

SWEDISH NATIONAL REPORT – LIDC CONGRESS KIEV 2013

QUESTION A) THE GROCERY RETAIL MARKET: IS ANTITRUST EFFICIENTLY HANDLING THIS MARKET?

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ECONOMIC BACKGROUND

1 The national market structure in Sweden

The retail grocery sector in Sweden can be categorised as an oligopoly comprising of four major retail chains. The four major players ICA, COOP, Axfood and Bergendahls dominate the market and ICA is the strongest incumbent retailer and has increased its market share over the last 15 years. The three biggest retail chains have increased their joint market share from 60 to 80 per cent between 1997 and 2007. A recent study conducted in Sweden shows² that the margins or prices are no different at any level of the distribution chain in comparison to other countries in Europe on average.

There are significant economies of scale in the food processing industry, although there are about 3 000 companies in the food processing industry. Some 1 300 companies of those are self-employed sole proprietorships and 650 companies have less than 10 employees. The Swedish Food industry is therefore still quite concentrated as the bigger companies account for most the sales in that level of the distribution chain. As a result, the suppliers are quite concentrated as well as retailers. There appears to be a balance of selling and buying power in middle of the distribution chain between suppliers and retailers. The introduction of private labels have increased the retailer's bargaining power vis-à-vis the suppliers. Farmers are generally small companies however organised in a primary agricultural associations in their roles as suppliers to the food industry.

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² Regarding this question – see the Swedish Competition Authority (Konkurrensverket, KKV), report *Mat och marknad – från bonde till bord*, Rapport 2011:3, April 2011.

Prices are most commonly negotiated by centralised negotiations between retail chains and suppliers and the price to end consumers appears to be most determined by the state of competition between retailers.

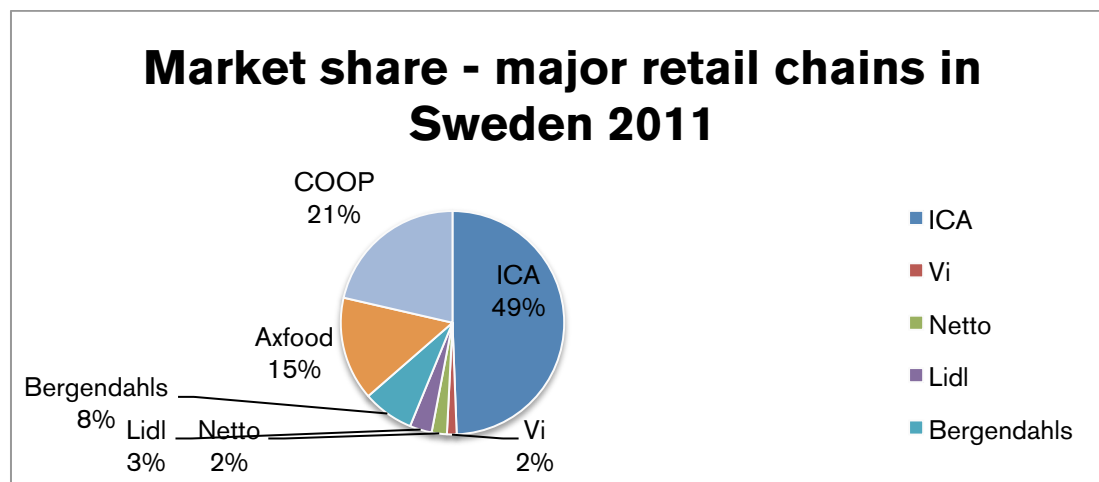


Figure 1. Market shares of the retail grocery chains in Sweden 2011, Source: DI Dimension Nr 4, May 2013.

LEGAL BACKGROUND

2 The scope of competition law with respect to the grocery sector in Sweden.

There are currently no specific competition regulations in place in Sweden for the grocery retail sector. Generally, the industry is to date subject to the general competition rules enshrined in the Swedish 2008 Competition Act (SFS 2008:579) and its EU counterparts. These national Swedish Rules on competition are essentially equivalent to the provisions of Article 101 and 102 TFEU, save for the criterion of affecting trade between Member States. The Swedish Competition Authority, Konkurrensverket (KKV), as well as private parties, are entrusted to apply Articles 101 and 102 TFEU when applicable in national litigation.

Unfair competition is, however, considered under Swedish law to be a broader concept and in a wider interpretation of the term would encompass several other legislative instruments directly or indirectly addressing the conditions of competition in different industries. Alongside the Competition Act, the Marketing Practices Act (2008:486) deals with misleading, aggressive and unfair marketing practices, which arguably are important issues when taking a broader view on the market conditions and behaviour of undertakings. Rules on fair competition is essentially a

long-standing tradition in Sweden and in this field there is currently a comprehensive bundle of rules aimed at unfair practices and consumer protection.³

3 Provisions specifically aimed at the retail market in Swedish Competition law

There are currently no specific provisions applicable to the retail market regarding competition law. Previously, however, Sweden had a national block exemption for voluntary chains of retailers⁴, i.e. chain stores made up from independent retailers under common brand name, as opposed to corporate chains. Agreements or practices establishing the latter would normally escape the application of competition law, as such retailers normally are within the same economic unit, whereas Article 101 TFEU could catch the former.

The old national block exemption was targeted at smaller chains holding up to 20 per cent market share, whereby joint purchasing and marketing, co-operation on the determination of prices in the common marketing, common accounting and calculation standards, exclusivity on purchased goods and co-operation regarding establishments, financial and administrative services for stores and staff development were exempted from the application of the Swedish 1993 Competition Act.⁵ The Ordinance also exempted horizontal co-operation on prices and accounting and calculation standards for chains holding between 20 to 35 per cent in market shares. Special rules were also applicable for the calculation of market shares.

The ordinance had no counterpart in EU-law and was not enacted on the basis of long-standing experience that lay behind the Commission's block exemption regulations. Instead, and in hindsight, it could be viewed as a practical way by the legislator to cope with the state of play in the Swedish retail sector, which indeed was made up from many of such voluntary chain stores at a time when a dramatic change in Swedish competition law occurred and entirely new principles were introduced. The ordinance was limited in time and should expire on July 1st, 2001. Another motivation behind the ordinance was the on-going work in the EU on group exemp-

³ Amongst the most relevant legislative measure could be mentioned the Distance and Doorstep Sales Act (SFS 2005:59), The Consumer Contract Terms Act (SFS 1994:1512), The E-sales Act (SFS 2002:562), the Consumers' Credit Act (SFS 2010:1846), The Consumers' Sales Act (SFS 1990:932), The Consumers' Services Act (SFS 1985:716), The Act on dangerous imitations of products that look like foodstuffs (SFS 1992:1328), The Price Indication Act (SFS 2004:347) and the Product Safety Act (SFS 2004:451).

⁴ Government Ordinance (SFS 1993:80) on exemption according to Section 17 of the Competition Act (SFS 1993:20) for retail chains.

⁵ The current 2008 Competition Act that replaced the 1993 Act significantly updated the procedural aspects and remedies available. However the rules related to anti-competitive agreements and abuse of dominance have remained the same over the years.

tions and that the Government, at that time, needed to clarify for undertakings the rules of game in the market place.

The national block exemption regulation received severe critique on grounds that the market share calculation deviated from established practice within EU Competition law; that the exemption itself was an anomaly in relation to then EU law; and that the exemption could be questioned from a constitutional point of view.⁶

In a report from 2000, the KKV held that a national block exemption ordinance on horizontal co-operation in the retail sector might run afoul of EU-rules, as it could entail a more favourable approach to individual exemptions than what followed from EU rules and case law. From a harmonization point of view, this was consequently deemed potentially contrary to EU law. Equally important, the KKV held that the concentration level in the Swedish retail industry was quite high and the Ordinance could prove counterproductive to enhance efficiency in the retail sector, strengthen even further the power of larger players and restrict competition. Therefore, the KKV advocated that the ordinance should not be extended and instead let it expire.

At the same time, the 2000 vertical agreement block exemption regulation entered into force⁷ and the block exemption regulations for certain horizontal agreements were under way.⁸ Based upon the apparent overlapping regulation that would this would result in, the Swedish Government found that that the Ordinance should be let to expire, leaving the retail sector subject to general competition rules.

4 Has Sweden enacted specific laws (uniquely or primarily) aimed at controlling the structure of the grocery retail market or the behaviour of large-scale grocery retailers outside of competition law?

Apart from the old national block exemption ordinance, which was applicable not only to the grocery retail sector, but voluntary chain stores in general, there has been no sector specific

⁶ See Wahl, N., *Rättsutlåtande rörande gruppundantagen för kedjor i detaljhandeln*, Konkurrensverkets rapportserie 1997:1, Wahl, N., *Application of Competition Rules in Sweden – The Swedish Competition Act and National Application of Community Competition Rules*, ERT 1999, p. 16. See also Wahl, N., *Gruppundantaget för kedjor i detaljhandeln* in *Märkbara småföretag och konkurrens*, 2000 pp. 101 and Bernitz, U., *Konkurrensrätten på dagligvarumarknaden*, ERT 2004, p. 239.

⁷ Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, p. 21–25.

⁸ Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ L 335, 18.12.2010, p. 36–42 and Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 335, 18.12.2010, p. 43–47.

legislation for the grocery retail sector. The question does, however, also relate to the necessity to prevent inflationary pressure of grocery retail prices. In that regard the Price Regulation Act (SFS 1989:978) is still in force and applies to goods and services supplied in return for payment as well as renting of residential apartments and commercial premises.

It was originally passed as part of legislative instruments to cope with macroeconomic challenges during and after World War II, whereby rationing and the interest to control escalation of prices as a result of shortages of supply were of prime interest. Following the oil crisis in the early 1970s and the 1980s the act was used quite frequently, mirroring the macroeconomic policy of that time. Essentially the act provided for the possibility of introducing maximum prices or to freeze price. Experience showed, however, that it was a blunt instrument that merely dealt with the symptoms of an underlying macroeconomic problem and the price regulation activities decreased significantly at the end of the 1980s to come a complete stop during the change in overall economic policies in the beginning of the 1990s. The introduction of the EC-based 1993 Competition Act marked the definite ending of the general retail price regulation activities in Sweden.

A Commission of inquiry on rationing and price regulation, which was chaired by this reporter, proposed in 2009 that the price regulation act should be repealed altogether and that such actions should be reserved to a complement to rationing, however no active steps have been taken in that direction yet.⁹

5 Is the retail grocery sector exempted in part or in full from competition law?

No, competition law is fully applicable to the retail grocery sector and subject to both national provisions on competition as well as the EU counterparts.

ADVOCACY

6 Has the competition authority of your country done market studies (or made sector enquiries) of the retail grocery sector?

Yes, following an assignment by the Swedish Government to assess the conditions of different levels of the distribution chain in the food sector, the KKV published in 2011 a comprehensive

⁹ Swedish Government Official Reports SOU 2009:3, Ransonerings och prisreglering i krig och fred – delbetänkande av utredningen om översyn av ransoneringslagen och prisregleringslagen and SOU 2009:69, En ny ransonerings- och prisregleringslag – slutbetänkande av utredningen om översyn av ransoneringslagen och prisregleringslagen.

study of the groceries sector, concerning not only the retail level, but also the whole distribution chain from farmers/growers to end consumers.¹⁰

Apart from this general assessment, the KKV has a permanent assignment to supervise and report twice a year to the Commission the retail monopoly for alcoholic beverages regarding its non-discriminatory function. This assignment stems from the accession treaty to the EU. Such goods are not, at least from a Swedish viewpoint, treated as foodstuffs in general and these reports are therefore forthwith treated as outside the scope of this national report.¹¹

In 2009, the KKV published a report on the state of competition in the grocery retail sector, which was authored by Copenhagen Economics. The assignment was to use qualitative and quantitative methods to describe the underlying factors that affect the price level of foodstuffs in Sweden in comparison to other countries in Europe.¹²

The competition authorities of the Nordic countries published jointly in 2005 the results and findings of a working group. The group was assigned with the task to identify, analyse and propose solutions to the competition problems in the Nordic food markets and provide recommendations on how to promote and ensure a competitive Nordic food market.¹³

An overview of the Swedish grocery retail industry was published by the KKV in 2004. The report provided a contemporary description of the grocery sector and proposals for changes in the legislation.¹⁴

The Swedish government assigned the KKV to conduct an in-depth investigation into the competition conditions in the retail grocery sector in 2002 and to analyse the price levels in comparison to other countries. The assignment resulted in two reports.¹⁵

¹⁰ The main findings of the inquiry was published in the KKV report *Mat och marknad – från bonde till bord*, Rapport 2011:3. There were several underlying reports to the KKV findings; Olofdotter, K., Gullstrand, J., Karantininis, K., *Konkurrens och makt i den svenska livsmedelskedjan*, Agrifood Economics Centre, 2011, Berg-Andersson, B., Rantala, O., *Konkurrenstryckets och konkurrenskraftens inverkan på livsmedelskedjans prisbildning – Sverige i internationell jämförelse*, Näringslivets Forskningsinstitut Finland, 2011, Nilsson, J., *De lantbrukskooperativa företagens betydelse för konkurrensen inom livsmedelskedjan*, Agrifood Economics Centre, 2011, Jörgensen, C., *Lokalisering och konkurrens i dagligvaruhandeln*, Agrifood Economics Centre, 2011, Persson, M., *Pristransmission inom den svenska livsmedelskedjan*, Agrifood Economics Centre, 2011.

¹¹ Cf. case C-189/95, *Criminal proceedings against Harry Franzén*, ECR [1997], s. I-5909.

¹² Ballebye Okholm, H., *Konkurrensen på dagligvarumarknaden*, Copenhagen Economics, Uppdragsforskning 2009:2, 2009.

¹³ Fællessekretariatet for Konkurrencenævnet & Grønlands Forbrugerråd, Konkurrencestyrelsen, Konkurrenceverket, Konkurransetilsynet, Samkeppniseftirlitið, Kilpailuvirasto and Kappingarráðið, *Nordic Food Markets – a taste for competition*, Report for the Nordic competition authorities, No. 1/2005.

¹⁴ Lundvall, K., *Konsumenterna, matpriserna och konkurrensen*, Konkurrenceverket rapportserie 2004:2, June 2004.

Based upon statistics from Eurostat that Swedish food prices were in the region of 20–25 per cent higher than the EU average price level for groceries, the KKV published a study in 2001 that dealt with what could be done in order to bring prices down. Questions raised entailed what could increased competition result in in that respect, what should be done and, lastly, who should act in order to reduce prices.¹⁶

The 2001 study had a forerunner in a major multi-industry survey covering several sectors in the economy. The Swedish Government had assigned the KKV to chart and analyse how competition conditions had developed on the Swedish market during the 1990s. One of the sectors that were given special attention was the grocery retail sector.¹⁷

7 Why were the sector inquiries or market studies undertaken?

The common denominators of the studies undertaken is mostly related to concerns that food prices were higher in Sweden in comparison to the EU average and that it has constantly been a concern regarding the high concentration level in the groceries retail sector. However, the paradox appears to be that the output or quality has not been a major concern and the establishment of discount retailers alongside with incumbent supermarkets have so far implied both lower and higher prices spread on a wider range of products.

8 What were the main topic covered by such market studies?

The first study in 2000 was of general nature, whereby the task was to analyse the state of competition in general in eight important sectors of the economy in the light of the accession to the EU, internationalisation and consumption patterns. Furthermore, more than 30 different proposals were introduced in order to enhance competition and find more efficient instrument to combat restrictions of competition that ran contrary to the consumers' interest.

The 2001 study on the possibility for local communities to promote lowering of food prices covered mainly issues related to local rules on establishment and the application of the local planning/zoning procedures.

¹⁵ Lundvall, K., Viidas, K., *De svenska priserna kan pressas!*, Konkurrensverkets rapportserie 2002:5, December 2002 and Eliasson, J., Hangström, C-J., *Dagligvaruhandeln – Struktur, ägarform och relation till leverantörer*, Konkurrensverkets rapportserie 2002:6, December 2006.

¹⁶ Lundvall, K., Odlander, R., *Kan kommunerna pressa matpriserna?*, Konkurrensverkets rapportserie 2001:4, October 2001.

¹⁷ Konkurrensverket, *Konkurrensen i Sverige under 90-talet – problem och förslag*.

In 2002, the KKV conducted a specific study of the grocery retail sector in Sweden in order to analyse the competition conditions in that sector. The Swedish Government assigned the KKV to present how the different players in the retail level of the distribution chain were organised in relation to ownership, way of organisation and existing co-operations. The on-going centralisation of the industry should also be investigated in order to assess how that affected the business methods of the retail companies especially regarding the product range and what effects could be anticipated in the light of the changes in the industry. Another study in 2002 set out firstly, to highlight the reasons to the high price levels in Sweden and, secondly, to generate proposals of measures to bring down price levels.

The KKV presented a follow-up study in 2004, at which time it concluded that the competition had intensified in the grocery retail sector, but there was still room for considerable improvements. Again, the KKV looked, *inter alia*, in to the local planning rules and how new retail chains could be established.

The Inter-Nordic study presented jointly the Nordic competition authorities in 2005 examined the food markets in the Nordic region, again against the background that food prices tended to be higher in the Nordic countries than other countries in Europe. The more or less explicit apprehension was that grocery prices would be permanently higher than the EU average to the detriment of consumers.

Several years passed and in 2009 the KKV decided to deepen the understanding of the driving forces of prices and factors underpinning the price mechanisms in Sweden in comparison to other countries in Europe. In doing so, the KKV therefore assigned Copenhagen Economics to undertake such a study based upon qualitative and quantitative methods. The study analysed the relationship between concentration and mark-ups, relation between barriers and concentration and ended with a simulation of price impacts and connecting all steps.

The most comprehensive study of the food sector in Sweden was undertaken in 2011 and encompassed the whole distribution chain from farmers/growers to end consumers. Like the older studies, the task assigned the KKV by the Swedish Government was to analyse competition conditions and other market factors in the food sector. However, this time the task was considerably broader compared to older studies as the whole distribution chain was covered. Apart from describing the food sector in terms of structure, market players, concentration levels, ver-

tical integration, pricing in relation to other countries, the task was also to analyse entry barriers and the impact of locally and/or organically small scale grown foodstuffs.

9 What were the main conclusions and/or recommendations?

The first major study dating back some 13 years did not result in any major recommendations in terms of competition policy. It did, however, contribute with a deepened understanding of the structure and market behaviour of the grocery retail sector and how this in general affected the state of competition in the sector. The study showed that there were three major chains dominating the market. In total there were about 10 000 outlets of groceries in Sweden in 2000, however only 6 500 outlets were actual grocery retail stores with a traditional range of products. The remainder consisted of specialised stores, food halls, tearooms, farmers' markets, service stations etc. In 1998 the total private consumption of groceries amounted to about 170 billion SEK or about 18 per cent of total private consumption. The market shares were distributed as follows:

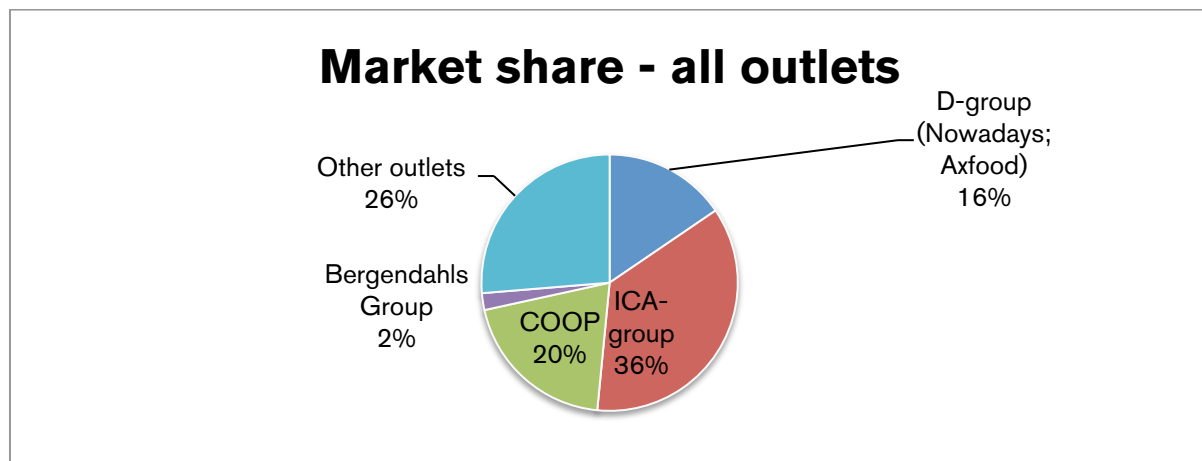


Figure 2. Distribution of market shares by turnover in 1998. Source: KKV Study 2000.

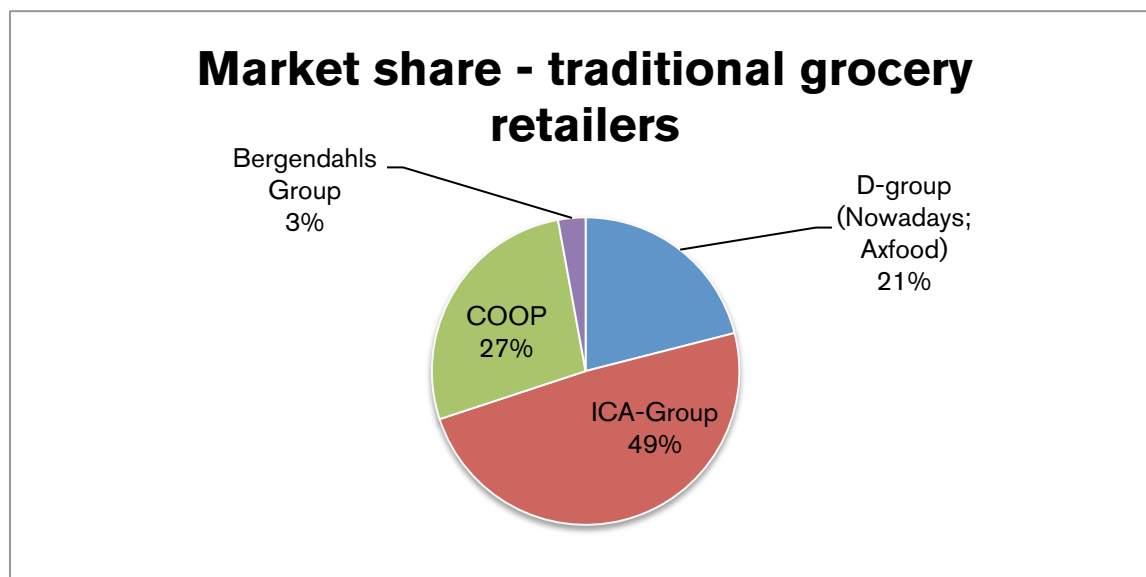


Figure 3. Distribution of market shares by turnover 1998 for traditional grocery stores. Source: KKV Study 2000.

An important conclusion of the study was that the higher prices in Sweden could at least to 50 per cent be ascribed to macroeconomic factors; level of income, labour costs, taxes, density in population, consumption patterns and currency exchange rates. However the remaining 50 per cent were ascribed to weak competition in many sectors of the economy. Enhancing competition would therefore be beneficial for consumers.

The 2001 study took the first steps in that direction and some 16 000 local development plans/zonings for property development were analysed. The study concluded that there was a clear relationship between higher prices and smaller retail space, i.e. the development of supermarkets and hypermarkets could bring price levels down considerably. However, this meant that the local municipalities had an important role to play in their capacity as city and local planners in granting building permits and to plan for such zones locally. Municipalities were urged to look favourably on such establishments, naturally in a transparent and non-discriminatory way. At the same time, however, it was acknowledged in the study that such major shifts in the planning procedure brought about trade-offs and difficult considerations in terms of impoverishment of the trade within the towns (especially old city centres), environmental aspects, road planning etc., as new hypermarkets typically required new land to be utilised outside the old city centres. Therefore, the local municipalities were identified as a key player in bringing consumers' prices down.

The first 2002 study revealed that food prices were about 11 per cent higher in Sweden than the EU average in 2001 including VAT. Consumer prices in general were about 19 per cent higher than the EU average. The reasons to the generally higher prices in Sweden again highlighted weaker competition in Sweden in relation to other countries and that this could explain as much as 50 per cent of the price differences. Other factors were also considered, primarily the absence of significant grey import (parallel import), high transport costs, a high gross national income (although that connection did not apply to Sweden), cost of labour and nominal currency exchange rates. Causes of actions suggested by the KKV was increased funding to the authority in order to combat cartels even more fiercely and to continue the re-regulation of several markets previously sheltered from competition; taxi, domestic air travel, post- and telecommunications etc. Also, the remaining monopolies in the pharmacy industry should be discontinued and the local competition plans should be drafted. A report from the Swedish Government¹⁸ also suggested that entrepreneurship was lower in Sweden than in other comparable OECD-countries and the KKV held that entry barriers of different kinds should be minimised. On the macro-level, the KKV argued that remaining obstacle to intra-community trade must be enhanced in those sectors still not harmonised and that Sweden should introduce the Euro as currency in order to eliminate the exchange rate effect on prices. Moreover, the KKV held that consumers' surplus should be given special attention in the competition policy.

The parallel and more specific 2002 study into the grocery retail sector emphasized the increased concentration levels as a specific problem. The overall risks connected thereto considered were the difficulties of smaller manufactures to access shelf space, that local retailer have less room to adapt locally and that the product range will not match consumer demand. Therefore, the KKV propagated the need for the introduction of new players on the market. In order to achieve that, the planning rules should be designed to look favourably on new establishments and the competition interest should be "considered" in granting building permits and the overall planning work by municipalities and county councils.

The 2004 study found that the introduction of international food chains had brought about enhanced competition, at least to some extent, whereby overall prices had been reduced. The gap to the EU average had dropped but was still considered too high. The growing importance of private labels was seen as sign of increased competition. Again, the importance of local municipalities' planning activities was given special attention.

¹⁸ *Benchmarking av näringspolitiken 2002*, Näringsdepartementet, Ds 2002:20.

The inter-Nordic study in 2005 found that although food prices had decreased over the last 5-10 years, they were still between 12-24 per cent higher than the European average. However, increases in food prices were lower than elsewhere. Eliminating for VAT and the low promotional activities in the Nordic countries, the difference turned out to be lower, some 6–12 per cent, i.e. still significantly higher than the EU15 average. Food supply was found to be narrower than in e.g. France, although the general findings remain somewhat unclear.

Consumer demand was deemed notably heterogenic between the Nordic countries, despite the similar demographical characteristics. Consumers had displayed an increasing interest for ‘exotic’ food, but remained traditional in their demand as national dishes dominated the dinner tables in the Nordic countries. The nature of demand had also changed over the years as interest had been growing for quality, ethical considerations and sustainability in the food sector. Such products were growing in demand.

The study noted the growing importance for super- and hypermarkets as well as discount stores in the retail level of distribution. The overall concentration level had grown even further, which entailed a change in the balance of market power. Concerns were raised that even though lower prices were envisaged, this might occur at the expense of product diversity in the store shelves. The increased concentration in the retail level was found to exhibit the hallmarks of stable tacit collusion, increasing the risk for reduced manufactures’ prices not being passed on to consumers. Also, the cost structure was found to be less favourable in the retail sector as a result of wages in general being higher in the Nordic countries. The establishment of Lidl as a new player marked a change towards increased internationalisation of the trade, although the assortment and marketing remained national. Although only anecdotal evidence exist, milk products turned out to be especially difficult to sell in Sweden unless it had Swedish origin. Changes in zoning regulation and application of such rules allowing for development of hypermarkets and other large self-service store with a wide range of goods and a large car park, usually situated outside a town had also contributed positively to the increased competition.

The study also showed that the increased downstream concentration had led to vertical integration upstream whereby the role of previously independent wholesalers and other middlemen had been taken over by the retail grocery chains to a large extent. This could naturally result in increased bargaining power amongst the retailers and increase efficiency by reducing double marginalisation. The trend was generally considered to be beneficial to consumers, but on the

other hand no guarantees were in place to ensure that the efficiency benefits would be passed on to consumers either in full or in part. Furthermore, the more powerful position of buyers would also affect the suppliers, as they would have to supply distributions centres rather than individuals shops. It appears safe to say that bargaining power of retail grocery sector has increased over the last decade considerably, although distributed over a few major players. Such increased buying power is expected to have effects on the structure of the upstream suppliers.

The 2009 report from the KKV showed that the concentration level is an important determinant for the level of mark-ups and thereby general price levels. Across Europe mark-ups were in the region of 13 percentage points, whereas the sparsely populated Sweden with higher concentration levels in the retail sector amounted up to 27 percentage points in mark-up. The size of the local market was found to be very important factor for mark-ups. A larger market allows in general for more differentiated products, which could imply higher and lower prices, albeit the supply and range of products would be larger and wider, respectively. According to the study, emphasis should be on the local markets; establishments of newcomers would only have effects on prices if new shops were introduced locally. Also, in this report the impact of the municipality planning regulations was underlined and in general, it was demonstrated that strict regulation and discriminatory measures tend to increase concentration levels and thereby reduce competition and increase prices.

The most recent study from 2011 showed that the consumer prices had been brought down so much that Swedish consumers did not pay more than other consumers in comparable EU countries. Margins in the food supply chain were found to be no higher than in comparable EU-countries. The KKV found, at the outset, that the competition in the food supply chain was essentially functioning efficiently and that any extensive regulatory reforms were not warranted. Still, however, the focus remained on the Planning and Building Act and it was considered that there was yet work to be done in order to reform that regulation to allow for better planning standards allowing increased establishments and thereby competition.

Apart from reforming the EU agricultural policies to allow for increased import of food grown outwith the EU, which is normally circumstances that Sweden as a member state cannot influence alone, focus was put on a proposed checklist for local municipalities. Consequently, it was suggested that the checklist to cover

- i. a pronounced objective to facilitate newcomers for daily consumers goods and being permissive in that role;
- ii. facilitation of establishment when food supply chains have reached the conclusion that establishments is commercially viable;
- iii. a procedure resembling that in public procurement in order to facilitate a fair process for awarding permits to stakeholders wishing to establish locally;
- iv. increased transparency in the application of planning rules; and
- v. unification of the planning process and permit granting across communities in order to make application of rules more foreseeable.

To summarize, the studies conducted over the years have revealed an increased concentration and building up of buyer power in the retail grocery sector. At the same time, competition appears to be more efficient than before, offering consumers wider range of products and lower prices in general. This may seem paradoxical that increased concentration does not necessarily imply reduced effective competition. Also, this put existing co-operations in the retail grocery sector in another light. Co-operation that would normally be viewed as suspicious from a competition law point of view are not necessarily or inherently detrimental to consumers. This makes application of competition law in the retail grocery sector particularly difficult, since enforcement against agreements that at face value are anti-competitive may have adverse effects on consumers and the efficiency of competition. This is, however, well in line with existing legislation as the conditions for exemption under Article 101.3 TFEU and its national counterpart may indeed be fulfilled. This could also explain the few cases so far related to abuse of dominance and anti-competitive behaviour, notwithstanding that the contrary could have been expected in the light of the serious concerns put forward in the different report over the last decade.

MERGER CONTROL

10 Are there special thresholds for merger control in the retail (or the grocery retail) sector? Who is in charge of controlling mergers at the local level?

No, there are no special rules for concentrations in the retail sector in Sweden. Concentrations are instead subject to general rules enshrined in section 4 of the Competition Act. There is a mandatory notification requirement according the Article 6 of the Competition Act for concentrations if the combined aggregate turnover in Sweden of all the undertakings concerned in the preceding financial year exceeds SEK 1 billion, and at least two of the undertakings concerned had a turnover in Sweden the preceding financial year which exceeds SEK 200 million for each

of the undertakings. In case the second requirement is not fulfilled, the KKV may require a party to a concentration to notify the concentration, where particular grounds exist for so doing, or a party and other participants in a concentration may voluntarily notify a concentration.

The competent authority to assess concentrations that do not have a community dimension is entrusted to the KKV alone.

11 How are relevant product (or service) markets defined in the grocery sector at the retail level? Are all types of grocery store formats considered to belong to different markets? Is there a statutory definition of markets or what kind of tests is applied by court or enforcement agencies to delineate relevant markets?

The relevant market is delineated according the exact same standards as those applied by the EU-Commission. Therefore, the test relevant market comprising of the relevant product market and relevant geographic market is based on the EU case law and the notice on the definition of the relevant market and applied in the very same as laid down by the EU-Commission.¹⁹ The definition of the relevant market will always take the prevailing market conditions into consideration and there are therefore no presumptions regarding the store formats. Consumer demand will be the most important factor to consider and as demand has shifted over the last decades it is not unlikely that this will have an impact on both product and geographic markets. There are no other statutory provisions in place in Sweden to define the market in any other way.

Some references have been made by the KKV to the Commissions decisional practice and full range grocery retailers have been found to constitute an own product/service market where smaller shops (special shops, kiosks, petrol stations) are viewed as complements forming a distinct separate market from the full range stores.²⁰

Earlier case law have found the grocery retail market to be a distinct product market, at least in cases involving collusion on prices amongst retailers.²¹

¹⁹ Cf. Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5–13. See also NJA 2008 s. 120, *Bornholmstrafikken* and MD 2013:5, *TeliaSonera*.

²⁰ KKV decision 747/2006, *ICA AB/Netto*. See also KKV Decision 744/2002, *Fri Mat ek. för. and Axfood AB (publ.)*. This was also in line with the Commission's decision in *Kesko/Tuko*, where the Commission held that " ... the relevant market consists of the provision of a basket of fresh and dry food-stuffs, and non-food household consumables sold in a super-market environment. The market does not include sales at specialised stores, kiosks and petrol stations. Instead these outlets provide a service that is complementary to those of supermarkets.", Commission decision M.784, *Kesko/Tuko*, 20.11.1996, p. 20.

²¹ MD 1997:11, *VIVO Stockholm ekonomisk förening and members of VIVO Stockholm ek. för. v Konkurrensverket*.

12 How are the geographical markets defined for the retail grocery sector? Is there a statutory definition of what constitutes a relevant market in your country. What criteria are used by courts of enforcement agencies?

Like the product market, there are no statutory provisions governing the definition of the relevant market and the definition is done in accordance with the notice on the definition of the relevant market. There are very few cases on concentrations in the retail grocery sector. Some 40 cases have been notified in total, however, they cover the food industry as a whole and only a few cases concern the retail level and all have been cleared. No cases have been brought before the Swedish Courts. The relevant market in general appears to be national at most and in some cases regional. However, the KKV decisional practice indicates even narrower geographical areas such as local municipalities or towns.²²

Earlier case law have more in detail analysed the geographic market. In VIVO, the Market Court dealt with a calculations system that was shared amongst independent retailers. The court held that the starting point should be the area within which the retailers are conducting trade and where the co-operation have effect. The retailers were active in the greater Stockholm area, the island of Gotland the around the city of Södertälje (a major town some 35 kms south of Stockholm). It was assumed that the retailers had their clientele and deposition within that area. At least it was not proven that any significant trade was done outside that area. Whether the market should be defined narrower, i.e. to the immediate nearby area of the individual shops, the Market Court held that the consumers' possibility to source groceries elsewhere, bearing in mind communication possibilities, did not imply that the market should be defined so narrowly. Instead, the market was defined as the greater region of Östergötland and the island of Gotland.²³

13 Has the growth of concentration of grocery retail networks (franchises, cooperatives etc.) been considered to be problematic in your country? What are the legal instruments, which can be used to control their growth or concentration?

Yes, the growing concentration has been viewed as problematic from a competition point view. As indicated above in the reports commissioned by the KKV, about half of the price difference between Sweden and other comparable countries was ascribed to the weak competition, i.e. the oligopoly situation in Sweden. Lately, the concentration is even higher than before but prices

²² KKV decision 747/2006, ICA AB /Netto.

²³ MD 1997:11, VIVO Stockholm ekonomisk förening and members of VIVO Stockholm ek. för. v Konkurrensverket. Similar delineation of markets have been done in the KKV decision 570/95, Kooperativa Detaljhandelsgruppen AB (KDAB)/ Konsum Öst, ek.för.

have decreased. Some new players are now active in the market, but despite the increased concentration the oligopoly has apparently been capable of yielding effective competition in the retail level of the distribution chain. Therefore, concentration levels as such do no longer appear to be a major concern. On the contrary, the KKV has concluded two years ago that the market is functioning efficiently.

14 Has the increasing (or high) level of concentration of the retail sector been offered as a reason for mergers among grocery suppliers? Has the competition authority taken into consideration the “countervailing” force of retailers to allow mergers among suppliers, which may have otherwise raised competition problem?

A few cases within the food industry have dealt with the concept of countervailing buyer power. In the *Arla/Milko*-case²⁴ the KKV considered the possible countervailing power of the retail chains vis-à-vis dairy companies. The KKV found that there was a mutual interdependence between the dairy companies and the retail grocery sector, however most retailers, insofar they had the possibility to source dairy products independently, did at most have two alternative suppliers of dairy products. Therefore, any countervailing bargaining power did not neutralise the restrictive effects of the concentration. A similar reasoning was plied in the *Carlsberg/Pripps Rignes*-case²⁵. Following the acquisition of biggest national brewery Pripps, the combined market shares of the parties in the concentration case would more than 50 per cent. Such a strong position would, according to the KKV, enable Carlsberg to exert upward pricing pressure towards the retail sector, despite the existence of countervailing buyer power.

Stronger evidence for countervailing bargaining power has been found in other cases. In the *Cloetta/Leaf*-case²⁶, which concerned confectionary and chocolate products, the KKV held that retailers did have bargaining power, at least their position was describe in the double negation in that the buyers did not possess insignificant buyer power. Also, in the concentration case *Fazer/Lantmännen Färskbröd*²⁷, the KKV focused on the considerable buyer power possessed by the four major retail chains in Sweden and it was held unlikely that the acquiring firm subsequent the concentration would be in any position to exert selling power against the retailers. The KKV reached a similar conclusion in the *Swedish Meats/SLP Pärsons*²⁸ cases that concerned a concentration for meat and meat products. Essentially the same buyers were in focus

²⁴ KKV decision 445/2011, *Arla Foods ambal/Milko ek. för.*

²⁵ KKV decision 615/2000, *Carlsberg A/S and Carlsberg Breweries A/Pripps Ringnes AB.*

²⁶ KKV decision 841/2011, *Cloetta AB (publ/Leaf Holland B.V.*

²⁷ KKV decision 606/2008, *Fazer Bageri/Lantmännen Färskbröd AB.*

²⁸ KKV decision 123/2006, *Swedish Meats ek. för./SLP Pärsons AB.*

and the KKV held that alongside strong competition from imported meat and meat products, the countervailing buyer power from the retail chains would counteract the stronger upstream position that Swedish Meats would have after the concentration. The same findings have been put forward by the KKV for other suppliers to the retail grocery sector; the bread sector in the *Cerealia/Juvel*-case²⁹, in which the milling industry for bakery flour.

Countervailing buyer power has proven to be a viable defence or at least an important factor to consider in concentration cases in Sweden. For most suppliers, the retail sector possesses significant bargaining power, as it has not been uncommon to observe that concentrations timely travel upwards in the distribution chain, i.e. the high concentration level in the retail level is likely to trigger upstream mergers. Only when the upstream level is very concentrated, like the dairy industry, such countervailing bargaining power has been considered offset by the KKV.

15 Has the increasing (or high) level of concentration among the suppliers of grocery products been offered as a reason for mergers in the grocery retail sector? Has the competition authority taken into consideration the “countervailing” force of suppliers to allow mergers amongst retailers, which may have otherwise raised competition problems?

In general, the countervailing buyer power argument has been raised as a “shield” against alleged problematic concentrations. However, there are no cases indicating the mirror image that the argument would be used a “sword”, i.e. an argument in support of creating buyer power. Concentration has generally not been driven by acquisition in Sweden and growth of the chains are merely attribute to new establishments and closing down by competitors. Essentially, there are still the same 3-4 major players with increased joint market share, albeit market shares have changes amongst them.

16 What remedies are imposed when there is a problematic concentration in the retail grocery sector (divestiture, behavioural remedies, regulatory changes etc...) In how many concentration cases has the competition authority (or the adjudicating body) imposed remedies for concentrations in the food retail sector over the past five years?

Concentration cases within the retail level of the distribution chain remain few in numbers. However in the *ICA/Netto*-case³⁰ the KKV raised concerns about ICA’s strong market position in the cities of Kumla, Uppsala, Enköping, Västerås and the municipality of Katrineholm. ICA

²⁹ KKV decision 694/2000, *Cerealia AB/Kvarn AB Juvel*.

³⁰ KKV decision 747/2006, *ICA AB/Netto*.

voluntarily offered to divest 14 of the notified 21 stores in a non-discriminatory way. This undertaking was accepted by the KKV and the acquisition was cleared. Similar remedies were considered in the upstream dairy sector in the *Arla/Milko-case* (cited above). The acquiring dairy group Arla offered to divest several trademarks and to sell off one of the biggest dairy plants situated in mid-Sweden. The plant was subsequently acquired by the COOP. Thereby the retail group reversed a long-standing strategy and integrated upstream further than the wholesale level to now encompass manufacturing as well.

17 Are internet stores an important part of the retail grocery sector? What are the specific competition or fairness problems raised in relation to their existence? Which laws applying to brick and mortar food retail stores do not apply to internet grocery retail stores?

Groceries sold over the internet are still not developed in Sweden. Although no official statistics has been found, it is estimated to be below 1 per cent of total sales.³¹ The sector is, however expected to grow rapidly and there are several smaller players that have established business in home-delivery systems for food. The major retailers such as ICA and COOP have launched such services recently.

In terms of regulation, the same rules apply for handling food sold over the internet as for brick and mortar shops. The rules are mostly related to food safety, a harmonized area of law within the EU.³²

ABUSE OF BUYING POWER, ABUSE OF DEPENDENCY

18 If your competition law prohibits abuse of buying power or abuse of dependency, how buying power (or dependency) defined? Is there a statutory definition of buying power? What test is used by enforcement agencies or courts?

Abuse of market power, either in form of monopoly or monopsony power is regulated in the Competition Act, Section 2, Article 7, whereby any abuse by one or more undertakings of a dominant position on the market shall be prohibited. The prohibition is a national counterpart

³¹ Dagens Industri section 2, DI Dimension, Nr 4, May 16, 2013.

³² See regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31, 1/2/2002, p. 1–24. In addition hereto, there are also a large number of detailed EU Regulations in several fields that has impact on the Swedish food sector. The Swedish Food Act (Livsmedelslagen SFS 2006:804) complements the EU Regulations. It also contains rules on food control authorities and sanctions for violating the regulations. Furthermore, EU Directives are transposed into National Food Agency's (Livsmedelsverket) regulations and published in the NFA's own Code of Statutes, LIVSFS (previously SLVFS). The NFA has been authorised to issue legislation primarily as laid down in the Food Act and the Food Ordinance (livsmedelsförordningen, SFS 2006:813).

to Article 102 TFEU and Sweden is applying the same rules on abuse of dominance as EU-rules. Also, Articles 101 and 102 are directly applicable for national courts and the KKV. Therefore the relevant EU case law the concepts of dominance and abuse will be fully applicable in these cases.

19 Are abuses of buyer power or dependency prohibited per se or prohibited only if they restrict competition on a relevant market.

Referring to question 18, the finding a dominant position is in itself not a recrimination under Swedish law. Like in article 102 TFEU there are identical examples of abuses under Swedish law but no *per se*-prohibitions on certain market conduct. Instead, one would have to rely upon any of the presumptions of abuse that has been laid down in EU case law. These do not, however, create a non-rebuttable *per se*-finding of violation of competition law.

20 Is there a statutory definition of what constitutes an abuse of “buying power” or and abuse of “dependency”? What test(s) is (are) used in enforcement to define such abuses?

No, there is no statutory definition of buying power or and abuse of dependency. Abuse of dominance will, instead, be assessed in accordance with established EU case law.

21 List practices which have been considered in the case law to be abuses of buying power or dependency

There are no cases on abuse of buyer power on file. However dependency can be viewed in many different ways. The mirror image of buyer power, i.e. selling power or the abuse of a position of a mandatory or essential trading party has given rise to several cases, relating to several kinds of abuses like excessively high prices, discriminatory behaviour etc.

COMPETITION LAW ENFORCEMENT

22 Please list the relevant case law (both before the national competition authority and the courts) related to the conduct of grocery retailers in your country in the last 5 years; please report by type of conduct and type of retail grocery format

There are no cases related to the conduct of grocery retailers in the last five years from the Swedish courts or the KKV. The bulk of older cases relates to application of individual exemptions or negative clearance for anti-competitive agreements. Subsequent the abolishment of the noti-

fication of such agreements and making the national counterpart to Article 101.3 TFEU these strand of such cases came to a complete stop.

23 Does the competition authority deal with horizontal anticompetitive practices at the local level (for example price fixing agreement between the only two retail food stores in a small village)? If not, how can such micro-violations be sanctioned?

In Sweden, as within the EU, there is a minimum threshold for the application of the competition rules. It is first and foremost a legal requirement that anti-competitive agreements or concerted practices must to appreciable extent be capable of prevention, restricting or distorting competition. The Swedish *de minimis* rules state that companies with a turnover of less than 30 million SEK the last fiscal year can jointly hold a market share of maximum 15 per cent without being subject to the application of the rules against anti-competitive agreements.³³ However, the existence of any blacklisted restrictions will set aside that exemption. Also, the definition of the relevant market will be very important. Such micro-cartels essentially imply a very narrow definition of the geographical market. So far, however very few examples of micro-cartels exist, although there are examples of smaller cartels being sanctioned. A new instrument aimed especially at the smaller cartels is the fine order enshrined in Chapter 6, Article 16 of the Competition Act. Instead of instituting proceedings before the Court of first instance regarding an administrative fine, the KKV may, in uncontested cases, order a company to pay such a fine. Several criteria must be met before such an order can be issued and the violators must also concede to the order as the KKV otherwise would have to bring the case before the Court.³⁴

24 Have horizontal agreements between grocery suppliers to withdraw quantities in order to keep prices up (over and beyond what is allowed by the Common Agricultural Policy) been sanctioned under competition law?

No, there are no such cases in Sweden.

³³ Konkurrensverkets allmänna råd om avtal av mindre betydelse (bagatellavtal) som inte omfattas av förbudet i 2 kap. 1 § konkurrenslagen (2008:579), KKVFS 2009:1.

³⁴ See Henriksson, L., *Two Novelties in Swedish Competition Law: Fine Order and Trading Prohibition – A Critical Review*, in Lidgard, H.H. (ed.) *National Developments In the Intersection of IPR and Competition Law*, Swedish Studies in European Law, vol. 3, 2011, p. 263–281.

25 Has the internal governance of grocery retail networks (franchises, co-operatives etc...) been considered to be problematic in your country from the point of view of competition? What are the legal instruments, which can be used to control this? Has the competition authority dealt with the internal rules of retail grocery networks?

No there have been no such cases. However, the largest retail player, ICA, is essentially made of independent retailers in a complex structure of cross-ownership, vertical and horizontal restraints, which may or may not be subject to the competition rules. Paradoxically, such restraints have not generated any cases, seemingly because the internal structure of ICA has laid down a well functioning incentive of local retailers and consistent market behaviour over a longer period that has been considered beneficial to consumers.

26 Under what conditions can recommended resale prices in the retail grocery sector be considered a violation of the competition law (as opposed to a unilateral practice by a supplier)?

The Swedish rules on resale price maintenance (RPMs) in vertical agreements are in essence the same as the EU rules. It has been expected that more lenient approach to RPM following the ruling in *Leegin Leather*³⁵ in the U.S. would bring about a change of the per se approach to other price maintenance that recommended prices and maximum prices. Therefore, the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties would be considered a hard-core restraint not possible to be exempted under Swedish Law.³⁶

The Swedish Market Court ruled in *MånpoCKET* that recommended prices pre-printed to the cover of books did not amount to actual recommended prices as it required from resellers to take active steps to remove the affixed retail price (if even possible) or to cover it with new labels. Most resellers did not do so and the recommended price did in fact entail resale price maintenance in practice in violation of competition law.³⁷

³⁵ See U.S. Supreme Court ruling in *Leegin Creative Leather Products, Inc. V. PKS, Inc.*, 551 U.S. 877.

³⁶ Cf. Article 4.a of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23/04/2010, p. 1–7 in conjunction with Swedish Act (2008:581) concerning block exemption on vertical anti-competitive agreements. Generally about RPMs in Sweden, see further Henriksson, L., *Distributionsavtal – vertikala avtal och konkurrensrättsliga aspekter*, Norstedts Stockholm 2012, pp. 126.

³⁷ MD 2002:5, *Svenska Bokhandlareföreningen v Månadens Bok, Bonnierförlagen AB/Norstedts Förlag AB/Bokförlaget Forum AB/Perigab AB HB*.

27 Are reselling below cost, de-listing of suppliers, resale price maintenance, prohibited by competition law?

Yes, insofar they meet the criteria for predatory pricing as laid down by the EU-courts³⁸. RPM-schemes have already been dealt with under the previous question, but in general obligations related to minimum or fixed prices are considered as hard-core restraints in vertical agreements. De-listing of suppliers would in theory be the monopsonists's mirror image of refusal to supply. There have been no cases of de-listing of suppliers in the retail grocery sector. However, some 18 years ago a dispute arose between ICA and one of its suppliers in the *Master Foods*-case³⁹, and the KKV assessed a de-listing practice of ICA, which was considered a collective boycott in violation of competition law. Uncertainty related to the application of the block exemption regulation led to the dismissal of the case, although the KKV envisaged its intention to sue for administrative fines if the practice would be repeated. In general, refusal to purchase may amount, according to the KKV, to an abuse in some situations when the buyer enjoys a legal monopoly and without objective justification refuses to accept yet another supplier. The arguments are more or less the same as for essential facilities. Discontinuing an existing trading relationship with a supplier will be, nonetheless, treated differently; most likely as a discriminatory behaviour if undertaken by a dominant buyer.

28 Have there been collective boycotts by small food retail stores against suppliers selling to discounters during the past five years?

No, there have been no such cases at least not in the decisional practice of the KKV or in the Courts.

29 Are there cases of small suppliers (for example farmers) jointly retaliating against large grocery food retailers to punish the latter for selling low priced imported agricultural products cheaply? Can such practices be found to be violations of the competition law? What other legal means exist to fight such practices?

No, there have been no such cases at least not in the decisional practice of the KKV or in the Courts. The practice of selling low priced products as such does not amount to a violation of competition law in Sweden and there are no other available legal instruments to curb cheap import apart from macroeconomic measures.

³⁸ Cf. Case C-62/86, *AKZO Chemie BV v Commission of the European Communities*, ECR [1991], p. I-3359, case C-333/94 P, *Tetra Pak International SA v Commission of the European Communities*, ECR [1996], p. I-5951, case C-202/07 P, *France Télécom SA v Commission of the European Communities*, ECR [2009], p. I-2369 and case C-209/10, *Post Danmark A/S v Konkurrenserådet* [not yet published].

³⁹ KKV Decision 93/95, *ICA Handlarnas AB v Master Foods*.

30 Are there cases of large-scale retail grocery stores agreeing to limit competition on prices? At the national level? At the local level?

No, there have been no such cases at least not in the decisional practice of the KKV or in the Courts.

31 Are abusively high prices punishable under your competition law? What standard is applied to establish what constitutes a high price?

Excessively high prices can at least in theory amount to an abuse of dominance. The legal standard for establishing this kind of exploitative abuse is the same as established by the ECJ in the *United Brands*-case⁴⁰, i.e. charging a price, which is excessive because it has no reasonable relation to the economic value of the product supplied. As lastly demonstrated in the *Helsingborgs Hamn*-cases⁴¹, it is most difficult to practically draw the line between high –yet still legal prices – and illegally exorbitantly high prices. When considering both cost measures, profitability demand factors this becomes very difficult indeed. In practice, therefore excessive pricing has mostly been related to cases where there also has been a restriction of intra-community trade.⁴²

32 In the last five years, have there been any cases against retail grocery distributors where the “waterbed effect” was a central issue? How did the competition authority assess such effects?

No, there have been no such cases at least not in the decisional practice of the KKV or in the Courts.

REGULATIONS

33 What are the main general or sector specific regulations applying to retail grocery market structures or behaviour aside from competition law? Please give the substance of these regulations. To what extent do they limit the scope for competition in the retail grocery sector?

There are no general sector-specific regulation to govern the structure of the retail grocery market structure in Sweden in Sweden apart from general competition law and the merger control

⁴⁰ Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECR [1978], p. 207.

⁴¹ Case COMP/A.36.568/D3 – *Scandlines Sverige AB v Port of Helsingborg* and case COMP/A.36.570/D3 – *Sundbusserne v Port of Helsingborg*.

⁴² See e.g. Wahl, N., *Exploitative high prices and European competition law – a personal reflection*, in *The Pros and Cons of High Prices*, KKV 2007, p. 47–64 and Henriksson, L., *Konkurrensrättsöverträdelser – Ekonomisk analys i den juridiska processen*, Norstedts, 2013, pp. 213.

regulation in the Competition Act. In addition to competition law there is general legislation for marketing practices and unfair market practice. These regulations apply to all industries and do not directly affect the structure of the retail grocery sector. What does have a direct impact on the retailers, on the other hand, would the building and planning rules, as mentioned above.

34 Are there specific constraints, which apply differently on large scale (grocery) retailers, depending on whether they are concentrated structures or they result from non-structural aggregation of firms (such as retailers', co-operatives', retailers' voluntary associations, franchising contracts and alliances by companies to undertake joined purchasing and logistics functions)?

No, not directly, the way retailers are formally organised does not appear to affect constraints in general. However, the still on-going vertical integration and development of distribution centres at strategic geographical locations has become an important competitive factor for the retail chains. To withstand the increased competition and be able to offer even more favourable prices, the logistic function has become strategically important.

35 Are there specific regulations applying to internet retail stores? Are internet grocery stores subject to the same regulations (referred to in question 32) as brick and mortar stores?

Yes contracting with consumers over the Internet means that the Distance and Door-to-Door sales Act will apply, which, *inter alia*, entails a right for consumers to cancel the contract within a fortnight period. However foodstuffs are not covered by that legislation for obvious reasons. Other than that, the same rules apply for Internet retail stores.

36 Are reselling below cost, de-listing of suppliers, resale price maintenance, prohibited by a specific statute (outside of competition law)?

No there are no such provisions under Swedish law.

37 Are there regulations, which prevent or limit the ability of large scale food retailers from passing on discounts they obtain from suppliers

No, there are no such regulations in force in Sweden.

38 Are some grocery products subject to price control? What is the rationale for such regulation? Are such price controls regularly reviewed and if so what is the periodicity of the review? Is the competition authority required to give an opinion before a price control is established?

There is a general Price Control Act (SFS 1989:978) act that was originally intended to be used during wartime or at risk of war to complement the rules on rationing. In the 1970s and the 1980s it was also used as a macroeconomic tool to curb inflation. A fundamental change in the overall macroeconomic policy at the end of the 1980s marked the end of the application of that law, although it is still in force. There is currently no price control on any grocery products in Sweden.

REGULATION OF LARGE-SCALE FOOD RETAILING AND VERTICAL RELATIONSHIPS BETWEEN SUPPLIERS AND RETAILERS

39 Are the contractual relationships between large-scale food retailers and small suppliers or small scale retailers regulated in your country? If so, what is the scope of the regulation?

No there are no such regulations in Sweden.

40 What is the role of the competition of the competition authority (if any) in the adoption and enforcement of such regulations?

The KKV has no role, as there are no regulations.

41 Do the regulation, which apply to large-scale retail food distributors refer explicitly or implicitly to the necessity to achieve a “level-playing field” or to protect “fairness of transactions”. If so, is there any judicial interpretation of the content of these concepts?

There is no specific market regulation in force to actively achieve a level-playing field or to ensure fairness in general apart from the competition law. In contract law, on the other hand, there are two acts that govern unfair contract terms in B2C and B2B settings, respectively.⁴³ The two laws complement Article 36 of the Contracts Act according to which unfair contracts or contract terms may be adjusted or nullified.

⁴³ Lag (1994:1512) om avtalsvillkor i konsumentförhållanden and lag (1984:292) om avtalsvillkor mellan näringsidkare.

42 Are small-scale farmers or suppliers of food products exempted from competition law and allowed to collectively sell their products in order to counterbalance the buying power of large-scale distributors?

Yes, special rules apply to farmers if they are members of a primary agricultural association. Such organisations are under section 1, Article 7 of the Competition Act defined as an economic association whose members are individual farmers or other undertakings engaged in agriculture, horticulture or forestry. If associations of such undertakings are members of an association, the latter is, however, only regarded as a primary agricultural association providing that such associations only contain local associations of undertakings operating activities of the kind specified. The Act (2000:1025) on the meaning of the terms agricultural, horticultural and forestry produce, as used in the Competition Act, contains special provisions on what is meant by such produce.

According to Section 2, Article 4 of the Competition Act the prohibition against anti-competitive agreement does not apply to those agreements within a primary agricultural association or its subsidiaries that concern co-operation between the members of the association on

- 1) the production, collection, processing, sale or related activities such as the use of jointly owned facilities, storing, preparation, distribution or marketing of agricultural, horticultural or forestry produce, or
- 2) the purchase of goods or services for such activity as is referred to in 1).

The first paragraph does not, however, apply to agreements, which have as their object or effect

- 1) the prevention or impairment of free mobility of a member on the market
 - a) with respect to choosing a buyer or a supplier,
 - b) with respect to the possibility of leaving the association, or
 - c) in other respects of equivalent importance, or
- 2) that selling prices are directly or indirectly fixed for goods when the sale takes place directly between the member and a third party.

43 List negotiating practices of large-scale retailers, which are prohibited *per se* by unfair trade law (such as reselling at a loss, clauses of category management, upfront payments, slotting allowances, long delays of payments etc...) Who is in charge of implementing those regulations? How abundant is the case law for each type of practice?

There are no *per se*-prohibitions by unfair trade law in Sweden other than Articles 101 and 102 TFEU and the national equivalent prohibitions.

PROSPECTIVE

44 What are the legislative changes that you would recommend to improve the competitive landscape in the grocery retail sector in your country and why?

Currently there appears to be very little room for sector specific regulation in the grocery retail sector in Sweden. Over the years, very little has been voiced about the need for special regulation and focus has been on facilitating entry to the market – especially on local markets. Market concentration has been viewed both as a threat to consumers, however, large players have also meant fierce competition between the oligopolists and the trade has evolved considerably over the last years as the product range has widened and prices have been lowered in general. The introduction of large international discount retailers has put pressure on the incumbent retail chains.

Although vertical integration and large-scale purchasing are very important factors for the retailers, competition is still manifested locally and role of local municipalities is crucial in the development of competition. It is not possible in Sweden for incumbents to enter into exclusivity agreements with local communities on grounds of non-discrimination obligations on local government. Incumbent firms do own considerable amount of real estate and buildings, however most for internal needs. Renting to third parties is very limited in scope. In 2011, changes were introduced in the Building and Planning Act (2010:900) and it is now necessary for local authorities to pay special attention to economic growth and the development of competition in the planning/zoning procedures. There are still challenges to be dealt with like abuse of appeal of planning decision in order to delay or oust competitors to the incumbents, long handling procedures and non-consistent procedures between communities. All in all, there appears currently not to be any pressing needs for major legislative reform to boost competition in the retail grocery sector. Fine-tuning of the existing administrative rules appears to be more in focus.

There is still, however, room for improvement and efficiency in the application of the rules that directly and indirectly affect the competitive situation.
