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16.1 Economic Background

16.1.1 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 % between 1997 and 2007. A recent study conducted in Sweden shows¹ 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 some 650 companies have less than ten employees. The Swedish food industry is therefore still quite concentrated as the bigger companies account for most of 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 the middle of the distribution chain between suppliers and retailers. The introduction of private labels has increased retailer's bargaining power vis-à-vis the suppliers. Farmers are generally small companies however

¹ See the Swedish Competition Authority (Konkurrensverket, KKV), report *Mat och marknad – från bonde till bord*, Rapport 2011:3, April 2011.

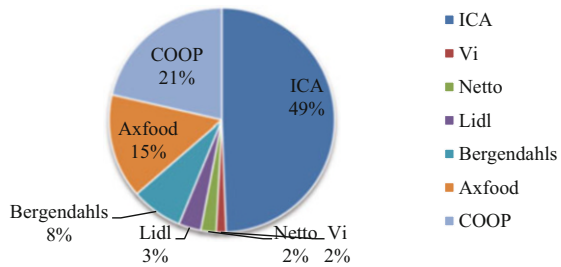
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Fig. 16.1 Market shares of the retail grocery chains in Sweden 2011. *Source:* DI Dimension Nr 4, May 2013

Market share - major retail chains in Sweden 2011



organised in a primary agricultural associations in their roles as suppliers to the food industry.

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

Figure 16.1 shows the market shares of the retail grocery chains in Sweden in 2011.

16.2 Legal Background in Sweden

16.2.1 Scope of Competition Law with Respect to the Grocery Sector

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 Act² and its EU counterparts. These national Swedish Rules on competition are essentially equivalent to the provisions of Articles 101 and 102 TFEU, save for the criterion of affecting trade between Member States. The Swedish Competition Authority, Konkurrensverket (the “KKV”), as well as private parties, is 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 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 Act³ 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 are essentially a long-

² SFS 2008:579.

³ SFS 2008:486.

standing tradition in Sweden, and in this field there is currently a comprehensive bundle of rules aimed at unfair practices and consumer protection.⁴

16.2.2 Abolishment of the Specific Regulation for 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 retailers,⁵ i.e. chain stores made up of 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 be applicable to the former.

The old national block exemption was targeted at smaller chains holding up to 20 % 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.⁶ The ordinance also exempted horizontal co-operation on prices and accounting and calculation standards for chains holding 20–35 % market share. Odd as it may seem within the context of competition law today, special rules also applied 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 of 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 was determined to expire on 1 July 2001. Another motivation behind the ordinance was the ongoing work in

⁴ 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).

⁵ Government Ordinance (SFS 1993:80) on exemption according to Section 17 of the Competition Act (SFS 1993:20) for retail chains.

⁶ 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.

the EU on group exemptions and that the Government, at that time, needed to clarify for undertakings the rules of the game in the marketplace.

The national block exemption regulation received negative critique on grounds that the market share calculation deviated from established practice within the EU competition law, that the exemption itself was an anomaly in relation to the then EU law and that the exemption could be questioned from a constitutional point of view.⁷ The regulation was undoubtedly not built on a solid legal ground.

In a report from 2000, the KKV held that the 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 harmonisation 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 force,⁸ and the block exemption regulations for certain horizontal agreements were under way.⁹ Based upon the apparent overlapping regulation that this would result in, the Swedish Government found that the Ordinance should not be renewed, leaving the retail sector subject to general competition rules.

16.2.3 Laws 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 also to voluntary chain stores in general, there has been no sector-specific legislation for the grocery retail sector. Food regulations

⁷ 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 i Märkbara småföretag och konkurrens*, 2000, p. 101 and Bernitz, U., *Konkurrensrätten på dagligvarumarknaden*, ERT 2004, p. 239.

⁸ Regulation 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 1999 L 336, p. 21.

⁹ Regulation 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 2010 L 335, p. 36 and Commission Regulation 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 2010 L 335, p. 43.

may potentially also have at least indirect effects on competition in the grocery sector, but such considerations are not the subject of this article.

Taking a more general view on grocery sector, there have been—and still are—legislative instruments that relate to the necessity to prevent inflationary pressure of grocery retail prices. In that regard, the Price Regulation Act¹⁰ 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 high inflation in 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 or cap prices. 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 to a complete stop during the change in overall economic policies in the beginning of the 1990s. The introduction of the then 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 rapporteur, 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.¹¹

In summary, therefore, competition law is fully applicable to the retail grocery sector and subject to both national provisions on competition as well as the EU counterparts. The retail grocery sector does not receive neither beneficial nor unfavourable treatment by competition law.

16.3 Advocacy

16.3.1 Market Studies Commissioned by the Swedish Competition Authority of the Retail Grocery Sector

There have been several major studies over the years related to competition issues in the grocery retail sector. Following an assignment by the Swedish Government to assess the conditions of different levels of the distribution chain in the food sector,

¹⁰ SFS 1989:978.

¹¹ 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.

the KKV published in 2011 a comprehensive study of the grocery sector, concerning not only the retail level but also the whole distribution chain from farmers or growers to end consumers.¹²

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 and the dispute between Sweden and the EU Commission on the legality of the Swedish retail monopoly. 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 article.¹³

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.¹⁴

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.¹⁵

¹² The main findings of the inquiry were published in the KKV report *Mat och marknad – från bonde till bord*, Rapport 2011:3. There were several underlying reports to the KKV findings; K. Olofdotter, J. Gullstrand, K. Karantininis, *Konkurrens och makt i den svenska livsmedelskedjan*, Agrifood Economics Centre, 2011; B. Berg-Andersson, O. Rantala, *Konkurrenstryckets och konkurrenskraftens inverkan på livsmedelskedjans prisbildning – Sverige i internationell jämförelse*, Näringslivets Forskningsinstitut Finland, 2011; J. Nilsson, *De lantbrukskooperativa företagens betydelse för konkurrensen inom livsmedelskedjan*, Agrifood Economics Centre, 2011; C. Jörgensen, *Lokalisering och konkurrens i dagligvaruhandeln*, Agrifood Economics Centre, 2011, Persson, M., *Pristransmission inom den svenska livsmedelskedjan*, Agrifood Economics Centre, 2011.

¹³ See ECJ, case C-189/95, *Criminal proceedings against Harry Franzén*, ECR 1997, I-5909. The dispute arose out of criminal proceedings against a local grocery owner who attempted to sell wine in his shop. Although his action was illegal in Sweden, he invoked that the legislation was contrary to Articles 30 and 37 of the EC Treaty and that his actions therefore should not be deemed criminal. The preliminary ruling of the ECJ resulted in the discontinuing of Vin & Sprit's monopoly on imports of alcoholic beverages to Sweden; however, the monopoly for retailing of alcoholic beverages could be remain with the state-owned Systembolaget primarily on grounds of public health considerations.

¹⁴ H. Ballebye Okholm, *Konkurrensen på dagligvarumarknaden*, Copenhagen Economics, Uppdragsforskning 2009:2, 2009.

¹⁵ Fællessekretariatet for Konkurrencenævnet & Grønlands Forbrugerråd, Konkurrencestyrelsen, Konkurrenceverket, Konkurransetilsynet, Samkeppnisefirlitid, Kilpailuvirasto and Kappingarráðið, *Nordic Food Markets – a taste for competition*, Report for the Nordic competition authorities, No. 1/2005.

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.¹⁶

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.¹⁷

Based upon statistics from Eurostat that Swedish food prices were in the region of 20–25 % 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 increase competition result in that respect, what should be done and, lastly, who should act in order to reduce prices.¹⁸

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.¹⁹

16.3.2 Motivation of the Sector Inquiries or Market Studies Undertaken in Sweden

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 grocery retail sector. However, the paradox appears to be that the output or quality of groceries has not been a major concern, and the establishment of discount retailers alongside incumbent super- and hypermarkets have so far implied both lower and higher prices spread on a wider range of products. The importance and impact of demand for locally organically produced food and groceries have not been the main concern in the market studies conducted despite the fact this appears to have attracted growing attention amongst consumers. Another important competition factor is the introduction and growth of private labels of the major retail chains. Further research on this topic appears to be needed.

¹⁶ K. Lundvall, *Konsumenterna, matpriserna och konkurrensen*, Konkurrensverkets rapportserie 2004:2, June 2004.

¹⁷ K. Lundvall, K. Viidas, *De svenska priserna kan pressas!*, Konkurrensverkets rapportserie 2002:5, December 2002 and J. Eliasson, C.-J. Hangström, *Dagligvaruhandeln – Struktur, ägarform och relation till leverantörer*, Konkurrensverkets rapportserie 2002:6, December 2006.

¹⁸ K. Lundvall, R. Odlander, *Kan kommunerna pressa matpriserna?*, Konkurrensverkets rapportserie 2001:4, October 2001.

¹⁹ Konkurrensverket, *Konkurrensen i Sverige under 90-talet – problem och förslag*.

16.3.3 Main Topics Covered by the Swedish 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, i.e., general concerns related to the conditions for establishments.

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 ongoing 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. Again, price levels appear to have been the prime concern.

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

The inter-Nordic study that 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 and the relation between barriers and concentration and ended with a simulation of price impacts and connected 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, vertical 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.

16.3.4 Main Conclusions and Recommendations of the Market Studies

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 SEK 170 billion or about 18 % of total private consumption. The market shares were distributed as shown in Figs. 16.2 and 16.3.

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

The 2001 study took the first steps in that direction, and some 16,000 local development plans/zonings for property development were analysed, thereby focusing on the conditions of new establishments. 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 obvious this may seem from a mere economy of scale perspective, it also 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 % higher in Sweden than the EU average in 2001, including VAT. Consumer prices in general were about 19 % higher than the EU average. The reasons for the generally higher prices

Fig. 16.2 Distribution of market shares by turnover in 1998. *Source:* KKV Study 2000

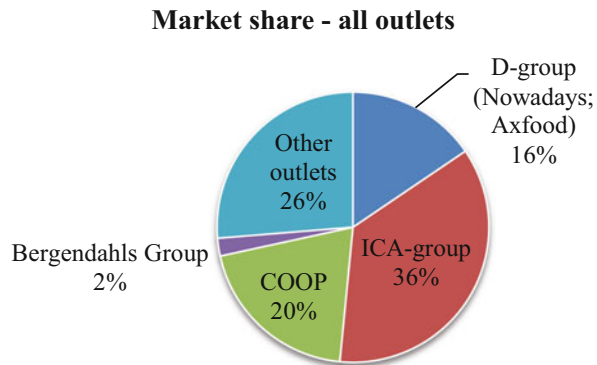
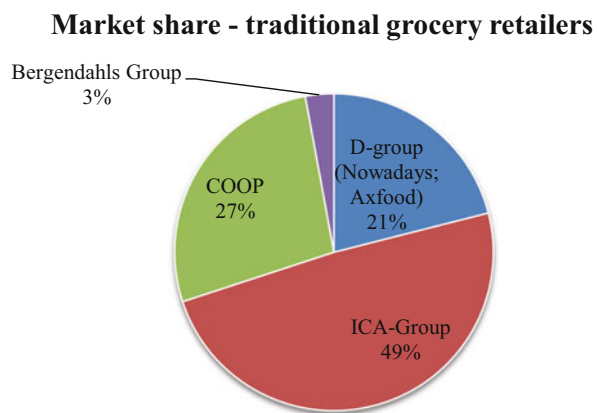


Fig. 16.3 Distribution of market shares by turnover 1998 for traditional grocery stores. *Source:* KKV Study 2000



in Sweden again highlighted weaker competition in Sweden in relation to other countries, and this could account for as much as 50 % of the price differences. Other factors were also considered, primarily the absence of significant grey import (parallel import), high transport costs, 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 were 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 Government²⁰ 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-

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

community trade must be enhanced in those sectors still not harmonised and that Sweden should introduce the euro as a 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 emphasised the increased concentration levels as a specific problem. The overall risks connected thereto that were considered were the difficulties of smaller manufacturers to access shelf space, local retailers having less room to adapt locally and product range not matching consumer demand. Presumably, this was an externality of the growing importance of private labels. The KKV therefore propagated the need for the introduction of new players on the market to remedy such concerns. Exactly how such actions would in fact have any adverse effects on private labels remains unclear. In order to achieve new establishments, 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. Again, it remains unclear exactly what should be changed either in the zoning regulations or in the practice of competent communal boards. It appears from the report as there is an underlying presumption that local communities had adopted a strict approach on permits to the detriment of newcomers and thereby indirectly counteracting the development of an increased competition. There are, however, no such supporting data to unequivocally draw such a conclusion. Instead, the fear of that this would be the case appears to motivate the measures proposed.

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 not seen as a problem but rather as a sign of increased competition. Again, the importance of local municipalities' planning activities was given special attention. It appears that inter-retailer competition (including that between private labels) were more important than the possibility of smaller producers to get access to shelf space in existing stores.

The inter-Nordic study in 2005 found that although food prices had decreased over the last 5–10 years, they were still between 12 and 24 % higher than the European average. However, increases in food prices were lower than elsewhere. Eliminating VAT and the low promotional activities in the Nordic countries, the difference turned out to be lower, some 6–12 %, i.e., still significantly higher than the EU-15 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 impact of these changes in demand in relation to competition has not been explored in further detail.

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 shift in the balance of market power to the benefit of large retailers. 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 exists, 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 the development of hypermarkets and other large self-service stores 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 at least in part. Furthermore, the more powerful position of buyers would also affect the suppliers, as they would have to supply distribution centres rather than individual shops. It appears safe to say that the bargaining power of the 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 to up to 27 percentage points in mark-up. The size of the local market was found to be a 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 out with the EU, 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 cover

1. a pronounced objective to facilitate newcomers for daily consumer goods and being permissive in that role,
2. facilitation of establishment when food supply chains have reached the conclusion that establishments are commercially viable,
3. a procedure resembling that in public procurement in order to facilitate a fair process for awarding permits to stakeholders wishing to establish locally,
4. increased transparency in the application of planning rules, and
5. unification of the planning process and permit granting across communities in order to make application of rules more foreseeable.

To summarise, 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 distrustful from a competition law point of view is 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. There are, however, some unresolved issues related to the possibility of smaller and local producers' access to shelf space and

whether the current state of the industry may mirror in supply the growing demand for locally produced and organic groceries and thereby satisfy a demand for true diversity.

16.4 Merger Control in the Grocery Retail Sector

16.4.1 Thresholds for Merger Control in the Retail (or the Grocery Retail) Sector

There are no special rules for concentrations in the retail sector in Sweden. Concentrations are instead subject to general rules enshrined in Section 4 on merger control of the Competition Act. There is a mandatory notification requirement according to 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 that 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.

16.4.2 The Legal Delineation of the Relevant Product (or Service) Markets in the Grocery Sector at the Retail Level

The relevant market is delineated according the exact same standards as those applied by the EU Commission. Therefore, the test relevant market comprising 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.²¹ 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.

²¹ Cf. Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C 372, p. 5. See also NJA 2008 p. 120, *Bornholmstrafikken* and MD 2013:5, *TeliaSonera*.

Some references have been made by the KKV to the Commission's 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.²²

Earlier case law has found the grocery retail market to be a distinct product market, at least in cases involving collusion on prices amongst retailers.²³

16.4.3 Definition of the Geographic Markets for the Retail Grocery Sector?

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 appears in general 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.²⁴

Earlier case law has more in detail analysed the geographic market. In the *VIVO* case, the Swedish Market Court dealt with a calculation 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 has effect. The retailers were active in the greater Stockholm area, the island of Gotland and around the city of Södertälje (a major town some 35 km 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

²² 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 supermarket 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". See Commission decision of 20 November 1996, M.784, *Kesko/Tuko*, p. 20.

²³ MD 1997:11, *VIVO Stockholm ekonomisk förening and members of VIVO Stockholm ek. för. v Konkurrensverket*.

²⁴ KKV decision 747/2006, *ICA AB/Netto*.

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.²⁵

16.4.4 The Swedish View on the Growth of Concentration of Grocery Retail Networks

The growing concentration has been viewed as problematic from a competition point of 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 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 2 years ago that the market is functioning efficiently.

16.4.5 Impact of Increasing Level of Concentration at the Retail Level in Relation to Mergers Amongst Grocery Suppliers

A few cases within the food industry have dealt with the concept of countervailing buyer power. In the *Arla/Milko* case,²⁶ 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 as 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 applied in the *Carlsberg/Pripps Rignes* case.²⁷ Following the acquisition of biggest national brewery Pripps, the combined market shares of the parties in the concentration case would be more than 50 %. 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* case,²⁸ which concerned confectionary and chocolate

²⁵ 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.*

²⁶ KKV decision 445/2011, *Arla Foods amba/Milko ek. för.*

²⁷ KKV decision 615/2000, *Carlsberg A/S and Carlsberg Breweries A/Pripps Ringnes AB*.

²⁸ KKV decision 841/2011, *Cloetta AB publ/Leaf Holland B.V.*

products, the KKV held that retailers did have bargaining power, at least their position was described in a double negation in that the buyers did not possess insignificant buyer power. Also, in the concentration case *Fazer/Lantmännen Färskbröd*,²⁹ 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 to 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* case,³⁰ which concerned a concentration for meat and meat products. Essentially, the same buyers were in focus, 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 *Cerealial/Juvel* case,³¹ as well as 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 concentration's 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.

16.4.6 Impact of Increasing Level of Concentration Amongst the Suppliers of Grocery Products in Relation to Mergers in the Grocery Retail Sector

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 as a "sword", i.e. an argument in support of creating buyer power. Concentration has generally not been driven by acquisition in Sweden, and growths of the chains are merely attributed to new establishments and closing down by competitors. Essentially, there are still the same three to four major players with increased joint market share, albeit market shares have changes amongst them.

²⁹ KKV decision 606/2008, *Fazer Bageri/Lantmännen Färskbröd AB*.

³⁰ KKV decision 123/2006, *Swedish Meats ek. för./SLP Pärsons AB*.

³¹ KKV decision 694/2000, *Ceralia AB/Kvarn AB Juvel*.

16.4.7 Remedies Imposed in Case of Concentration in the Retail Grocery Sector

Concentration cases within the retail level of the distribution chain remain few in numbers. However, in the *ICA/Netto* case,³² the KKV raised concerns about ICA's strong market position in the cities of Kumla, Uppsala, Enköping, Västerås and the municipality of Katrineholm. ICA 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. 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.

16.4.8 Significance of Internet Stores in the Retail Grocery Sector

Groceries sold over the Internet are still not developed in Sweden. Although no official statistics has been found, it is estimated to be below one per cent of total sales.³³ 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 harmonised area of law within the EU.³⁴

³² KKV decision 747/2006, *ICA AB/Netto*.

³³ Dagens Industri section 2, DI Dimension, Nr 4, May 16, 2013.

³⁴ See Regulation 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 2002 L 31, p. 1. In addition, there are also a large number of detailed EU Regulations in several fields that have an 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).

16.5 Abuse of Buying Power

16.5.1 Applicable Test Used by Enforcement Agencies or Courts

Abuse of market power, either in the 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 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.

The finding of 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.

There are no cases on abuse of buyer power on file. However, dependency can be viewed in 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.

16.6 Competition Law Enforcement in the Swedish Grocery Retail Sector

There are no cases related to the conduct of grocery retailers in the last 5 years from the Swedish courts or the KKV. The bulk of older cases relates to the application of individual exemptions or negative clearance for anti-competitive agreements. Subsequent to the abolishment of the notification of such agreements and making the national counterpart to Article 101(3) TFEU directly applicable for undertakings to rely upon, the strand of such cases came to a complete stop.

16.6.1 Application of Competition Law on Small Geographic Local Markets and Micro-Violations

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 an appreciable extent, be capable of preventing, restricting or distorting competition. The Swedish *de minimis* rules state that companies with a turnover of less than SEK 30 million in the last fiscal year can jointly hold a market share of a maximum of 15 % without being subject to the

application of the rules against anti-competitive agreements.³⁵ However, the existence of any blacklisted restrictions will set that exemption aside. Also, the definition of the relevant market will be very important. Micro-cartels typically imply a very narrow definition of the geographical market, on which smaller undertakings are active, or least involving a limited number of companies belonging to a larger chain. However, to date, very few examples of micro-cartels exist, although there are examples of smaller cartels being sanctioned.

A new instrument that is seemingly 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.³⁶

16.6.2 Competition Concerns Related to the Internal Governance Structure of Grocery Retail Networks

In Sweden, there have been no cases involving an assessment of the internal governance of grocery retail networks insofar that would be problematic to a competition point of view. However, the largest retail player, ICA, is essentially made up 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.

16.6.3 Recommended Resale Prices in the Retail Grocery Sector and Resale Price Maintenance in the Swedish Grocery Retail Sector

The Swedish rules on resale price maintenance (the “RPMs”) in vertical agreements are in essence the same as the EU rules. It has been expected that the more lenient approach to RPM following the ruling in *Leegin Leather*³⁷ in the U.S. would bring

³⁵ Konkurrensverkets allmänna råd om avtal av mindre betydelse (bagatellavtal) som inte omfattas av förbudet i 2 kap. 1 § konkurrenslagen (2008:579), KKVFS 2009:1.

³⁶ See L. Henriksson, *Two Novelties in Swedish Competition Law: Fine Order and Trading Prohibition – A Critical Review*, in H.H. Lidgard, (ed.) *National Developments In the Intersection of IPR and Competition Law*, Swedish Studies in European Law, vol. 3, 2011, pp. 263–281.

³⁷ See U.S. Supreme Court ruling in *Leegin Creative Leather Products, Inc. v. PKS, Inc.*, 551 U.S. 877.

about a change of the *per se* approach to other price maintenance measures than recommended prices and maximum prices. Therefore, the restriction of the buyer's ability to determine its resale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that it does 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.³⁸ In general, obligations related to minimum or fixed prices are considered as hard-core restraints in vertical agreements.

The Swedish Market Court ruled in *Mån-pocket* 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.³⁹

16.6.4 Reselling Below Cost, De-listing of Suppliers in Swedish Competition Law

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. Selling at losses is not considered to be unlawful in Sweden, unless the pricing practice would meet the criteria for predatory pricing as laid down by the EU courts.⁴⁰

De-listing of suppliers would in theory be the monopsonists' 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* case,⁴¹ 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

³⁸ Cf. Article 4.a of Commission Regulation 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 2010 L 102, p. 1, in conjunction with Swedish Act (2008:581) concerning block exemption on vertical anti-competitive agreements. Generally about RPMs in Sweden, see further L. Henriksson, *Distributionsavtal – vertikala avtal och konkurrensrättsliga aspekter*, Norstedts Stockholm 2012, p. 126.

³⁹ MD 2002:5, *Svenska Bokhandlareföreningen v Månadens Bok, Bonnierförlagen AB/Norstedts Förlag AB/Bokförlaget Forum AB/Perigab AB HB*.

⁴⁰ Cf. ECJ, case C-62/86, *AKZO Chemie BV v Commission*, ECR 1991, p. I-3359; ECJ, case C-333/94 P, *Tetra Pak International SA v Commission*, ECR 1996, p. I-5951; ECJ, case C-202/07 P, *France Télécom SA v Commission of the European Communities*, ECR 2009, p. I-2369 and case CJEU, C-209/10, *Post Danmark A/S v Konkurrencerådet* (not yet published).

⁴¹ KKV Decision 93/95, *ICA Handlarnas AB v Master Foods*.

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.

16.6.5 Excessive Prices in Swedish Competition Law

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 in Sweden the same as established by the ECJ in the *United Brands* case,⁴² 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* cases,⁴³ it is most difficult to practically draw the line between high—yet still legal prices—and illegally exorbitantly high prices. When considering cost measures, profitability and demand factors, this becomes even in theory a very difficult exercise indeed. In practice, excessive pricing has therefore mostly been related to cases where there also has been a restriction of intra-community trade.⁴⁴

16.7 Few Regulations Aimed at the Retail Grocery Sector

There are no general sector-specific regulation to govern the structure of the retail grocery market structure in Sweden, apart from general competition law and the merger control 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 retailers, on the other hand, would be the planning and zoning regulations, as mentioned above.

The way retailers are formally organised does not appear to affect constraints in general. However, the still ongoing vertical integration and development of

⁴² ECJ, case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECR 1978, p. 207.

⁴³ Commission decisions of 23 July 2004, COMP/A.36.568/D3, *Scandlines Sverige AB v Port of Helsingborg*, and case COMP/A.36.570/D3, *Sundbusserne v Port of Helsingborg*.

⁴⁴ See, e.g., N. Wahl, *Exploitative high prices and European competition law – a personal reflection*. In: *The Pros and Cons of High Prices*, KKV 2007, pp. 47–64; L. Henriksson, *Konkurrensträttsöverträdelser – Ekonomisk analys i den juridiska processen*, Norstedts, 2013, p. 213.

distribution centres at strategic geographical locations have 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.

16.7.1 Consumer Protection Rules Applying to Internet Retail Stores in Relation to Brick-and-Mortar Stores

Internet grocery stores are subject to complementary legislation in order to deal with the challenges that stem from the fact that purchasing is not done at the seller's premises. When Contracting between sellers (undertakings) and consumers over the Internet 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, as many of the products are perishable. Other than that, the same rules apply for Internet retail stores.

As mentioned above, increasing prices has traditionally been a major concern of the legislator. Already mentioned above, the general Price Control Act⁴⁵ is still in force, although the act 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, including prices for grocery retail goods. 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, and it appears highly unlikely that price control would be used in the grocery retail sector unless exceptional circumstances will arise.

16.7.2 Regulation of Large-Scale Food Retailing and Vertical Relationships Between Suppliers and Retailers

There is no specific Swedish 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.⁴⁶ The two laws complement Article 36 of the Contracts Act, according to which unfair contracts or contract terms may be adjusted or nullified. Again, these provisions are generally applicable and not aimed at any particular industry.

⁴⁵ SFS 1989:978.

⁴⁶ Lag (1994:1512) om avtalsvillkor i konsumentförhållanden and lag (1984:292) om avtalsvillkor mellan näringsidkare.

Special rules do, however, apply to farmers if they are members of what is called 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 Act⁴⁷ 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 that have as their object or effect the prevention or impairment of free mobility of a member on the market with respect to choosing a buyer or a supplier, to the possibility of leaving the association, in other respects of equivalent importance or where selling prices are directly or indirectly fixed for goods when the sale takes place directly between the member and a third party.

Other than these sector-specific rules for upstream producers, the grocery sector is subject to the full application of the general competition rules.

16.8 Looking Ahead: Recommended Improvements to the Competitive Landscape in the Grocery Retail Sector

Currently, there appears to be very little room for new 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.

⁴⁷ SFS 2000:1025.

Although vertical integration and large-scale purchasing are very important factors for the retailers, competition is still manifested locally and the 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 mostly for internal needs. Renting to third parties is very limited in scope, although, e.g., ICA Fastigheter (part of the ICA group) has become a major player as a landlord for commercial premises—especially around the new developed hypermarkets sites.

In 2011, changes were introduced in the Building and Planning Act,⁴⁸ and it is now mandatory for local authorities to pay special attention to economic growth and the development of competition in the planning or zoning procedures. How exactly this should be done in individual matters remains unclear. At the very least, however, the authorities cannot ignore these factors in their decisional practice.

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 better efficiency and consistency in the application of the rules that directly and indirectly affect the competitive situation.

⁴⁸ SFS 2010:900.