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Questions for National Reporters of LIDC BORDEAUX 2010

Question A: Competition Law

Which, if any, agreements, practices or information exchanges about prices should be prohibited in vertical relationships?

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SWEDEN National Report

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The purpose of, and idea behind, the captioned question is to assess what kind of practices that are considered illegal on a scale ranging from resale price fixing through recommended prices to vertical exchange of information about prices. These issues may be assessed under the same or different rules, they may also be subject to strict prohibitions or subject to a rule of reason analysis. However, not all the practices covered in the captioned question stem from formal agreements. Some may contain some sort of implied consent or may be unilateral, like price recommendations.

The various practices that we have in mind are the following:

- resale price maintenance;
- margin maintenance;
- minimum margin;
- guaranteed margin;
- suggested or recommended price;
- information exchanges about prices to consumers.

Please kindly revert to the international reporter and the general reporter without delay if you consider that other types of practices fall within the same question. This will allow the international reporter to communicate the other examples to the other national reporters.

All the above practices have intra-brand purposes. We are not considering consumer prices for the purpose of exchanges between competitors in this questionnaire. Now, it might be that under some legislations, information on prices is prohibited as a result of the risk that it leads to taming with inter-brand competition.

These practices may have intra-brand justifications, thus it is of interest to understand under what rationale they may be declared illegal. The rationale may vary depending on the practice considered.

[1] The working title of my PhD dissertation is 'Anti-Competitive Information Exchange – and Public Procurement'.
[2] The views expressed in this National Report are my personal views only and are by no means representative of the views of the Swedish Competition Authority.

Where these practices or some of them are considered illegal, it is of interest to understand whether they can be justified; for what reasons and to which extent. Are the justifications the same for all the practices? Justifications may stem from different rationales depending on the situations.

1. Legal framework

1.1 What is the legal framework in the national competition act applicable to vertical agreements, i.e. are these agreements in generally permissible or in part impermissible. Are vertical agreements or some of them illegal per se, presumed illegal or assessed on the basis of a type of rule of reason analysis? Does a block exemption apply to vertical agreements in your jurisdiction?

The new Swedish Competition Act of 2008[3] contains provisions prohibiting anti-competitive agreements and abuse of a dominant position which constitute copies of Articles 101 and 102 TFEU. According to the *travaux préparatoires* behind the preceding Competition Act,[4] the fact that the substantive provisions of the Swedish Competition Act are in line with those of EU competition law means that the Commission's practice and jurisprudence of the Court of Justice can serve as guidance when interpreting the Swedish Competition Act.[5]

The Swedish Supreme Court has recently, in a case concerning the existence of a dominant position,[6] concluded that the substantive provisions of Swedish competition law are in line with the corresponding provisions of EU competition law to such a degree that it in fact does not matter whether Swedish or EU competition law is applied, in practice the analysis to be effected is the same.

Public enforcement of Swedish competition law is entrusted to the Swedish Competition Authority[7] and its approximately 130 employees. In the majority of cases handled by the Swedish Competition Authority, the procedure is very similar to that of the Commission's DG Competition and to that of most other national competition authorities in the EU. The Swedish Competition Authority is entitled to take both final and interim injunction decisions on its own,[8] ordering an ongoing violation of Swedish or EU competition law to be terminated; such decisions can be combined with a penalty to be paid in case the antitrust offender would not comply with the injunction decision.[9] Moreover, the Swedish Competition Authority is entitled to take decisions making voluntary commitments mandatory, under threat of penalty payments.[10] The Authority is also entitled to issue fine orders.[11]

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[3] Konkurrenslagen (2008:579)
[4] The Swedish Competition Act of 1993, Konkurrenslagen (1993:20).
[5] See prop. 1992/93:56 p. 21.
[6] Judgment of the Swedish Supreme Court in case T 2808-05 of 19 February 2008, *The Ystad Harbour Case*.
[7] Konkurrensverket.
[8] Chapter 3, Articles 1 and 3 of the Swedish Competition Act
[9] Chapter 3, Article 1 and Chapter 6, Article 1 of the Swedish Competition Act.
[10] Chapter 3, Article 4 and Chapter 6, Article 1 (2) of the Swedish Competition Act.
[11] Chapter 3, Article 17 of the Swedish Competition Act; if the undertaking to which the fine order is addressed does not consent to the order within the time specified, the Swedish Competition Authority may initiate court proceedings concerning fines instead.

These decisions by the Swedish Competition Authority can be appealed to the Swedish Market Court.[12] An appeal against the judgment of the Swedish Market Court to the Swedish Supreme Court is not permitted, the Swedish Market Court is thus first and last court instance in the majority of cases when Swedish competition law is enforced by the Swedish Competition Authority.

However, a peculiarity of Swedish procedural competition law consists in the fact that the Swedish Competition Authority may not take any decision on its own to impose fines for breaches of Swedish or EU competition law. In these cases, the Swedish Competition Authority has to sue the undertakings involved before the District Court of Stockholm. It is thus the District Court of Stockholm which, if the Swedish Competition Authority wins its case, imposes fines in first instance. Also in these cases, there is only one more instance, as the judgments of the Stockholm District Court can be appealed to the Swedish Market Court, without any appeal to the Swedish Supreme Court being possible.

Another peculiarity of Swedish competition procedural law is that private injunction claims to cease any ongoing infringement of Swedish or EU competition law may not be brought directly to court. First, a complaint has to be made to the Swedish Competition Authority. If the Swedish Competition Authority decides to pick up the case, the Authority would take an injunction decision, which then could be appealed to the Swedish Market Court; in these proceedings, the complainant does not enjoy any standing as a party. If, however, the Swedish Competition Authority decides not to pursue the case, the complainant obtains a so called subsidiary right of action, the complainant can directly lodge her case at the Swedish Market Court which may then, as first and last instance, take an injunction decision.[13]

The relevant provisions of the Swedish Competition Act prohibiting both horizontal and vertical anti-competitive cooperation between undertakings are the following:

Chapter 2, Article 1

'Agreements between undertakings shall be prohibited if they have as their object or effect, the prevention, restriction or distortion of competition in the market to an appreciable extent, if not otherwise regulated in this act. This shall apply, in particular, to agreements which :

1. directly or indirectly fix purchase or selling prices or any other trading conditions; ...'

Chapter 2, Article 2

'The prohibition in Article 1 does not apply to agreements which
1. contributes to improving the production or distribution or to promoting technical or economic progress;
2. allows consumers a fair share of the resulting benefit;
3. only imposes on the undertakings concerned restrictions which are indispensable to the attainment of the objective referred to in paragraph 1, and
4. does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the utilities in question.'

[12] Marknadsdomstolen, www.marknadsdomstolen.se; see Chapter 7, Article 1 of the Swedish Competition Act.
[13] Chapter 3, Article 2 of the Swedish Competition Act.

Chapter 2, Article 6

'Any agreements or provisions included in agreements that are prohibited under Article 1 shall be void.'

The Swedish Vertical Block Exemption currently in force[14] refers to the earlier EU Block Exemption for vertical agreements, which since 1 June 2010 has been replaced by a new EU Block Exemption for vertical agreements.[15] Legislative work is currently undertaken to produce a new Swedish Block Exemption for vertical agreements which is expected to enter into force on 1 January 2011 (see prop. 2009/10:236, 'Vertikala konkurrensbegränsande avtal'). This means that in the period between 1 June 2010 and 31 December 2010, different regimes apply depending on whether trade between Member States is affected or not.

Vertical agreements and concerted practices that fall under the Swedish Block Exemption Regulation are automatically exempted. Agreements and concerted practices which are not covered by the Swedish Block Exemption are not presumed to be illegal, but are subject to individual assessment.

1.2 Do these principles vary depending on the type of vertical practice considered?

As set out above, the prohibition of anti-competitive cooperation between undertakings under Chapter 2, Article 1 of the Swedish Competition Act applies, as in EU law, to both horizontal and vertical cooperation. Moreover, the prohibition in both Swedish law and EU law applies to all vertical agreements,[16] concerted practices and decisions of associations, irrespective of the type of the vertical practice. The only precondition in all these cases is that the objective or the effect of the agreement, concerted practice or decision must be an appreciable restriction of competition.

1.3 Is there a specific prohibition in the national competition act on all vertical practices pertaining to prices? If not, which ways of controlling the prices applied to end-users are permissible?

Until 1993, earlier Swedish competition law contained a specific prohibition on resale price maintenance, which then constituted a criminal offence.[17]

Since the enactment of the Competition Act of 1993, there is, as set out above, no longer any specific prohibition on vertical practices pertaining to prices. Moreover, since 1993, the Swedish Competition Act no longer contains any criminal sanctions.

[14] Lag (2008:581) om gruppundantag för vertikala konkurrensbegränsande avtal.
[15] 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 [2010] OJ L102/1.
[16] This National Report only deals with price-related aspects of vertical agreements. For a comprehensive overview of the treatment of vertical agreements under Swedish competition law, see the contribution of Elisabeth Legnerfält and Helene Andersson in *GCR Getting the Deal Through 2010 – Vertical Agreements*, p. 279-285.
[17] See Carl Wetter, Johan Karlsson and Marie Östman, *Konkurrensrätt – en kommentar*, Thomson Reuters, 4 th. ed., 2009, p. 410.

1.4 What is the de minimis/appreciability threshold, if any, applicable to vertical arrangements and practices?

In 2009, the Swedish Competition Authority published revised guidelines on agreements of minor importance (de minimis) that are not covered by the prohibition of Chapter 2, Article 1 of the Swedish Competition Act.[18] The Swedish guidelines are in line with the terms of the de minimis notice of the EU. The threshold regarding vertical restrictions is fixed at a combined market share of 15 percent of the undertakings concerned in any of the relevant markets, but does not apply in cases of hardcore restrictions, in particular price fixing.

1.5 Has the competition authority in your jurisdiction issued guidelines regarding exchanges of information and/or vertical price agreements?

The Swedish Competition Authority has not issued any guidelines specifically targeting vertical price agreements or vertical exchanges of information. As to vertical price agreements, the Swedish Competition Authority follows the guidelines issued by the European Commission on vertical agreements.[19]

As to vertical exchanges of information, it is interesting to note that in spring 2009, the Swedish Competition Authority provided interactive guidance aimed at the activities of trade associations[20] on its website. This guidance contains a section on horizontal information exchange which may be of some guidance also for vertical information exchange.

In November 2006, the Swedish Competition Authority organised an international research conference on 'The Pros and Cons of Information Sharing'. The conference book can be downloaded from the website of the Authority.[21]

In November 2008, the Swedish Competition Authority organised an international research conference in the same series of conferences on 'The Pros and Cons of Vertical Restraints'. Also this conference book can be downloaded from the website of the Authority.[22]

2. Criteria applicable to price related vertical agreements

2.1 Is the national competition act declaring these or some of these practices as illegal under a per se rule, presumption or rule of reason?

All vertical practices having as their object or effect an appreciable restriction of competition are, as in EU law, automatically prohibited and therefore legally void.[23]

[18] Adopted on 15 January 2009, Konkurrensverkets allmänna råd om avtal av mindre betydelse (bagatellavtal) som inte omfattas av förbudet i 2 kap. 1 § konkurrenslagen (2008:579), KKVFS 2009:1.
[19] Commission Notice – Guidelines on Vertical Restraints, SEC (2010) 411.
[20] Kör på grönt – En vägledning om vad som är tillåtet och otillåtet för samarbeten inom branschorganisationer, available on www.kkv.se
[21] Available under: http://www.kkv.se/t/Page____1858.aspx
[22] Available under: http://www.kkv.se/t/Page____5386.aspx
[23] Chapter 2, Art. 6 of the Swedish Competition Act, respectively Art. 101 (2) TFEU.

2.2 Are only agreements pertaining to prices considered illegal? Which conditions have to be fulfilled in order to render "agreements" to be considered illegal?

The prohibition applies to all types of vertical restrictions of competition. As in EU law, the Swedish legislation covers not only agreements but also concerted practices and decisions of associations of undertakings.[24]

Regarding the interpretation of the term agreement, European standards have to be applied; in particular the decisions of the EU courts are decisive in that respect. An agreement or concerted practice can consist not only of an express commitment but may also result from factual behaviour which can be regarded as an implicit acceptance of the terms of business of the other undertaking concerned.

2.3 What about the situations which are in-between, such as recommendations / suggestions and exchange of information?

These practices are covered by the Swedish (and European) prohibition only if they constitute an agreement, a concerted practice or a decision by an association of undertaking. Recommendations or suggestions as such constitute unilateral conduct but they may form part of the contractual relations between the undertakings concerned or may turn into an agreement if the other undertaking implicitly approves or regularly follows the recommendations / suggestions.

A vertical exchange of information on prices or other competitive parameters might constitute an agreement. Whether and to what extent such an exchange may restrict competition or may be permitted has to be decided on the basis of all circumstances of the relevant case.

To my knowledge, *vertical* information exchange has not yet been subject to any intervention by the Swedish Competition Authority or subject to any court procedure. In contrast, there are a number of Swedish court cases involving *horizontal* information exchange.[25]

2.4 What is the assessment of vertical unilateral practices in relation to prices?

Unilateral practices which do not fulfil the terms of an agreement or concerted practice do not fall under the prohibition of a (vertical) restriction of competition as laid down in Chapter 2, Art. 1 of the Swedish Competition Act (Art. 101 (1) TFEU). They may however, in certain circumstances, constitute an abuse of a dominant position if the conditions of the relevant provisions (Chapter 2, Art. 7 of the Swedish Competition Act, Art. 102 TFEU) are met.

[24] A caveat is warranted as to the wording of Chapter 2, Art. 1 of the Swedish Competition Act, which read on a stand-alone basis, seems to suggest that only agreements strictly speaking are subject to the prohibition of anti-competitive cooperation between undertakings. However it follows from the definition contained in Chapter 1, Art. 6 of the Swedish Competition Act, that '[t]he provisions of the Act relating to agreements shall also apply to 1. decisions by an association of undertakings, and 2. concerted practices of undertakings.'

[25] For example, the judgments of the Swedish Market Court in the *Sydsvensk Färskpotatis Case* (MD 1997:5), the *SPI Case* (MD 1999:20) and the *VVS Installatörerna Case* (MD 2005:5).

2.5 Are some of these practices not considered illegal merely as a result of a de minimis/appreciability rule?

See chapter 1.4 above.

3. Anti-competitive effects

3.1 Are the anti-competitive effects considered by the national competition act different for each of these practices, or is it always the same kind of anti-competitive effect which is considered and found more or less serious?

With regard to the anti-competitive effects of a restrictive practice, all relevant facts must be properly assessed. The law does not distinguish between specific effects to be regarded as an appreciable restriction of competition.

3.2 To which extent is the national competition act considering only inter-brand effects or does it consider intra-brand effects?

The principles as described in chapter 3.1 above apply to inter-brand and intra-brand effects likewise. The Swedish Competition Act does not refer to these types of practices.

3.3 Is also the anti-competitive intent of the vertical agreement considered?

Agreements or concerted practices with the objective of restricting competition are generally regarded as hardcore restrictions. This objective as such renders such agreements or concerted practices illegal, even if they have not been executed or if they have not had any actual effect on the market. In practice, only this type of infringement is likely to be subject to fines.[26]

3.4 Do the courts take into account the actual acts performed by the supplier, e.g. if the supplier, in practise encourages a recommended price to constitute a fixed price through punishments or remunerations? Please give examples from case law and/or legal doctrine.

So far, the Swedish Market Court has only given judgment on a purely vertical constraint at one occasion, in the *Månpocket Case*. This case concerned recommended prices and the relevant parts of the Court's reasoning are reproduced below:[27]

'The recommended prices which are printed on the books are not binding on the retailers and there is nothing in the files that would indicate that Månadens Bok in any way would sanction those retailers which choose to set own prices for the books, in fact it has not even been claimed that such sanctions occur. However, this does not exclude that the printed recommended prices still could have an effect on competition. A recommended price which has been printed directly on each book differs, e.g., from a recommended price list in that a retailer which wants to sell at a price different from the printed price normally would need to

[26] However, it should be noted that so far the Swedish Competition Authority has not yet sued for fines concerning a purely vertical constraint without any dominance involved.

[27] Judgment of the Swedish Market Court in the Månpocket Case, *Svenska Bokhandlareföreningen ./. Månadens Bok et.al.*, of 22 February 2002, 2002:5, Dnr A 8/00, p. 14-15.

mark the books anew or take another measure to clearly show the consumer that another price is applicable. The retailer therefore has to take an active measure, which entails additional work. Admittedly, it can be argued, as Månadens Book has done, that a retailer easily can depart from the indicated recommended price by offering general price or volume rebates. However, such measures take the printed recommended price as departing point. In order for a retailer to price different books differently and thus achieve price differentiation, more far-reaching measures would probably be necessary anyway. It follows from the files that the practice at hand has resulted in retailers to a large degree aligning their prices to those indicated on the Månpocket paperbacks. According to what has been claimed by Bokhandlarföreningen, which not has been denied by Månadens Bok, this applies to an even higher degree to sales outlets which only market paperbacks such as department stores and shops. The price recommendations have thus resulted in price rigidity as to the Månpocket paperbacks.

The recommended price is determined with the so called F-price, i.e. the price a retailer pays to Månadens Bok, as point of departure as well as a certain margin for the retailer. As the recommended prices have the effects on pricing as mentioned above, the price recommendations thus entail a steering of both the margins of the individual retailer as well as the pricing of the Månpocket paperbacks to consumers.

In view of these facts of the case, the Swedish Market Court considers that competition is distorted as to sales of the Månpocket paperbacks. Because Månadens Bok has, as mentioned above, a significant market share, this distortion has an appreciable effect on the relevant market.' (author's translation)

4. Pro-competitive effects

4.1 Does the national competition act recognise justifications in relation to these vertical practices regarding prices? Has the relevant case law taken into account practical justifications for the need of price agreements and/or pro competitive aspects in relation to the exchange of information regarding price?

Pro-competitive effects may generally be recognized by an exemption of the relevant practice from the general prohibition to restrict competition. In principle, all vertical practices are block exempted by the Swedish or EU Vertical Block Exemption Regulation if the market share threshold[s] of 30 percent is not exceeded, with the exception of restrictions that remove the benefit of the block exemption – hardcore restrictions[28] and excluded restrictions.[29] In addition, an individual exemption[30] may be applicable, in particular in cases where the market share exceeds the threshold of 30 percent.

With regard to vertical price fixing, the rules in Art. 4 lit. a of the new and earlier EU Vertical Block Exemption Regulation apply, according to which price fixing is a hardcore restriction which is not block exempted and which normally does not qualify for an individual exemption.

[28] Art. 4 of the new respectively earlier EU Vertical Block Exemption Regulation.
[29] Art. 5 of the new respectively earlier EU Vertical Block Exemption Regulation.
[30] Chapter 2, Art. 2 of the Swedish Competition Act, respectively Art. 101 (3) TFEU.

4.2 What are the types of pro-competitive effects recognised in relation to vertical practices on prices?

Swedish (and EU) law does not differentiate between the different types of pro-competitive effects. The conditions as laid down in the EU Vertical Block Exemption Regulation or the whole set of criteria for an individual exemption[31] must be fulfilled. With respect to vertical practices on prices, no pro-competitive effects have so far been accepted by the competition authorities or the courts in the post-modernisation regime.

4.3 Are the following types of justifications taken into consideration and if yes, in relation to which sort of practices and to which extent?

- **competitive oversight inside the distribution network**
- **price-level positioning of the products by a supplier**
- **consumers benefits in relation to a resale price cap**
- **consumers' interest in general (please specify)**
- **launching of a new product**
- **market positioning of a product**
- **promotional organisation**
- **after sale services**
- **coordination with consumers' information**
- **short term promotional campaigns.**

Please give examples from case-law and/or legal doctrine.

There is no general answer to this question. Whereas a block exemption is based on a general assessment of the pro-competitive effects of a certain type of agreement or concerted practice, an individual exemption requires an in-depth analysis of all circumstances of the actual case. All above-mentioned justifications may result in an exemption, if the other conditions are met or may lead to the conclusion that competition is not restricted appreciably.

In the post-modernisation regime, extremely few cases concerning vertical constraints have been decided by the Swedish Competition Authority or Swedish courts. The legal exemption applies automatically, without a decision being required to that effect. In the only case on purely vertical constraints decided by the Swedish Market Court so far, the *Månpocket Case*,[32] the Court only analysed the anti-competitive effects of the price recommendations as it considered itself, for procedural reasons, prevented from analysing whether there were any efficiency reasons for exemption.

Between July 2004[33] and June 2010, the Swedish Competition Authority has to my knowledge only intervened against purely vertical constraints without any dominance involved on two occasions, in the *Reitan Case* and the *Eco Boråstapeter Case*.[34]

[31] Chapter 2, Art. 2 of the Swedish Competition Act, Art. 101 (3) TFEU.
[32] Judgment of the Swedish Market Court in the Månpocket Case, *Svenska Bokhandlareföreningen ./. Månadens Bok et.al.*, of 22 February 2002, 2002:5, Dnr A 8/00.
[33] This is the date at which the post-modernisation regime was launched in Sweden and the notification system was abandoned.
[34] For an overview of these and related cases, see section 6.2 below.

4.4 Does the national competition act and case law take into consideration other justifications?

No pro-competitive effect and no justification are *per se* excluded by Swedish (and EU) law with respect to the assessment whether competition is appreciably restricted or whether an individual exemption is applicable. Because of the limited pertinent case law, there are no precedents on other possible justifications. With regard to block exemptions, the relevant criteria are exclusively defined in the regulation.

4.5 Are pro-competitive effects automatically taken into consideration by the authorities / the courts or ought they be invoked by the interested parties?

As in EU law, Swedish law provides for a system of legal exemption which is automatically applicable, no decision to that effect being required. There is also no obligation to notify an exemption. Under Swedish administrative law, all administrative authorities such as the Swedish Competition Authority are subject to a general investigative obligation, which means that the authorities are obliged also to investigate circumstances in favour of an undertaking against which an investigation is directed. This general investigative obligation also encompasses the pro-competitive effects of a vertical constraint. However, the practical effects of this general investigative obligation are limited for two reasons. Firstly, the general investigative obligation is in itself not very far-reaching. Secondly, this obligation is very difficult for undertakings to rely on before a court, in particular as the burden of proof lies with the undertaking which benefits from the exemption.[35] Therefore, in practice the interested party will normally bring forward the necessary evidence. However, as the Swedish Competition Authority cannot take fine decisions on its own, an undertaking may choose to present the necessary evidence first if the Competition Authority sues the undertaking for fines before the Stockholm District Court.[36]

4.6 Might any of these justifications have anti-competitive effects and are they considered in the national competition act and case law?

Possible anti-competitive effects have to be taken into account in the context of an individual exemption and in the assessment of whether competition is appreciably restricted. If the conditions of the Vertical Block Exemption Regulation are fulfilled, the exemption is applicable irrespective of any negative effects. In these cases, the Swedish Competition Authority may be entitled to withdraw the benefits of the exemption, but only with effect for the future.[37] The practical implication of this is that the Swedish Competition Authority is prevented from imposing fines even on hardcore vertical constraints having an anti-competitive object or effect as long as the conditions for exemption under the applicable Vertical Block Exemption Regulation are fulfilled.

[35] This follows from Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002, which is directly applicable before Swedish courts.
[36] As pointed out above, the Swedish Competition Authority has not yet sued for fines concerning a purely vertical constraint without any dominance involved.
[37] Chapter 2, Art. 3 of the Swedish Competition Act.

4.7 Have these justifications led to the conclusions that the agreement is not covered by a prohibition on anti-competitive agreements or to an exemption from the competition rules?

See chapter 4.3 above. Up to now, there are no precedents in Swedish case law on justifications or exemptions.

4.8 In your opinion do the antitrust authorities sufficiently take into consideration the pro-competitive effects of some of these practices?

As mentioned above (see chapter 4.4 and 4.7), it follows from the post-modernisation regime that only in exceptional cases the authorities or courts have to decide on pro-competitive effects (justifications or exemptions). Therefore, no precise answer is possible on how and to what extent authorities or courts would accept possible pro-competitive effects.

5. Sanctions:

5.1 Is the national competition legislation sanctioning vertical practices in general and if yes through which forms of sanctions; administrative and/or criminal or other?

The fine in current Swedish law is an administrative fine which only can be imposed on undertakings, not on individuals. The Swedish Competition Authority may not impose any fine on its own but has to initiate a proceeding before the Stockholm District Court, which may impose a fine on an undertaking if the Swedish Competition Authority wins its case.[38]

The maximum fine imposed on undertakings is, following the EU example, limited to 10 percent of the worldwide turnover of the undertaking or the group to which the undertaking belongs.

While infringements of the Swedish Competition Act are not subject to any criminal sanctions, the Swedish Competition Act of 2008 introduced a new sanction on individuals. Chapter 3, Art. 24 of the Swedish Competition Act contains a reference to the Swedish Trading Prohibition Act (1986:436), according to which a trading prohibition may be imposed on certain individuals engaged in cartel activity. Such a trading prohibition may be issued for a time period ranging between three and ten years and means, *inter alia*, that the individual is barred from running business operations or holding a senior position in an undertakings. Non-compliance with the trading prohibition may entail imprisonment for at most two years.

However, it follows from Section 4 of the relevant General Guidelines[39] issued by the Swedish Competition Authority that a trading prohibition may only be imposed on such cartel activity which 'includes undertakings in the same line of trade or production fixing selling prices, limiting or controlling production or shar[ing] markets.'

[38] As pointed out above, the Swedish Competition Authority has not yet sued for fines concerning a purely vertical constraint without any dominance involved.

[39] The General Guidelines of the Swedish Competition Authority on trading prohibition in the event of infringements of the rules on competition of 24 February 2010, KKVFS 2010:1.

This means that Swedish law does not provide for any sanctions on individuals as to vertical constraints, even if they include hardcore restraints.

5.2 Are the above practices subject to sanctions as well?

All practices are in principle subject to sanctions, provided that they constitute an appreciable restriction of competition. However, statistically, the risk of fines for any vertical constraint, even hardcore restrictions such as price fixing and other price related practices have been very limited as the Swedish Competition Authority has not yet sued for fines concerning a purely vertical constraint without any dominance involved.[40]

5.3 Is the specificity of vertical relationships, for instance the lesser harm in relation to intra-brand restrictions, taken into consideration in the application of sanctions?

As the Swedish Competition Authority has not yet sued for fines concerning a purely vertical constraint without any dominance involved, no specific answer to this question may be given.

5.4 What are the major fines in your jurisdictions (in EUR) for vertical restraints? In which context have they been imposed? What is the major criminal or other sanction imposed?

As the Swedish Competition Authority has not yet sued for fines concerning a purely vertical constraint without any dominance involved, no specific answer to this question may be given. In contrast, fines for horizontal price fixing have increased considerably during recent years.[41]

6. Assessment

6.1 Is the national competition act sufficiently taking into consideration the specificity of vertical agreements when dealing with price-related practices?

As the provisions of the Swedish Competition Act as well as the Swedish Vertical Block Exemption Regulation mirror the EU provisions in this respect, it is not possible to give an answer specific to Sweden to this question.

[40] For an analysis of the reasons behind the limited public enforcement of the rules on vertical restraints in the post-modernisation regime, see section 6.2 below.

[41] The Swedish record fines on horizontal price fixing (bid rigging) were recently imposed by the Swedish Market Court in the *Asphalt Cartel Case* (MD 2009:11, judgment of 28 May 2009). The total amount of disputed fines was approximately 27 million Euro.

6.2 Is the case law evolving? Towards which tendency? On which points are an evolution of the situation advisable?

Overview over the post-modernisation case-law on vertical restraints in Sweden

As mentioned under section 3.4 above, the Swedish Market Court has only given judgment on a purely vertical constraint at one occasion, in the *Månpocket Case*[42]. This case concerned vertical price recommendations printed on paperbacks. The publishers involved were obliged to cease printing recommended prices on paperbacks under threat of a penalty payment of approximately 50 000 Euro. This case was initiated by Svenska Bokhandlareföreningen exercising its subsidiary right of action after the Swedish Competition Authority decided not to pursue the case.

In the post-modernisation regime, the Swedish Competition Case has only actively intervened against vertical constraints on two cases so far, in the Reitan Case and in the Eco Boråstapeter Case.

The *Reitan Case*[43] is the only case in the post-modernisation regime where the Swedish Competition Case so far has chosen to actively intervene against an anti-competitive vertical pricing practice. The facts of the case were as follows. According to the franchise agreements between Reitan Servicehandel i Sverige AB and its franchisees in the Pressbyrån and 7-Eleven chains, the franchisees had to use a specific computer programme for pricing of their products, which was also used for calculating the franchise fee. Through the computer programme, Reitan supplied its franchisees with recommended consumer prices, the franchisees were not allowed to charge consumers a higher price than the recommended price. The Swedish Competition Authority found that it was, for practical reasons, difficult for the franchisees, to set individual prices to consumers. Moreover, the Authority found that the franchisees to a large degree followed the recommended prices. After Reitan Servicehandel Sverige AB obtained the Authority's Statement of Objections, it offered voluntary commitments making it easier for franchisees to deviate from the recommended prices and apply individual retail prices. The Swedish Competition Authority accepted these commitments.[44]

The other case in which the Swedish Competition Authority has actively intervened in the post-modernisation regime is the *Eco Boroåstapeter Case*.[45] In its Statement of

[42] Judgment of the Swedish Market Court in the Månpocket Case, Svenska *Bokhandlareföreningen ./. Månadens Bok et.al.*, of 22 February 2002, 2002:5, Dnr A 8/00. The legality of specific vertical constraints has been subject to private litigation before several Swedish civil court, for an overview see Carl Wetter, Johan Karlsson and Marie Östman, *Konkurrensrätt – en kommentar*, Thomson Reuters, 4th. ed., 2009, p. 371, footnote 14.

[43] Decision of the Swedish Competition Authority in Case 994/2004 of 6 February 2006, *Reitan Servicehandel Sverige AB*.

[44] On 24 March 2006, the Stockholm District Court decided, upon application by the Swedish Competition Authority, that non-compliance with its commitments would render Reitan Servicehandel Sverige AB liable to pay a penalty of 3 million SEK (Case Ä 3237-06 at the Stockholm District Court). The Reitan Case is the only example of active intervention of the Swedish Competition Authority in the post-modernisation regime against vertical price recommendations. In contrast, the Swedish Competition Authority has recently intervened on several occasions against horizontal price recommendations made by trade associations, for example in the *Sveriges Annonsörer Case* (decision in case 269/2007 of 3 September 2008).

[45] Decision of the Swedish Competition Authority in Case 532/2004 of 13 December 2005, *Eco-Boråstapeter AB*. On 28 February 2006, the Stockholm District Court decided, upon application by the Swedish Competition Authority, that non-compliance with its commitments would render Eco-Boråstapeter liable to pay a penalty of 1 million SEK (Case Ä 33203-05 at the Stockholm District Court).

Objections, the Swedish Competition Authority found that Eco-Boråstapeter applied anti-competitive quantitative selection criteria for admittance to a selective distribution system. The company then offered voluntary commitments not to apply any quantitative selection criteria. The Swedish Competition Authority accepted these commitments.

The Swedish Competition Authority has conducted investigations in several other cases of vertical agreements, which either involved dominance or simultaneously horizontal aspects. Interesting examples are the Ticnet Case, The ICA Case and the Volvo Car Dealer Cartel.

The *Ticnet Case*[46] concerned exclusivity clauses imposed by a dominant provider of ticketing services – Ticnet. Upon a comprehensive investigation, the Swedish Competition Authority concluded that the exclusivity clauses were not infringing competition law.

The *ICA Case*[47] concerned retail price lists which were distributed by the wholesaler ICA Sverige AB to a number of independently owned ICA retailers. Upon a comprehensive investigation, the Swedish Competition Authority decided to close the case after ICA announced that it would abandon certain horizontal aspects, namely the participation of a number of representatives from the independent retailers in the production of the retail price lists distributed by the wholesaler to the retailers within the ICA chain.

The *Volvo Car Dealer Cartel Case*[48] is a very interesting example of horizontal cooperation in a vertical context. The Swedish Competition Authority found that a number of Volvo car dealers in the south of Sweden had engaged in horizontal price fixing. The dealers argued that they were so much integrated in the Volvo vertical distribution chain that the cooperation should be seen as a part of the vertical relationship. This view was shared by the Stockholm District Court.[49] However, on appeal, the Swedish Market Court fined the car dealers for horizontal price fixing.

Analysis and Conclusions

Until July 2004, when the notifications system was abandoned and the post-modernisation regime launched, the Swedish Competition Authority took some 100 reasoned decisions involving vertical constraints. Moreover, according to the authors of the leading Swedish competition law book, the Swedish Competition Authority was rather tough on vertical restraints.[50]

Against this background it may appear somehow puzzling that the Swedish Competition Authority has only actively intervened against purely vertical constraints on two occasions since July 2004.

In my view the reason for this development is the following.

[46] Decision of the Swedish Competition Authority in Case 444/2005 of 7 March 2007, *Ticnet AB*.
[47] Decision of the Swedish Competition Authority in Case 878/2003, *ICA-handlarnas & ICA Sverige AB*. ICA is Sweden's largest food retail chain.
[48] Judgment of the Swedish Market Court of 11 September 2008 (MD 2008:12)
[49] Judgment of the Stockholm District Court of 7 June 2006 (T 4231-04).
[50] See Carl Wetter, Johan Karlsson and Marie Östman, *Konkurrensrätt – en kommentar*, Thomson Reuters, 4th. ed., 2009, p. 371-372.

When the European Commission initiated the Modernization package and proposed an end to the notification system one of the reasons put forward was that the notification system absorbed a very large part of the available manpower both at DG Competition as well as at national competition authorities. By scrapping the notification system, European competition authorities would be free to refocus their activities towards actively combating the most anti-competitive practices, in particular horizontal cartels.

The Swedish Competition Authority is probably one of the national competition authorities which most eagerly embraced the new policy to focus on combating horizontal cartels. This focus on horizontal cartels has resulted in a number of court victories for the Swedish Competition Authority significantly increasing the fine level – and presumably – the deterrence level as to horizontal cartels. Moreover, the number of dawn-raids initiated by the Swedish Competition Authority has significantly increased over the last years.[51]

However, in my view, the very strong focus on horizontal cartels may have been unfortunate as to the enforcement activities – and corresponding deterrence levels – when it comes to vertical constraints. In my view, there has been a significant under-enforcement of the rules on vertical constraints in Sweden during the last six years in the post-modernisation regime.

The Swedish Competition Authority receives a large number of complaints every year and in most cases it decides not to start an investigation. As pointed out by advokat Henrik Nilsson in the Swedish National Report for the 2009 Vienna LIDC Congress, the Swedish Competition Authority enjoys a large discretion whether to start an investigation and whether to close an investigation.[52]

The decision of the Swedish Competition Authority to close a case is not subject to legal review by courts. The idea behind this is that the Swedish Competition Authority, in view of its limited resources, shall be rather free to give priority to which cases to investigate and bring to court. In its decisions to close an investigation it regularly makes clear that its decision to close a case is done on grounds of priority/policy reasons and does not mean that the Swedish Competition Authority has taken any view of the legality under the Swedish Competition Act of a given practice. Instead of a right to appeal against such a decision to close a case, undertakings concerned have as mentioned above a right of subsidiary action to request an injunction decision directly from the Swedish Market Court.

In my view, there was a significant transparency gap as to the priority policy of the Swedish Competition Authority during the first five years following the 2004 modernisation. This was unfortunate in view of the significant discretion actually enjoyed by the Swedish Competition Authority. Therefore, I think that the adoption of the Authority's Priority Guidelines[53] in January 2010 will prove to be very helpful.

The Priority Guidelines list three main factors of overriding importance when deciding whether to investigate a case: (1) How serious – *i.e.* anti-competitive – is the problem;

[51] The list of dawn-raids made by the Swedish Competition Authority can be downloaded at http://www.konkurrensverket.se/t/Page____360.aspx.

[52] Under section 4.6 of the National Report (p. 8) Henrik Nilsson summarizes the limits of the discretion as follows: 'The discretion is far-reaching with the only real limits being the ones set by the statutes on misuse of office in Chapter 20 of the Swedish Penal Code (1962:700) and the oversight exercised by the Parliamentary Ombudsman ("Justitieombudsmannen") over public institutions and officials.'

[53] Konkurrensverkets policy för prioritering av konkurrens- och upphandlingsfrågor, 4 January 2010, dnr 475/2009.

(2) How important is it to obtain a legal precedent from the courts; (3) Is there another authority or actor which is better placed to act in a given matter?

Before the adoption of the Priority Guidelines the *de facto* approach of the Swedish Competition Authority appears to have been almost automatically to give priority to combating horizontal cartels and to assign vertical restraints almost automatically such a low priority ranking that in practice only two cases of active intervention against vertical constraints took place over a six years period.

In contrast, the newly adopted Priority Policy appears to be more fine-tuned. In my view, it in fact opens up for a considerable increase of enforcement activities against vertical constraints.

The effects of vertical constraints may sometimes be as detrimental for consumers as horizontal cartels. It is widely accepted that resale price maintenance can have the same effects – i.e. higher prices for consumers – as a horizontal cartel at the distributors' level. Enforcing the competition rules of vertical constraints often require less investigative resources, in particular if the vertical constraint is explicitly embodied in the distribution agreement, as opposed to horizontal cartels where explicit cartel agreements are only available to competition authorities in very rare cases. Moreover, after 6 years of extremely limited enforcement of vertical constraints rules, there is a general lack of Swedish legal precedent, which is one of the three factors which according to the Priority Policy Guidance could trigger intervention by the Swedish Competition Authority.

In my view, it is therefore likely that we will see more active enforcement of vertical constraints rules by the Swedish Competition Authority over the next years. This means that companies – as well as their advisers – may be well advised to consider the risk of intervention by the Swedish Competition Authority when drafting or renewing their distribution agreements which may infringe Swedish or EU competition law.

SUMMARY

National Swedish Report – Question A (Competition Law)

By Robert Moldén[54]

The new Swedish Competition Act of 2008[55] contains provisions prohibiting anti-competitive agreements and abuse of a dominant position which constitute copies of Articles 101 and 102 TFEU. According to the *travaux préparatoires* behind the preceding Competition Act,[56] the fact that the substantive provisions of the Swedish Competition Act are in line with those of EU competition law means that the Commission's practice and jurisprudence of the Court of Justice can serve as guidance when interpreting the Swedish Competition Act.[57]

The Swedish Market Court has only given judgment on a purely vertical constraint at one occasion, in the Månpocket Case.[58] This case concerned vertical price recommendations printed on paperbacks. The publishers involved were obliged to cease printing recommended prices on paperbacks under threat of a penalty payment of approximately 50 000 Euro. This case was initiated by Svenska Bokhandlareföreningen exercising its subsidiary right of action after the Swedish Competition Authority decided not to pursue the case.

In the post-modernisation regime, the Swedish Competition Case has only actively intervened against vertical constraints on two cases so far. In the Reitan Case[59] the Swedish Competition Authority intervened against anti-competitive price recommendations printed on paperbacks. In the Eco Boråstapeter Case,[60] the Swedish Competition Authority intervened against anti-competitive quantitative selection criteria for admittance to a selective distribution system.

In my view, it is likely that we will see more active enforcement of vertical constraints rules by the Swedish Competition Authority over the next years. This means that companies – as well as their advisers – may be well advised to consider the risk of intervention by the Swedish Competition Authority when drafting or renewing their distribution agreements which may infringe Swedish or EU competition law.

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[55] Konkurrenslagen (2008:579)

[56] The Swedish Competition Act of 1993, Konkurrenslagen (1993:20).

[57] See prop. 1992/93:56 p. 21.

[58] Judgment of the Swedish Market Court in the Månpocket Case, *Svenska Bokhandlareföreningen ./. Månadens Bok et.al.*, of 22 February 2002, 2002:5, Dnr A 8/00.

[59] Decision of the Swedish Competition Authority in Case 994/2004 of 6 February 2006, *Reitan Servicehandel Sverige AB.*

[60] Decision of the Swedish Competition Authority in Case 532/2004 of 13 December 2005, *Eco-Boråstapeter AB.*