. A refusal to deal will, for example, generally have the requisite harmful effects where the refused enterprise represents a particular distribution form.¹²⁷ The theory is that such a refusal is likely to inhibit economic efficiency within the industry. This occurs, for example, where a manufacturer refuses to sell to a low-price or discount retailer or chain. According to the legislative history, a refusal to deal with discount retailers is particularly likely to lead to harmful effects.¹²⁸

This idea was developed in the *Sundsvall* case.¹²⁹ In that case a self-service supermarket attempted to enter the market in a Swedish city in which traditional family-owned grocery stores had not yet been replaced by more modern retail stores. The local wholesalers refused to make deliveries to the self-service market. Although the wholesalers claimed that their refusals were based on lack of confidence in the new supermarket and its president, a major reason for the refusal appeared to be pressure from existing retail outlets which feared the new competition. There was, however, no indication that these competitors were acting in concert.

The court turned for guidance to the legislative history of the LRC, which stated that refusals to deal based on the form or type of enterprise were likely to have harmful effects. According to the court,

Such a discrimination is particularly objectionable in our view when it is designed to hinder types of enterprises which attempt to use new methods or which show the desire to compete actively, price competition being included. Such a discrimination would, if it were successful, contribute in an unfortunate way to conserving existing forms and methods of business and impeding the rationalization of business structures. This becomes harmful from an economic standpoint. . . . It is in the nature of competition that varieties of distribution forms must be tested and be allowed to show what they can accomplish.¹³⁰

The court held that the refusal to deal with the self-service market was a violation of the LRC because the refusal impeded change and adaptation in the industry. The court also suggested that such refusals could rarely be justified.

127. For a review of such cases, see SOU 1978:9, at 113-117.

128. *Prop. 1953:103*, at 179.

129. *N. O. v. Vissa Partihandelsföretag med Försäljning av Kolonialvaror och Djupfrysta Varor i Sundsvallområdet*, Näringsfrihetsrådets Beslut 1954-1963 298 (No. 1958:14).

130. *Id.* at 291.

A 1983 case involving a Swedish subsidiary of a foreign corporation provides a modern example of this type of analysis. The case was brought by the competition ombudsman against the Swedish representative of the makers of Certina watches for refusing to sell Certina watches to Ur and Penn, a leading discount seller of watches with approximately thirty percent of the Swedish watch market.¹³¹

The high-priced watch market in Sweden is dominated by Seiko, Certina and Citizen. Ur and Penn had had an exclusive right to sell Seiko watches in Sweden for many years when, in 1979, Seiko established its own subsidiary in Sweden. Seiko's management then decided to increase the prices for its watches by selling not only to Ur and Penn but also to the traditional jewelry stores, which generally sold at higher prices. In response, Ur and Penn sought to reduce its dependence on Seiko by seeking to sell Certina and Citizen watches as well as Seiko watches. Max Huttner, the general agent for the Swiss manufacturer of Certina, refused to sell to Ur and Penn.

The market court held that this refusal had a direct price-increasing effect because it reduced Ur and Penn's ability to use price as a method of competition. According to the court,

The traditional retail stores now have the possibility of selling the dominant brand names in this specialized portion of the market, while Ur and Penn has only Seiko. Against this background it can be asserted that Ur and Penn no longer has the opportunity to compete with the traditional stores on the same terms. What has been presented here indicates in our view that Ur and Penn's ability to use price as a method of competition in this situation may have been reduced.¹³²

The court recited the legislative history suggesting that refusals to deal that are directed at specific types of enterprises are likely to cause harmful effects and concluded that this had occurred here.

The court also found that such refusals hampered efficiency in business and therefore met the second of the harmful effects criteria. It reviewed the factors which allowed Ur and Penn to sell at prices lower than those of its competitors. These included, primarily, economies of scale in warehousing and distribution and buying power resulting from its size. It concluded that the refusal to deal had a negative effect on business efficiency because it meant that Ur and Penn's "rational structure and cost savings cannot be fully exploited in the consumer's

131. N.O. v. Max Huttner AB (No. 1983:4) (stencil not yet published).

132. *Id.* at 19.

interests."¹³³

Certina argued that this refusal to sell was based on the fact that Ur and Penn did not maintain the level of service available in traditional jewelry stores. The court found that the levels of service at Ur and Penn were generally lower but nevertheless generally acceptable to customers. From this the court concluded that the negative effects of the restraint on competition were not outweighed by their societal benefits.

VI. CONCLUDING COMPARATIVE PERSPECTIVES

The Swedish experience with antitrust law has been influenced by many factors, including the size and international economic relations of the country, its political system and its legal and business cultures. The result is an antitrust system which is unique and which provides valuable insights into the phenomenon of antitrust laws. A comparison of elements of the Swedish system with the vastly dissimilar United States antitrust system provides additional insights into both systems.

A. The Goals of Antitrust Law

In both Sweden and the United States, the basic goals of antitrust law relate to protecting the competitive process from distortion through restraints on competition. Notwithstanding this basic similarity in objective, there are significant differences between the two systems with regard to the status and role of these goals in the legal system, and the relationship between stated goals and their implementation.

In Sweden the goals of antitrust law are explicit. They have been carefully formulated in the process of preparing antitrust legislation, and the formulations are based on widespread agreement between political and industrial interests. Antitrust law is accepted as an instrument of economic policy, the main thrust of which is to foster economic development.

Moreover, the goals of Swedish antitrust law are anchored in the process by which the law is applied. They are reflected in the structure of the antitrust statutes, and, because legislative history plays a key role in the process of applying the statute, they serve as guides to the handling of particular cases and the development of legal principles. The Swedish experience illustrates the systemic benefits of having a clearly articulated set of goals and a statute which reflects and orders those goals. This

133. *Id.*

clear articulation of goals provides valuable guidelines for interpretation of the statute.

In contrast, the goals and values of United States antitrust law are often unclear. In fact, controversy surrounding antitrust law in the United States in recent years has centered largely around what the goals of antitrust law should be. Antitrust case law reflects a broad spectrum of political and economic goals in which there is little order or structure. As a result, important areas of antitrust law have become confusing and inconsistent. Consequently, influential critics such as Judge Robert Bork have vigorously argued that the only proper goal of antitrust law is consumer welfare.¹³⁴ Other leading experts argue, however, that antitrust law must continue to seek greater consistency while taking into account political and social goals and values as well as economic objectives other than the maximization of short run consumer welfare.¹³⁵

An important reason for this controversy is that in the United States there exists no mechanism which requires or even encourages the careful formulation of goals. Explicit and authoritative review of the goals of antitrust law can be achieved only through legislation, but there have been no major changes in United States antitrust statutes since the Clayton Act was passed in 1914.¹³⁶ Moreover, the central antitrust statute, the Sherman Act,¹³⁷ was passed almost a century ago, and its legislative history has ceased to have much relevance.¹³⁸

The recent controversy ignited by the economics-in-law movement has rekindled interest in the goals of antitrust. A central argument of the so-called "Chicago school" is that the exclusive goal of antitrust law must be consumer welfare as defined by neoclassical price theory, for it is only in this way that the United States can have a rational, *i.e.* consistent, antitrust policy.¹³⁹ The Chicago school argues that the existing multi-valued system necessarily produces confusing and inconsistent case law.¹⁴⁰ The argument rests, however, on the assumption that courts

134. See R. BORK, *supra* note 4.

135. See, e.g., Fox, *supra* note 4; Pitofsky, *supra* note 4; Sullivan, *supra* note 4.

136. Clayton Act, 15 U.S.C. §§ 12-27 (1976) (original version at 38 Stat. 730 (1914)).

137. Sherman Act, 15 U.S.C. §§ 1-7 (1976) (original version at 26 Stat. 209 (1890)).

138. The legislative history of the Sherman Act discusses the goals of antitrust in relation to specific economic problems and a particular legal context. Both the specific economic problems and the legal context have changed greatly since the Sherman Act was passed. Moreover, the legislative history has been studied by courts and commentators who have reached vastly differing conclusions about its contents. See, e.g., Fox, *supra* note 4, at 1152-55.

139. See, e.g., R. POSNER, *supra* note 2, ch. 9. The "Chicago School" is discussed by one of its leading proponents in Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

140. R. BORK, *supra* note 4, at ch. 3.

must remain solely responsible for the development of antitrust law. The underlying notion is that the goals of antitrust law must be simplified because courts are unable to achieve a reasonable conceptual structure in a multi-goal context. There is, however, no apparent reason why clear goals and an effective conceptual structure cannot be developed elsewhere within the system, as, for example, by Congress or by an independent commission.

B. The Processes of Antitrust Law

A comparison of the process of applying antitrust law in the two countries suggests two very different conceptions of the nature of antitrust law. Sweden treats antitrust as a separate and unique kind of law, subject to its own rules and administered by special legal institutions. It views antitrust law as a legal subsystem in which the institutions applying the law perform functions for which those institutions are designed. The traditional legal functions of characterization, statutory construction and balancing of interests have well-defined roles, as does the economic analysis function. Institutions within the system have traditional legal competence, but they also incorporate the competence to perform the required economic analysis. The conceptual structure which is applied, and the process by which it is applied, function together as a system.

In the United States, in contrast, there is little coordination of the different components of the antitrust system. Antitrust law is treated like any other law. It is applied primarily by the ordinary courts, and the basic analytical method used is the traditional judicial tool of "reasoning by analogy." Analogical reasoning has tended, however, to function poorly in the antitrust context due to the extraordinary complexity of many antitrust cases. Moreover, the ordinary courts admittedly have only limited competence to engage in the economic analysis which is often required.¹⁴¹ Thus from a systemic perspective, the institutions and processes used to apply antitrust law in the United States may be inadequate or inappropriate for certain of the tasks assigned to them.

C. The Role of Economics

The importance of systemic considerations is particularly evident with respect to the role of economics. In both Sweden and the United States, economic analysis plays a central role in antitrust law. Yet that role differs significantly in the two systems, as does the content of the respective analyses.

141. See, e.g., *U.S. v. Topco Associates*, 405 U.S. 596, 609 (1972).

In Sweden the roles of economics are clearly defined. The effects criteria are at the center of the statutory structure; a restraint may constitute a violation only where it causes specific economic effects. The primary role of economics is to determine whether it has done so or is likely to do so. Since economics is a science the primary function of which is to identify and predict the economic consequences of behavior, the law thus poses questions which economic analysis is designed to answer.

The same is true with regard to the second role which economics plays in Swedish antitrust law. If harmful effects are established, there is the further issue of whether societal benefits flowing from the restraint outweigh these effects. Although a variety of factors may be considered here, most of those which have been accorded weight by the ombudsman and the market court have been economic. The primary consideration has been the identification and evaluation of the long run economic effects of the competitive restraints. Again, economic analysis is designed to perform the task which the law has assigned it.

Moreover, economic analysis is built into the process in operational terms. Economists participating in legislative commissions identify basic patterns of cause and effect and establish these patterns as guideposts for analysis. The adaptational issues to which the statute is primarily addressed are identified and their likely applications to particular contexts are clarified. Thus economic analysis on a principled and generalized level is integrated into the legal mechanism. Moreover, economists are part of both the market court and the Office of the Ombudsman, thereby incorporating economic competence into the institutions applying the law.

Defining the role of economics also determines the types of economic analysis to be applied in particular cases. The price criterion, for example, requires macroeconomic price theory analysis, whereas the public interest criterion may involve long term structural development analysis. Though there may be differences in the way individual economists analyze the specifics of a given case, the general *type* of analysis to be applied follows from the nature of the effects to be analyzed.

In contrast, the role of economics in United States antitrust law is often unclear. There is no clearly identifiable role for economics in the statutes; economic competence is not incorporated into the institutions which must apply the law; and there is little guidance as to what kind of economic analysis to apply in any given situation.

United States antitrust statutes provide no explicit role for economic analysis. The Sherman Act states, for example, that restraints of trade are illegal, but the term "restraint of trade" can be defined only by refer-

ence to case law developments. Following common law tradition, the issue is thus whether a set of facts fits within categories developed by judicial reasoning. The analytical process involved is the traditional legal process of characterization. The development of a rule of reason requires that a court look at all factors surrounding a restraint to determine whether there has been a substantial anticompetitive effect. This indirectly introduces economic issues into the decision. The decisional criterion is, however, whether a restraint is "anticompetitive," and, except in relation to certain horizontal restraints, attempts to relate that concept to economic analysis have been strained.¹⁴²

Therefore, the questions posed by United States antitrust law are often questions which economic analysis is not designed to answer. The required analysis remains one of characterization and analogy in which economics plays an indirect and often uncertain role.

There is also a lack of clarity regarding the *kind* of economic analysis to be applied in United States antitrust law. Where the law asks whether a restraint is likely to increase prices, an economist knows to turn to microeconomic price theory. Where the law asks whether a restraint is anticompetitive, the role of economics is unclear, because the question involves a legal rather than an economic concept.

Finally, the effectiveness of economic analysis under the United States system is impeded by the fact that economic competence is incorporated to only a limited extent in the institutions which apply the antitrust laws. The ordinary courts have primary responsibility for developing antitrust law. Yet individual judges, not to mention juries, are unlikely to have economic competence, and the system provides little authoritative guidance with respect to the application of economic principles in the antitrust context.

A comparison of the Swedish and United States antitrust systems suggests that the role of economics is a critical factor in the effective operation of such systems. It also suggests that assigning economic analysis a clear analytical role may be important to achieving overall analytical clarity in antitrust systems.

142. Professor Bork, after reviewing several definitions of "competition" which are sometimes used by the courts, argues for the following definition largely on the grounds of economic rationality and consistency of application:

[Competition is] . . . a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree. Conversely, "monopoly" and "restraint of trade" would be terms of art for situations in which consumer welfare could be so improved. . . .

R. BORK, *supra* note 4, at 61.

