

Chapter 10 Sweden

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The present chapter follows the outline pattern of the previous sections. The first part (sub A) **10.01** introduces roughly to the legal provisions and the main institutions concerned with the implementation of competition law in Sweden. It continues with the general approach to demand and supply side substitutability for defining the relevant product market, and the criteria used to define the geographic market. Afterwards, (sub B) this chapter portrays the main markets delineated in the media sector by the Swedish authorities. The third section (C) provides a comparison between the market definition applied at the EC level and the methodology adopted by the Swedish authorities. The last part (sub D) provides an analysis of the impact of different regulatory frameworks in Sweden on market definition.

A Market Definition in Competition and Media Law

This chapter examines the general concept of market definition in Swedish competition and **10.02** media law after introducing the legal framework governing those areas of law.

I Introduction to the Legal Framework

In the following, a short introduction to the legal framework regarding competition and media **10.03** law in Sweden is presented. This section specifies the major legal provisions as well as the relevant authorities and courts as required for the understanding of the main part.

1. Legal Provisions

The Competition Act¹ deals with all competition law matters such as anti-competitive co- **10.04** operations², abuse of dominant positions³, as well as concentrations of undertakings⁴. The Competition Act is accompanied by several executive provisions. As to media sectors, the Telecommunications Act⁵ and the Radio Communications Act⁶, both supplemented by several executive provisions and regulations, were relevant. Due to the EC Regulatory Reform, both acts have been repealed by the new Electronic Communications Act⁷ which entered into force on 25 July 2003⁸. Further, the Radio and Television Act⁹ applies to “broadcasting of sound

¹ Konkurrenslag (hereinafter Competition Act), SFS 1993:20 as last amended by SFS 2002:595; an English version is available at http://www.kkv.se/engwebb/eng_doc/com_act.htm.

² §§ 6 et seq. Competition Act.

³ §§ 19 et seq. Competition Act.

⁴ §§ 34 et seq. Competition Act.

⁵ Telelag (hereinafter Telecommunications Act), SFS 1993:597 as last amended by SFS 2002:282; an English version is available at <http://www.pts.se/dokument/getFile.asp?FileID=2320>.

⁶ Lag om radiokommunikation (hereinafter Radio Communications Act), SFS 1993:599 as last amended by SFS 2000:1251.

⁷ Lag om elektronisk kommunikation (hereinafter Electronic Communications Act), SFS 2003:389 as amended by SFS 2003/390 C. J. Af Petersens/J. Sahlstrand, “Sweden: Telecommunications–Proposed Legislation” [2002] 8(8) C.T.L.R. N-161.

⁸ Footnote deleted

⁹ Radio- och TV-lagen (hereinafter Radio and Television Act) SFS 1996:844 as last amended by SFS 2002:1096.

radio programmes and television programmes that are directed to the general public”¹⁰ as well as to the content of those programmes including commercial advertising¹¹. Pursuant to the Radio and Television Act, licences are required for programmes that are conveyed via radio waves at frequencies below 3 GHz¹². For the distribution of programmes by means of cable or satellite no licence is required¹³.

2. *Authorities and Courts*

The Competition Authority (*Konkurrensverket*) is in charge of enforcing the Competition Act. **10.05** It is empowered to prohibit anti-competitive co-operations of undertakings and abusive behaviours of dominant undertakings¹⁴, to grant exemptions for agreements¹⁵, and to provide negative clearances (*icke-ingripandebesked*)¹⁶. These decisions can be appealed to the Market Court (*Marknadsdomstolen*)¹⁷, which is the highest court in competition law matters. On request of the Competition Authority, the Stockholm District Court (*Stockholms Tingsrätt*) may order administrative fines¹⁸ and prohibit a concentration¹⁹. Again, appeals to those decisions are handled by the Market Court²⁰.

As to matters of electronic communications, two authorities are currently responsible for the **10.06** enforcement of the respective statutes. The Post and Telecommunications Authority (*Post- och telestyrelsen*)²¹ is the administrative body for regulating radio and telecommunications networks and services, whilst the Radio and TV Authority (*Radio- och TV-verket*) deals with broadcasting issues pursuant to the Radio and Television Act and is therefore mainly entrusted with licensing of rights for the transmission of radio and television programmes for community and local commercial radio broadcasting²². Decisions of both authorities can be appealed to the general administrative courts²³.

¹⁰ Ch. 1 § 1(1) Radio and Television Act.

¹¹ Ch. 6 and 7 Radio and Television Act.

¹² Ch. 2 § 1 Radio and Television Act.

¹³ O. Alffram/J. Wentrup, “Sweden”, in: C. D. Long, “Global Telecommunications Law and Practice”, at para. SW-31.

¹⁴ § 23 (1) Competition Act.

¹⁵ § 8 et seq. Competition Act.

¹⁶ § 20 Competition Act.

¹⁷ § 60 (1) Competition Act. Recent case law is available at <http://www.marknadsdomstolen.se>.

¹⁸ §§ 26 and 59 Competition Act.

¹⁹ § 34 a Competition Act.

²⁰ § 63 Competition Act.

²¹ As to the cooperation of the Competition Authority and the Post and Telecommunications Authority cf. Ch. Koenig/J. Kühling, in: Koenig/Kühling/Schedl (eds.) *Liberalisierung der Telekommunikationsordnungen*, at p. 80 (86).

²² Ch. 2 § 2 Radio and Television Act. Television and national radio broadcasting are licensed by the Government.

²³ § 19 Electronic Communication Act Ch. 13 Radio and Television Act.

II The General Approach to Market Definition in Swedish Competition Law

According to § 19 (1) Competition Act, “any abuse by one or more undertakings of a dominant position on the market shall be prohibited.” In order to establish, whether a dominant position exists, the relevant market has to be defined regarding to both the products comprising a market (sub 1) and the geographic dimension of the market (sub 2)²⁴.

I. Definition of the Relevant Product Market

The preparatory works on the Competition Act allude to the substitutability test in respect to the definition of the relevant product market²⁵. Demand-side substitutability is identified as the main factor as comparable characteristics especially in terms of price, function and usage of products are relevant criteria for the assessment of product markets²⁶. In addition, the preparatory works make reference to substitutability on the supply side²⁷. The following sections go further into both criteria as they are considered by recent Swedish case law.

a) Demand-Side Substitutability

Especially in the Swedish transport sector, market definition was a decisive factor on several occasions. Repeatedly, the question arose whether certain means of transport are interchangeable. For example, in *Swedish Rail*²⁸ the Market Court held that passenger transport by train offered in course of public procurement tenders is interchangeable with transport by coach in a limited extent only. From the perspective of public authorities, the operation of train services involves more expenses and planning ahead²⁹. Thus, coach services were not included in the relevant product market which was defined as the market for the operation of public passenger traffic services by rail under public contracts.

Recently, the Market Court examined in *SAS*³⁰ the approach to market definition in the air traffic sector. *SAS* had employed a loyalty scheme called *EuroBonus*, which promised frequent customers several advantages such as free flights. To redeem those bonuses, a certain amount of points must have been collected what could be achieved by using domestic flights

²⁴ K. Olsson, “Sweden”, in: P. Behrens (ed.), *EC Competition Rules in National Courts (VI)*, at p. 89 (108); L. Widén/S. P. Lindeborg, “Competition Law in Sweden”, in: F. Vogelaar/J. Stuyck/B. van Reeken, *Competition Law in the EU, its Member States and Switzerland*, at p. 395 (430).

²⁵ Government Bill on the Competition Act, Prop. 1992/93:56 at p. 85.

²⁶ K. Olsson, “Sweden”, in: P. Behrens (ed.), *EC Competition Rules in National Courts (VI)*, at p. 89 (108); C. Wetter/J. Karlsson/O. Rislund/M. Östman, *Konkurrenslagen*, at p. 77; L. Widén/S. P. Lindeborg, “Competition Law in Sweden”, in: F. Vogelaar/J. Stuyck/B. van Reeken, *Competition Law in the EU, its Member States and Switzerland*, at p. 395 (430).

²⁷ As in EC law, the factor of potential competition is not considered within market definition, cf. C. Wetter/J. Karlsson/O. Rislund/M. Östman, *Konkurrenslagen*, at p. 74.

²⁸ Market Court, Case A 3/99, *Statens Järnvägar (Swedish Rail)*, MD 2000:2; T. Pettersson/S. P. Lindeborg, “Comments on a Swedish Case on Predatory Pricing—Particularly on Recoupment”, [2001] 22(3) E.C.L.R. 75.

²⁹ Market Court, Case A 3/99, *Statens Järnvägar (Swedish Rail)*, online version at p. 21.

³⁰ Market Court, Case A 14/99, *Konsortiet Scandinavian Airlines System (SAS)*, MD 2001:4. Cf. Ch. Danielsson, “Developments in National Competition Laws—Sweden”, [2001] 51(6) WuW 582; L. Widén, “National Reports—Sweden: SAS ‘Eurobonus’ scheme”, [2001] 22(6) E.C.L.R. N-93; S. André, “National Reports—Sweden: Scandinavian Airlines System—EuroBonus scheme”, [2001] 22(6) E.C.L.R. N-141;

provided by *SAS* or other airlines belonging to *Star Alliance* in which *SAS* is a partner. In result, the Market Court prohibited the application of the *EuroBonus* scheme on domestic flights where *SAS* faced competition. In the court's opinion, the scheme hindered competitors from entering the market as it increased the loyalty of customers regardless competitive factors such as price³¹. Concerning market definition, the Market Court followed the opinion of the Competition Authority that the relevant market should not be defined by each single route and other means of transport should not be considered as substitutes. Thus, the relevant market was defined as comprising regular domestic flight transports of passengers (for further discussion see *infra* para. 10.26).

Moreover, the case *Swedish Post*³² has given rise to controversy, in particular on the presence 10.11 of abusive pricing³³. *Swedish Post* had applied four different zone prices for its bulk mail services. The Market Court held that this division could not be justified by cost differences for the transport of mail correlating to different regions³⁴. As to market definition, it was at issue whether regional aspects had to be included in the definition of the relevant product market. The court's ruling is not entirely lucid in this respect³⁵. The relevant product market was found to be the market for bulk mail, which had to be distinguished from the distribution of individual mail. According to the court, a "special part" of this market comprised large deliveries of mail to the areas in which the competitor *CityMail* was active, namely Stockholm, Gothenburg and Malmö. The relevant geographic market was defined as the whole of Sweden.

b) Supply-Side Substitutability

In *Swedish Rail* mentioned above (*supra* para. 10.09) the substitutability of transport services 10.12 by train and coach was rejected also from a supplier's perspective. The provision of train services by an operator of coach services would require essential additional costs and economical risks. Moreover, access to competency must be ensured for the operation of train transports, not least for safety reasons.

2. Definition of the Relevant Geographic Market

The definition of the relevant geographic market depends much on criteria like transport costs 10.13 or different preferences of customers³⁶. Those factors determine the ability of undertakings to compete in a given area. The building sector can serve as a good example. In the merger case

³¹ Regarding the effects of frequent flyer programmes cf. Competition Authority, *There Is No Such Thing as a Free Lounge—A report on Frequent Flyer Programmes, Executive summary of the report 2003:1*, available at http://www.kkv.se/engwebb/epdf_eng/rap_2003-1summary.pdf.

³² Market Court, Case A 3/98, *Posten Sverige AB (Swedish Post)*, MD 1998:15. Cf. L. Widén, "National Reports—Sweden: Posten Sverige AB", [1999] 20 (2) E.C.L.R. N-31.

³³ L. Pehrson/N. Wahl, "Marknadsdominerande företags rätt att prisdifferentiera", (1999) 10(4) *Juridik Tidskrift*, 960; C. Wetter/O. Rislund, "Geographical Pricing in the Postal Sector—The Swedish Zone Price Case", [1999] 20(4) E.C.L.R. 240; Ch. Striby/M. Billing, "The Swedish Zone Price Case: Sweden Post's Comments", [1999] 20(8) E.C.L.R. 446; W. J. Baumol, "Predation Criteria in the Swedish Postal Zone Price Case—A Reply", [2000] 21(4) E.C.L.R. 225.

³⁴ It accepted however a justification for a two-zone price list.

³⁵ Cf. C. Wetter/O. Rislund (*supra* note 33), p. 242.

³⁶ Competition Authority, *Evaluation of Optiroc's acquisition of Stråbruken—A Summary*, at p. 7.

*NCC/Siab*³⁷ the Competition Authority divided the sector of construction works into four separate markets depending on the project value. The construction of smaller buildings formed a regional market whereas the market for larger projects was considered to be national. This was due to the fact that work on large projects was offered by large construction companies only, which were active in the whole country.

Moreover, the Competition Authority established separate regional markets for rolled bitumen 10.14 offered by *NCC* because of the special characteristics of this product. Hot rolled bitumen is perishable and can only be transported over a distance of 100 km before it begins to deteriorate. Thus, the relevant geographic markets extended over an area with a radius of 100 km around the asphalt mixing plants. Contrarily, the market for asphalt milling was considered to be national because of inter alia low costs for transportation.

B Survey on Relevant Product and Geographic Markets in the Swedish Media Sector

This section features the definition of relevant markets in Swedish media sectors as occurring 10.15 in general and sector-specific competition law. In this respect, a peculiarity is to be mentioned. In Sweden, the relationship between competition law and the constitutional rules on the freedom of press and speech is still uncertain³⁸. On the one hand, the Competition Authority tends to apply competition law to the media sector in a regular manner. On the other hand, the opinion is expressed that the constitutional freedoms could conflict with the application of the competition rules to activities of media companies, like for example newspapers³⁹. This view seems to be supported by a decision of the Market Court (see *infra* para.10.17). Because the constitutional rules always have precedence of national competition law, the constitutional freedoms could in principle conflict with the application of the competition law to activities of media companies, like e.g. newspapers, and thus circumscribe the applicability of the competition law in some business areas. In some cases, a sophisticated and difficult legal analysis is required in order to delineate the border between constitutional and competition law. Especially for media cases, it is therefore uncertain whether competition rules can be employed fully or whether constitutional freedoms hinder their application at all. Hence, the exercise of market definitions in this sector is subject to the appraisal whether competition law applies. In practice however, it only rarely occurred that the Competition Authority could not apply competition law to the activities of media companies because of constitutional rights.. In addition, recent decisions in Swedish competition law concerning media sectors are rare since most of the cases have been closed already during the first stage of investigations without explicit analyses of the sectors concerned. In those cases, it was not necessary to reach a definite conclusion on the relevant markets because under the conceivable alternative market definitions the operation in question did not raise competition

³⁷ Competition Authority, Case 292/97, *NCC/Siab*; reported in L. Widén, “National Reports: Sweden–*NCC/Siab*”, [1998] 19(1) E.C.L.R. N-15.

³⁸ As to uncertainties concerning the application of Swedish merger control rules in the media sector, B. Mullaart/A. Gahnström, “Revised Swedish Merger Control Rules–Harmonisation with Community Law”, [2000] 21(7) E.C.L.R. 317 (318).

³⁹ L. Widén/S. P. Lindeborg, “Competition Law in Sweden”, in: F. Vogelaar/J. Stuyck/B. van Reeken, *Competition Law in the EU, its Member States and Switzerland*, at p. 395 (446).

concerns. Since in such cases a detailed and explicit analysis of the sector concerned is not needed, a decision will be made without presenting a definition of the relevant market.

I Publishing

In a case concerning the publishing of books, the Market Court found that the publisher **10.16** *Månadens Bok*⁴⁰ had infringed competition law by printing recommended retail prices on its pocket books. The relevant product market consisted of pocket books. These had to be distinguished from hardcover books first of all because of the immense price differences. Moreover, both book types vary in their physical quality and pocket books are more convenient in size. Additionally, pocket books are sold through different distribution channels and are available in places where hardback books are not sold. Therefore, a larger customer group is reached by pocket books. These findings are valid even though sometimes special editions of hardcover books are offered at a low price. The geographic dimension of the relevant market was found to be Sweden.

As to newspapers, the Competition Authority found in *Svenska Interpress AB* that the relevant **10.17** product market consisted of distribution of foreign daily newspapers and magazines for sale of single copies. Other forms of distribution like subscription and bulk-deliveries reached other or limited categories of consumers. The geographic market was defined as Sweden.^{40a}

Concerning the distribution of magazines, the Competition Authority established in *Tidsam* a relevant product market for the distribution of magazines for sale on single copies. The relevant geographic market was defined as Sweden.^{40b}

In 1996, the Competition Authority investigated whether the daily newspaper *Dagen* had abused its dominant position by refusing to publish certain commercial advertisements⁴¹. The authority's order to supply information was revoked by the Stockholm District Court. According to the decision, the provisions of the Competition Act could not affect the editorial decision. The determination of the newspaper's contents was the basic right of the publisher laid down in the Freedom of the Press Act. This finding was upheld by the Market Court⁴². Thus, a market definition for the newspaper sector was not required in this respect.

A market definition regarding newspaper advertisements could be established later in three **10.18** similar decisions dealing with advertising agencies⁴³. The Competition Authority examined the effect of a uniform standard for agreements between the agencies and newspapers. This agreement set amongst others a fixed price for the commission of advertisements, which the authority found to be a clear restriction on competition. High market shares could be detected as three different product markets have been determined, namely the arrangement of

⁴⁰ Market Court, Case A 8/00, *Svenska Bokhandlareföreningen/Månadens Bok et al.*, MD 2002:5; see L. Widén, "National Reports: Sweden–Månadens Bok", [2002] 23(6) E.C.L.R. N-82.

^{40a} Competition Authority, Case 1035/1994, *Svenska Interpress AB*

^{40b} Competition Authority, Case 766/1994, *Tidsam AB*

⁴¹ Cf. Competition Authority, *Annual Report 1998*, at p. 13.

⁴² Market Court, *Dagengruppen*, MD 1998:18.

⁴³ Competition Authority, Cases 1193/93, 1256/93 and 1820/93; see L. Widén, "National Reports: Sweden–Advertising Agencies", [1998] 19(4) E.C.L.R. N-71.

advertisements to the weekly press, to the daily press, and to specialised press. The relevant geographic market was defined as Sweden.

Concerning the distribution of newspapers, the Competition Authority found in *Dagens Nyheter*⁴⁴ that the relevant product market consisted of the distribution of morning papers via delivering by carriers at early morning times in the region of Stockholm. Other forms of distribution like post services are offered during the day and involve higher costs or do not allow for the arrival of the newspapers at the subscribers in the early morning.

II. Music and Copyright

In 1998, the Market Court evaluated the tariff structure of *STIM*, a commercial society for the administration of the rights of composers, authors and music publishers. The court found that the tariff structure applied by *STIM* to commercial TV channels treated TV channels with low penetration unfairly. The relevant market was defined as performing rights in copyright protected music on television in Sweden.^{44a}

The tariff scheme of the collecting society *STIM* was again at stake in a later case of the Competition Authority⁴⁵. *STIM* charged TV channels different tariff levels depending on the category they belonged to, such as sport and news channels or music channels but also music content and the number of subscribers per annum. This price differentiating was seen as having an anticompetitive effect due to the fact that the tariff did not take account of actual viewing. As to the relevant product market, the Competition Authority stated that the market consists of the services demanded by TV companies, namely “transmission” (i.e. performing) rights for music protected by copyright. The geographic market was regarded as Sweden. A detailed reasoning for the findings of the relevant markets was however not presented.

III. Film

In *Swedish Film Industry*⁴⁶ it was at issue whether *Astrid Lindgren* movies on retail video tapes constitute a separate product market or whether they are interchangeable with other children movies or even with films of other genres. The Competition Authority argued that *Astrid Lindgren* movies and its main characters like *Emil*, *Pippi* and *Madicken* enjoyed a special popularity in Sweden. Amongst others, *Astrid Lindgren* stories occur in fairy-tale books, movies and TV serials for children. Additionally, there are well-known tourist attractions like *Astrid Lindgren World* in Vimmerby and *Villa Villekulla* in Gotland. From a customer’s perspective, *Astrid Lindgren* movies could thus hardly be substituted by other films. The Competition Authority paid special attention to a comparison with *Walt Disney* productions. Although there have been substantial price differences, customers appeared not to perceive cheaper movies to be substitutable with Astrid Lindgren films. This indicated that cross-price-elasticity is very low between Astrid Lindgren movies and other retail films. Thus, the Competition Authority concluded that from both the customer’s and the video retailer’s perspective, Astrid Lindgren movies are interchangeable with other movies in a limited extent

⁴⁴ Competition Authority, Case 1044/1996, *AB Dagens Nyheter/Pressens Morgontjänst KB*.

^{44a} Market Court, MD 1998:5, *TV3*.

⁴⁵ Competition Authority, Case 142/1999, *Svenska Tonsättares Internationella Musikbyrå (STIM)*.

⁴⁶ Competition Authority, Case 660/1995, *AB Svensk Filmindustrie (Swedish Film Industry)*.

only and constitute an own relevant product market. These findings of the Competition Authority have been criticised as appearing to be based on speculative assumptions rather than precise calculations⁴⁷. In fact, the Stockholm District Court rejected the postulation of an own market for Astrid Lindgren movies as being too far-reaching⁴⁸. Whilst presenting only scarce reasons⁴⁹, the court distinguished four markets: movies for children on rental videos, movies for adults on rental videos, movies for children on retail videos, and movies for adults on retail videos⁵⁰.

IV. Broadcasting

Some market definitions in respect of the transmission of radio and TV programmes have been established by the Post and Telecommunications Authority because of its responsibility for the control of this sector. As amendments to the Swedish telecommunications legislation have been implemented⁵¹, a clarification of market definitions in this sector is required. Within the new regulatory framework and pursuant to the Electronic Communications Act, the Post and Telecommunications Authority will define relevant national markets susceptible to ex ante regulation. At present, the Post and Telecommunications Authority is working on the national market definitions and has already issued a proposal for the definition of relevant markets pursuant to the new Electronic Communications Act⁵². In the draft version of this document, the authority acknowledged markets for broadcast and transmission services for the distribution of TV programmes, respectively radio programmes to end users⁵³. Starting from the market definitions provided in the recommendation of the EC Commission⁵⁴, the authority states that there is still need for particular market definitions in respect to the transmission of broadcasting programmes. Although the recommendation suggests one single market for the transmission of TV and radio programmes on wholesale level, the authority does not regard the substitutability of both services to be sufficiently high. Thus, it defines two separate markets, one for the transmission of TV programmes and one for the transmission of radio programmes, regardless of the distribution form, i.e. transmission via terrestrial networks, satellites and TV cable networks. Further, the distribution of radio and TV programmes via Internet was not seen as a substitute for the classic networks⁵⁵.

⁴⁷ C. Wetter/J. Karlsson/O. Rislund/M. Östman, *Konkurrenslagen*, at p. 84 et seq.

⁴⁸ Stockholm District Court, Case Ä 8-72-96, *AB Svensk Filmindustri*.

⁴⁹ Cf. C. Wetter/J. Karlsson/O. Rislund/M. Östman, *Konkurrenslagen*, at p. 85.

⁵⁰ See already Competition Authority, Case 1413/1994, *Buena Vista Home Entertainment AB*, in which the relevant product market was regarded as consisting of children movies on retail video tapes.

⁵¹ *Supra* para. 10.04.

⁵² Post and Telecommunications Authority, *Remiss angående definitioner av relevanta marknader enligt förslag till lag om elektronisk kommunikation (prop. 2002/03:110)* and three attachments, Reference No. 02-16209/69 of 9 May 2003, available at <http://www.pts.se>.

⁵³ Post and Telecommunications Authority, *Definitioner av relevanta marknader enligt förslag till lag om elektronisk kommunikation (prop. 2002/03:110)–konsultativt dokument*, Bilaga 2, at p. 69.

⁵⁴ Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC, [2003] OJ L 114/45.

⁵⁵ Post and Telecommunications Authority, *Definitioner av relevanta marknader enligt förslag till lag om elektronisk kommunikation (prop. 2002/03:110)–konsultativt dokument*, Bilaga 2, at p. 73.

V. Internet

Certain matters within the Internet sector are part of telecommunications regulation. For **10.23** example, the interconnection of internet service providers with operators of telecommunication networks could be an issue for the regulatory authority⁵⁶. If market definition was required, the Post and Telecommunications Authority would refer to generic competition law, i.e. to the assessment of substitutability of the supply and the demand side⁵⁷.

⁵⁶ Cf. e.g. Competition Authority, Case 60/1998, *Telia AB*, at para. 14 et seq.

⁵⁷ Cf. e.g. Post and Telecommunications Authority, File Reference 00-14849/23, *Europolitan Vodafone AB/Tele2 Sverige AB/Telia AB*, at p. 5.

Table 1

<u>Media Markets</u>				
<u>TV-Broadcasting</u>				
Market Category	Main Markets	Submarkets (1st Level)	Submarkets (2nd Level)	Submarkets (3rd Level)
TV Markets	Transmission services			
<u>Radio</u>				
Radio Markets	Transmission services			
<u>Film</u>				
Market for Video Production	Rental videos	Films for children		
		Films for adults		
	Retail videos	Films for children		
		Films for adults		
<u>Music</u>				
Markets for Music Performance	Performance rights for music protected by copyright			

<u>Print Media</u>				
Market Category	Main Markets	Submarkets (1st Level)	Submarkets (2nd Level)	Submarkets (3rd Level)
Book Markets	Book Market	Market for hardcover books		
		Market for pocket books		
Distribution of Newspapers	Distribution of morning papers via delivering by carriers at early morning time			
	Distribution of foreign daily newspapers and magazines for sale of single copies			
	Distribution of magazines for sale of single copies			
Advertising Markets	Arrangement of advertisements	Arrangements to the weekly press		
		Arrangements to the daily press		
		Arrangements to the specialised press		
<u>Internet Markets</u>				
None				

C Comparative Analysis of Market Definitions Adopted by the European Commission and those Adopted by Competition Authorities in Sweden

This section compares the national approach to market definition with the methods and results **10.24** found on the EC level. From the previous sections it appears that there is no major difference as to the principles of market definition. On national as well as on the EC level substitutability of both demand side and supply side is used as the main instrument for market definitions. As will be demonstrated below, a closer look however reveals that there are still slight differences in the results established by the authorities. Therefore, a detailed analysis regarding the approaches to market definition as adopted by national and European authorities is conducive.

I. General Relationship to EC Competition Law

First of all, it should be mentioned that the Swedish competition legislation is clearly **10.25** modelled on EC law⁵⁸. Furthermore, the EC competition rules pursuant to Art. 81 and 82 EC recently became directly applicable by Swedish authorities and courts⁵⁹, in parallel with the Competition Act⁶⁰. Thus, it does not surprise that the understanding of EC competition rules has major influence on the application of competition law in Sweden. Correspondingly, Swedish case law makes extensive use of references to EC law in respect of both legislative acts and rulings of the Commission and the courts⁶¹. Swedish authorities and courts show great effort to be in line with the European practice in competition law⁶². However, in the following section is shown, that they will not uncritically adopt the results delivered in decisions on EC level. National peculiarities are often referred to in order to explain divergent results.

⁵⁸ Cf. e.g. Government Bill on the Amendment of the Competition Act, Prop. 1997/1998:130 sub ch. 6.1; Ch. Danielsson, "Developments in National Competition Laws: Sweden" [1997] 47(6) WuW 515; U. Forsman, "Doing Business in Sweden", [1998] 9(8) I.C.C.L.R. 223 (224); S. Mohamed, "Competition Rules of Sweden and the European Union Compared", [1998] 19(4) E.C.L.R. 237; L. Widén, "National Reports: Sweden—Legislation", [2000] 21(5) E.C.L.R. N-46; M. Ojala/R Larsson, "Nordic Views on Merger Control", 24(3) E.C.L.R. 136 (139); so already J. Carle/K. Simonsson, "Competition Law in Sweden", [1993] 14(4) E.C.L.R. 176 (179).

⁵⁹ Lag om tillämpningen av Europeiska gemenskapernas konkurrens- och statsstödsregler (Act on the application of E.C. competition and state aid rules), SFS 1994:1845 as last amended by SFS 2000:1458. Cf. Competition Authority, Annual Report 2001, at p. 13. T. Jones, "Regulation 17: The Impact of the Current Application of Articles 81 and 82 by National Competition Authorities on the European Commission's Proposals for Reform", [2001] 22(10) E.C.L.R. 405 (407); L. Widén, "National Reports: Sweden—Legislation", [2001] 22(3) E.C.L.R. N-49; Ch. Danielsson, "Developments in National Competition Laws in Europe: Sweden", [2001] 51(3) WuW 271.

⁶⁰ OECD, *Annual Report on Competition Policy—Sweden 2001*, at para. 1.

⁶¹ Especially to the Commission Notice on the definition of relevant market for the purposes of Community competition law, [1997] OJ C 372/5. Cf. L. Widén/S. P. Lindeborg, "Competition Law in Sweden", in: F. Vogelaar/J. Stuyck/B. van Reeken, *Competition Law in the EU, its Member States and Switzerland*, at p. 395 (430).

⁶² Cf. e.g. Market Court, Case A 7/00, *Telia AB*, MD 2001:30, at p. 8.

II. Comparative Analysis

The case *SAS* mentioned above (see supra) may serve as an example for this approach. The **10.26** Market Court acknowledged the relevant EC case law relating to scheduled air traffic⁶³. In those cases, distinct markets have been defined for every single route. The Market Court however held that those cases can offer little guidance in the case it was reviewing⁶⁴. Whilst the Community cases dealt with competitive conditions on certain routes, the situation of *SAS* was seen as being different. The bonus scheme applied by *SAS* was applicable to air travel throughout Sweden using Arlanda Airport as their hub. Further, *SAS* offered passenger flights to and from points throughout the whole country. Therefore, its actions affected the entire Swedish domestic aviation market. The Market Court thus established a broader definition of the relevant market than suggested by Community law. In result, the Market Court's definition of the relevant market was affected by the allegedly anticompetitive conduct of the company concerned and the area in which the company is active. This does not appear to conform with the approach to market definition in EC competition law, since latter does not depend on a certain behaviour of undertakings but rather on the specific business sector concerned.

Similarly, in *Swedish Post* (see supra) the Market Court stated that the market definitions **10.27** provided in the Commission's Postal Notice⁶⁵ were not suitable for the distribution of bulk mail in Sweden. Thus, it did not obey the distinction of four separate markets for clearance, sorting, transport and delivery of mail as indicated in the Notice⁶⁶.

As a result, it can be said that though Swedish authorities appear to apply market definitions **10.28** in accordance with EC competition law in principle, other definitions will be adopted when considered necessary in respect to national peculiarities. It should be pointed out that this observation does not imply that either market definition would be incorrect. The characteristics of national markets might require a deviation to the findings on EC level since the specific competition issues have to be considered on a case to case basis.

The methodology used for finding the appropriate market definition resembles the approach on EC level. For instance, Swedish competition authorities and courts will refer to the so-called hypothetical monopolist test⁶⁷ when required for the detection of demand side substitutability⁶⁸. Further, the findings are often based on informal inquiries into the business

⁶³ ECJ, Case 66/86, *Ahmed Saeed Flugreisen and others v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, [1989] ECR 803; CFI, Case T-2/93, *Air France v. Commission*, [1994] ECR II-323; amongst others: Commission, *Air Lingus (Case IV/33.544)*, [1992] OJ L 96/34; *Lufthansa/SAS (Case IV/35.545)*, [1996] OJ L 54/28; *British Airways/Air Liberté (IV/M.857)*, [1997] OJ C 149/25.

⁶⁴ Market Court, Case A 14/99, *Konsortiet Scandinavian Airlines System (SAS)*, MD 2001:4, at p. 47.

⁶⁵ Commission Notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, [1998] OJ C 39/2.

⁶⁶ Postal Notice, at para. 2.5.

⁶⁷ Also referred to as SSNIP test.

⁶⁸ K. Olsson, "Sweden" in: P. Behrens, *EC Competition Rules in National Courts (VI)*, at p. 89 (109); C. Wetter/J. Karlsson/O. Rislund/M. Östman, *Konkurrenslagen*, at p. 75 with further references; cf. e.g. Post and Telecommunications Authority, *Definitioner av relevanta marknader enligt förslag till lag om elektronisk kommunikation (prop. 2002/03:110) – konsultativt dokument*, Bilaga 1, at p. 2.

sector concerned⁶⁹. However, those methods are disclosed scarcely in publicly available decisions.

In general, it can be observed that first of all the Swedish courts do not attach the highest importance on the definitions of markets within their decisions⁷⁰. Although the outcome of competition cases may largely depend on it, market definition is often presented only laconically. Frequently, it is not entirely clear on which grounds the courts established the relevant markets, especially when they disagree with the findings of the Competition Authority. Furthermore, market definition is not revealed at all if the Competition Authority decides not to carry out in-depth investigations. Then, cases are closed without giving detailed reasons. Unfortunately, most of the recent cases in the media sectors have been treated in this way what renders it difficult to grasp the notion of Swedish competition law towards market definitions in media related sectors.

As a result, the special treatment of the media sector (supra para. 10.15) and the lack of information on the application of competition law in this sector do not allow to conclude that the Swedish competition law will in any case determine the same relevant markets as in EC competition law. Nevertheless, it should be noted that from the case law reviewed above it can be assumed that this seems to be likely.

D Impact of different regulatory frameworks on market definitions

I The Regulatory Framework for the Media Sector in Sweden

1. Background Information

The first competition law in Sweden was enacted in 1954. By that law, gradually, an established cartel economy characterised by fair competition was turned into an economic system with free competition.

Within the media sector, as in any other industry at that time, there was a number of cartels of different kinds as well as a system of resale price maintenance (on sales of advertising as well as of circulation). The newspaper industry declared that the new competition law was not relevant to the newspaper industry because of the Fundamental Law of Freedom of Expression, with its tradition to late 18th century. It is an important fact, that the newspaper industry was and still is the strongest industry inside the media sector.

For about fifteen years, for cultural reasons an exception was made for the resale price maintenance system in the book trade. The publishers were allowed to go on setting the lowest price at retail level and the books were sold in commission. In 1970, this system was abolished, and state aid had to be introduced to support the publishing of quality books⁷¹.

⁶⁹ Cf. J. Westin, "Merger Control Law in Sweden", [1997] 18(5) E.C.L.R. 306 (308-309).

⁷⁰ Sometimes the reasoning of the Competition Authority is also quite scarce, see e.g. *STIM*, supra para. 10.20.

⁷¹ Decision by Parliament Spring 1976. In November 1976 the first five volumes were published by Stiftelsen Litteraturfrämjandet, founded by popular movements in order to promote good literature. The brand name

In the 1960s, when a selective subsidy for weak newspapers was discussed⁷², for the first time, **10.34** protests were heard from the newspaper industry saying that it was against the constitutional law, and in addition to that against the Competition Act. All the same, in 1971, the political majority decided to introduce selective press subsidies⁷³. When a government proposal in 2000 for a law on concentration was planned it did not receive what the social-democratic government regarded as a sufficient majority in Parliament⁷⁴ reference was made by the non-socialist parties to the Constitutional Law on Freedom of the Press, which overthrow any competition and concentration law.

To the fact of the strength of the newspaper industry, and its ability with support of **10.35** constitutional law to protect its interests, it should be added that broadcasting media were deregulated very late in Sweden. In practice, the newspaper industry did not meet any competition for advertising from radio and television before 1990. Along with the deregulation of the radio and television public service monopolies a number of media authorities were established.

In 1954, at the time when the first competition law was enacted, the only authority in the media field was the National Board of Film Classification. It was established in 1911 in order to preview films for cinema distribution and to set age limits for children. In 1925, radio was regulated by an agreement between the state and one public service company, founded as a monopoly and financed solely by licence fees on radio sets. When television was introduced in the middle of the 1950s the same public service company was entrusted with the television service. The financing method continued to be the licence fee system. Advertising was not allowed.

Since the 1970s, debates on media concentration have come and gone. A number of **10.36** commissions have studied the market structures and the propensity of competition but, as indicated above, none has been able to come up with proposals acceptable to a political majority.

When the Bonnier Group, the largest media group in Sweden⁷⁵, in the beginning of the 1990s, **10.37** planned to buy the largest one of three newspaper companies in Malmö, the third largest city in Sweden, the Bonnier Group asked the Competition Authority to make an anticipatory verdict. The authority accepted to do it and made an evaluation of the consequences on newspaper competition. The authority limited its analysis to the Malmö region and concluded that the competition between the three newspapers in Malmö would not be affected by a take over of the biggest of them by the Bonnier Group. In the public debate arguments were raised supporting the verdict from a Swedish perspective; a Swedish buyer was to be preferred to a foreign buyer. This later debate contributes to a conclusion that might possibly be drawn, i.e. that media policy is often conceived as a policy of national interest.

used was En bok för alla ("A book for all"). In 1992 this foundation was liquidated. It was replaced by En bok för alla AB ("A book for all Ltd"), and approved by the National Council for Cultural Affairs in its place as receiver of state support.

⁷² SOU 1965:22, SOU 1968:48.

⁷³ SOU 1975:79.

⁷⁴ SOU 1999:30. No proposition was ever made by the minority social-democratic government.

⁷⁵ Sundin, S: Den svenska mediemarknaden. Medienotiser 2/2003. Nordicom-Sverige.

When it comes to Sweden, the general impression is that the Competition Authority will draw more narrow market limits than the media authorities. In any case, there are no formal or **10.38** informal links between the two legal systems (see below).

In the following the media authorities, their legal framework, and their “market” definitions are presented in order of age.

2. Legal Framework

Besides the two fundamental laws (The Freedom of the Press Act and the Fundamental Law **10.39** on Freedom of Expression), the following basic legal acts build the legal regulatory framework in Sweden:

- Radio and Television Act (Radio- och TV-lagen)⁷⁶
- Radio Communication Act⁷⁷ and the Telecommunications Act⁷⁸ (both Acts will be repealed by the new Electronic Communications Act (supposed to enter into force on 25 July 2003)⁷⁹, which will implement the EC Communications framework.
- Law forbidding certain decoding equipment⁸⁰.
- Qualified Electronic Signatures Act⁸¹
- Act on Responsibility for Electronic Bulletin Boards⁸²
- Act on Copyright in Literary and Artistic Works⁸³
- Decree on press support⁸⁴

In addition to these Acts of major importance for the regulatory framework of the media **10.40** sector, there are also several other legislative rules which can be considered as more complementary to the above-listed basic acts. These are for example:

- Rules for the National Board of Film Classification (Statens biografbyrå)
- Rules concerning support to the Swedish film industry

⁷⁶ Radio- och TV-lagen (hereinafter Radio and Television Act), SFS 1996:844 as last amended by SFS 2002:1096.

⁷⁷ Lag om radiokommunikation (hereinafter Radio Communications Act), SFS 1993:599 as last amended by SFS 2000:1251.

⁷⁸ Telelag (hereinafter Telecommunications Act), SFS 1993:597 as last amended by SFS 2002:282; an English version is available at <http://www.pts.se/dokument/getFile.asp?FileID=2320>

⁷⁹ Lag om elektronisk kommunikation, Government Bill of 20 March 2003, Prop. 2002/03:110.

⁸⁰ Lag omförbud beträffande viss avkodningsutrustning, SFS 2000:171.

⁸¹ Lag om kvalificerade elektroniska signaturer, SFS 2000:832.

⁸² Lag om ansvar för elektroniska anslagstavlur, SFS 1998:112.

⁸³ Act of December 30 1960 (SFS 1960:729), as amended up to January 1, 1996.

⁸⁴ Decree 1990:524.

- Terms of the broadcasting licences between the State and the public service radio and television (financed by licence fees) and the commercial channel TV4 (financed by advertising)

II. Media Regulators

1. National Board of Film Classification (*Statens biografbyrå*)

a) Legal basis

The Board was established by an Act of Parliament in 1911. The activity of the Board is **10.41** conducted in accordance with the Act (SFS 1990:886) on the scrutiny and inspection of films and video recordings, decree (SFS 1990:992) on the scrutiny and inspection of films and video recordings, decree (SFS 1990:994) with instructions for the Board, and Ch 16 §10 b c and §10 of the Penal Code.

b) Functions/Competencies

The rules for the National Board of Film Classification (*Statens biografbyrå*), by and large, **10.42** remained the same until the beginning of the 1980s⁸⁵. Then the introduction and development of video made it necessary to widen the film concept and the scope of the activities of the Board, i.e. covering not only film for cinema distribution⁸⁶.

The aim of the legislator was defined (a) to prevent films and video recordings with brutalising content being shown in public, and (b) to set age limits at such public events and general gathering to which children have access⁸⁷. The number of films scrutinised by the National Board of Film Classification is entirely dependent on the number of applications received by the Board either a) from video retailers and television channels wishing not to distribute pornographic films that have not been approved by the board, or b) from video companies for video recordings that have not been approved for children.

2. Council on Media Violence (*Våldsskildringsrådet*)

In addition to the issue of prior scrutiny, a modern version of the National Board of Film **10.43** Classification might be mentioned. That is the Council on Media Violence (*Våldsskildringsrådet*) which was established in 1990⁸⁸.

a) Legal basis

A committee established by the Ministry of Culture. In 1998 it was linked to the EU **10.44** recommendation on the protection of children and human dignity by self-regulation of the media sector (98/560/EG).

⁸⁵ Hultén, O: Mass Media and State Support in Sweden. The Swedish Institute, Stockholm 1984.

⁸⁶ Op cit.

⁸⁷ The Swedish Radio and Television Authority: Developments in the media field 2002. (www.rtvv.se)

⁸⁸ A committee of the Ministry of Culture (U 1990:03).

b) Functions/Competencies

The task of the Council is to oppose, through information and by dialogue, to harmful depictions of violence in moving picture media. The council is linked to the European Union recommendation on the protection of children and human dignity by self-regulation of the media sector. **10.45**

3. *Swedish Film Institute*

a) Legal basis

The Institute was created in 1963 by Act of Parliament. **10.46**

b) Functions/Competencies

Until the 1960s, state interest in film was, beside the prior scrutiny, largely of fiscal nature. There was an amusement tax on cinema tickets, a box office tax. Declining cinema attendance and as a consequence of that lower production rates of Swedish films made it necessary to introduce support to the Swedish film industry. A production support was preferred to a distribution support. As a result, most of the support goes to Swedish film production. **10.47**

In 1963 the Swedish Film Institute (Svenska Filminstitutet) was created to administer this support, based and financed by an agreement between the government and the film industry. In 1983, the agreement was extended to cover the video industry. Later the agreement has been extended to cover the television industry. **10.48**

Recently a film production has been refused support, the reason being that too little Swedish production resources were involved. The producer has appealed against the decision to the Swedish Film Institute. **10.49**

4. *Press Subsidies Council (Presstödsnämnden)*

a) Legal basis

Act of Parliament and established 1st of July 1976. Updated by decree⁸⁹ with instructions for the Swedish Press Subsidies Council and decree⁹⁰ on press support. **10.50**

b) Functions/Competencies

The Press Subsidies Council (Presstödsnämnden) distributes government support to daily newspapers according to the decree on press support. It also monitors yearly the financial results of the daily press. The press subsidies are allocated from year to year and are of two kinds, (1) an operating, cash support introduced 1971 to newspapers in a weak, secondary position – well defined in market terms on the advertising market, and (2) a promoting support since 1970 for joint distribution, organised by specialised distribution companies. **10.51**

In order to finance the system a levy on advertising was introduced, first for newspapers, later for all printed media. In the latter case the advertising market definition was extended.

⁸⁹ Decree 1988:673.

⁹⁰ Decree 1990:524.

5. *Talking Newspapers Council (Taltidningsnämnden)*

a) Legal basis

The rules for the work of the Talking Newspapers Council (Taltidningsnämnden) are set out **10.52** in a Decree on Government support for radio and cassette newspapers⁹¹.

b) Functions/competencies

The Talking Newspapers Council (Taltidningsnämnden) pays grants to newspapers that **10.53** publish a spoken version of their printed edition.

6. *National Council for Cultural Affairs (Kulturrådet)*

a) Legal basis

The Council was established in 1974. The decision was made by Parliament as a part of a **10.54** proposition of a state policy for culture⁹². The instruction for the Council was given by a decree in 1974⁹³.

b) Functions/Competencies

In Sweden, some 200 cultural and political journals receive state support. As early as 1968, **10.55** the state made available funds to guarantee the continuation of many such publications. Unlike the press subsidies system, state support to cultural and political journals is not offered in a standardised form. The variations between the political and cultural journals are too big. The support is extended in the form of grants to individual projects. Each publication must each year apply to the National Council for Cultural Affairs (Kulturrådet)⁹⁴. The Council makes the definitions necessary and allocates the funds among the applicants according to its evaluation. The Council allocates grants and subsidies to different cultural activities such as regional museums, county libraries and regional music, and to regional and local theatre, dance and music institutions, public libraries, independent theatre, dance and music ensembles, and international cultural exchanges.

7. *Radio and Television Authority (Radio- och TV-verket)*

a) Legal basis

The authority is based on the Radio and Television Act (Radio- och TV-lagen) of 1996, as **10.56** amended.

b) Functions/Competencies

The Radio and Television Authority (Radio- och TV-verket) issues licences for local **10.57** (commercial) and community (non-commercial) radio broadcasting as well as for temporary broadcasting activities. It appoints local cable broadcasting companies, and makes proposals

⁹¹ Decree 1988:582.

⁹² Prop. 1974:28; prop. 1975/76:135.

⁹³ Förordning SFS 1974:644 med instruktion för statens kulturråd, as amended by SFS 1977:612.

⁹⁴ At <http://www.kur.se>

to the Government on licences to transmit digital terrestrial television and radio. It deals with matters concerning licence fees for local commercial radio (introduced 1993) and terrestrial commercial television (introduced 1992).

The level of fees for each licence to broadcast for local commercial radio were arrived at by open auctions until July 1st 2001 and after that by “beauty contests”. However, the fee for terrestrial commercial television (the national channel TV4) was decided by the Government on the basis of calculations of the potential advertising revenues for a national channel and the cost levels of the Swedish public service television channels (Swedish Television SVT1 and SVT2).

The authority registers all players engaging in broadcasting activities according to the Radio **10.58** and Televisions Act⁹⁵, even those engaging in activities for which no licence is required. In addition the authority supervises television standards.

Since July 1st 1998, the Radio and Television Authority was commissioned to monitor **10.59** developments within the entire media field and produce an annual report⁹⁶. However, so far the reports have mainly covered the development of radio and television and in addition to that, and somewhat wandering from the subject, a presentation of the large media groups in Sweden.

The reports disclose that the Radio and Television Authority does not think in market terms. Instead, the authority uses the concept “landscape” for their report, i.e. the radio landscape and the television landscape⁹⁷.

As in all other nations, the main changes in the regulations are the result of adjustments by the **10.60** authorities and the state to changes that the players already have introduced and practised for some time.

Two examples are the following:

- For radio: in 1991 newspaper publishers and radio and television companies were no longer excluded from holding licences to broadcast local commercial radio, and holders were accepted to hold more than one licence⁹⁸.
- For television: advertising was permitted to interrupt programmes to a larger extent than before⁹⁹.

However, the advertising monopoly in analogue broadcasting will be winded up in parallel, step by step, to the introduction of digital television. But that has more to do with media policy than competition policy. The commercial channels – the terrestrial on the one hand and the satellite-to-cable on the other – have been competing from the beginning, although the latter with a handicap on limited distribution.

⁹⁵ See section 4 of Act SFS 1996:844 as last amended by SFS 2002:1096.

⁹⁶ In accordance with EU Council decision 1999/297/EC.

⁹⁷ The Swedish Radio and Television Authority: Developments in the media field 2002. (www.rtvv.se)

⁹⁸ Since 1st of July 2001 and as long as the licences do not relate to the same broadcast area.

⁹⁹ “Koncessionsavgift på televisionens område”, SOU 2003:47.

8. *Broadcasting Commission (Granskningsnämnden för radio och TV)*

a) Legal basis

The Commission refers to two main legal sources: The Radio and Television Act and the **10.61** terms of the broadcasting licences between the State and the public service radio and television (financed by licence fees) and the commercial channel TV4 (financed by advertising), i.e. a financing model similar to that of the well known British duopoly BBC and ITV.

b) Functions/Competencies

The Broadcasting Commission (Granskningsnämnden för radio och TV) assesses whether the **10.62** contents of radio and television programmes transmitted in Sweden to a Swedish audience conform to Swedish broadcasting laws and licence agreements in question¹⁰⁰.

Although the Commission has no jurisdiction over radio and television companies established **10.63** in other countries, its yearly reports concerning television programming covers all channels with national ambitions. Thus in addition to SVT1, SVT2 and TV4, it reports on TV3, TV6, ZTV and TV8 (Modern Times Group) as well as Channel 5 (SBS/ABC/Disney).

9. *National Post and Telecom Agency (Post- och Telestyrelsen)*

a) Legal basis

The Agency is based on the provisions of the telecommunications act¹⁰¹. **10.64**

b) Functions/competencies

The National Post and Telecom Agency (Post- och Telestyrelsen) is the official body which **10.65** oversees telecoms, IT, radio and postal service. It was established in 1992¹⁰². It is the biggest of all authorities in the media field, employing about 200 persons. PTS shall promote competition and efficient use of resources in its sector and safeguard the interests of the consumers.

With reference to convergence of radio, telecommunications and data communication, the **10.66** agency states that it is becoming more and more relevant to talk of an electronic communications sector. Thus this agency uses the concept “sector”, neither “landscape”, nor “market”. It sees as one of its most important duties to create competition by means of regulation: to lower the barriers to entry, to create alternative forms of access and to stimulate new players.

¹⁰⁰ The Commission publish four times a year the periodical “granskat och klart”. Each year a monitor report “Swedish TV programming” is published written by professor Kent Asp, University of Göteborg. (www.grn.se)

¹⁰¹ SFS 1993:597 as last amended by SFS 2002:282. Compare 10.22 for new developments under the Electronic Communications Act.

¹⁰² At <http://www.pts.se>

However, the agency works mostly with each field separately, at least so far:

- In telecommunication it deals with problems such as preselected operators, local loop unbundling, directory enquiries, barriers of entry to networks. The agency is responsible for issuing UMTS licences.
- In the IT field the corresponding problems regard availability of IT services (e.g. e-commerce) and infrastructure as well as confidence in IT.
- In the radio field the main concern is a major shortage of available frequencies, and wireless broadband.

10. Linkage with General Competition Authorities

There are no formal or informal links between the two legal systems. As an example, the **10.67** Competition Authority in its submissions on proposals related to the press subsidies¹⁰³ has always regarded that system as an interference in the free competition. A lower form of cooperation between media and competition authorities could be seen in the Competition Authority's submissions to proposals dealing with media issues. However, the political majority has never taken any notice of that. Another example, presently plans of joint operations agreement (as in the USA) between newspapers at the same place of issue are of growing interest in Sweden. Such operations might be accepted by the media authorities, and entitled to support, but it is definitely questionable whether the Competition Authority would – according to the relevant provisions – accept such practice when respective assessment would be necessary.

There are even no linkages between the different media authorities with the exception of the Press Subsidies Council and the Talking Newspapers Council¹⁰⁴.

III. Market Definitions and/or Criteria upheld for Market Perception in the Relevant Sector focused Legislation

1. Publishing

a) Press

Daily newspaper is defined in the decree on press support¹⁰⁵ with regard to contents (general **10.68** interest publication of newspaper character) and periodicity (at least once a week). When it comes to general operating support the decree differs between a) newspapers issued 1-2 times a week and newspapers issued 3-7 times a week as well as b) newspapers published in the big cities Stockholm, Göteborg and Malmö and newspapers published elsewhere. These categories decide levels of support.

(Weak) secondary position, is also defined in the decree: newspapers with a larger newspaper **10.69** as its place of issue. In principle, in a city with three newspapers, as once in Malmö, the two

¹⁰³ This can be seen from submissions to any of the press commissions from the 1960s to the 1990s.

¹⁰⁴ The support to talking newspaper can be regarded as an extension of the support to the printed newspaper. The two boards work in close co-operation. The administrative body is the same.

¹⁰⁵ Decree 1990:524.

smaller ones were secondary newspapers. Weak is defined by setting a maximum limit to receiving operating support, i.e. 30 per cent household coverage at place of issue as a maximum level.

Advertising (levy on advertising): As long as the levy was on advertising in newspapers there were no problems. These came when the levy was extended to all kinds of printed media (at that time advertising on radio and television was not permitted), particularly printed mail. When advertising on radio and television was allowed, the levy was not extended to these media. **10.70**

b) Books

Quality books: The project¹⁰⁶ „En bok för alla“ emphasized two aspects. One was a low price – when it was introduced in 1976 five crowns as a standard price, the other what a group of reviewers suggested. Anyone is entitled to suggest titles for reviewing. When it comes to the price it is still low. **10.71**

2. Music

Although specific provisions with regard to phonographic records are included in the Copyright Act¹⁰⁷, there is no specific legal definition of what is a “music work” or a “phonographic record”. **10.72**

3. Film

In the above mentioned agreements¹⁰⁸ between the government and the film industry, regulating the support for Swedish Films, Videos and television production, the terms Swedish film production, film industry, video industry and television industry are mentioned. The definitions can vary, e.g. from agreement to agreement, from commission to commission. As was outlined before, there may be reasons for voluntarily submitting video recording for scrutiny. Swedish Television (licence fee financed) as well as TV4 (advertising financed) give support to Swedish film production and become a part of the film industry. **10.73**

4. Broadcasting

The Radio and Television Authority (Radio- och TV-verket) issues e.g. licences for local (commercial) and community (non-commercial) radio broadcasting as well as for temporary broadcasting activities. It appoints local cable broadcasting companies, and makes proposals to the Government on licences to transmit digital terrestrial television and radio. It deals with matters concerning licence fees for local commercial radio and terrestrial commercial television. The definitions are based on geographical or technical dimensions, sometimes they are open (expressed in general terms) to be able to include new developments. **10.74**

¹⁰⁶ Decision by Parliament Spring 1976. As already mentioned under part I, 1.

¹⁰⁷ See section 46 and 47.

¹⁰⁸ See part II, 3 b).

5. Internet

The Act on Responsibility for Electronic Bulletin Boards¹⁰⁹ contains a definition of the term **10.75** “electronic bulletin board”, by which is meant a service for conveyance of electronic messages, whether it covers text, picture, sound or other information formats¹¹⁰, but the law does not apply to provisions of only networks or other connections for the transmission of messages or other services necessary to use a network or other transmission channel. It does furthermore not apply to mediation of messages within or between government agencies or with a company or a legal group of companies and also not to services covered by the regulations in the Freedom of the Press Act or the Fundamental Law on Freedom of Expression¹¹¹. For example a newspaper publication may be protected by the Freedom of the Press Act as well in a printed version as on the Internet, and is then not controlled by the BBS act.

IV. Market Definitions in the Media Sector, as upheld in Sector Specific Practice of Authorities and/or Courts

1. Publishing

a) Press

The introduction of the above portrayed press subsidy system was postponed for many years. **10.76** The biggest problem was to get a common definition of newspaper¹¹². The definition selected was one that could gain a political majority: publications of newspaper character issued at least once a week¹¹³. This left out publications of magazine character issued once a week. The newspaper market was divided in two: subscribed morning papers and single copy sold evening papers (national tabloids). No opposition was raised against that: there were two markets.

Single copy sold newspapers were not entitled to press subsidies. As they were financed **10.77** mainly by revenues from their readers – 75 per cent compared to 33 per cent for subscribed morning papers – the advertising market did not distort the mechanism of the circulation market.

By and large, the selective system is market oriented, working as it is against the market **10.78** mechanism on the morning newspaper market. There are no restrictions on the ownership side, i.e. the rules are not violating the European Union rules of free flows between member states.

As a spin-off of the press subsidies system, newspapers fulfilling the newspaper definition, **10.79** irrespective of their competitive position (number one or number two newspapers), might receive subsidies for talking newspapers. The Talking Newspapers Council

¹⁰⁹ Act 1998:112

¹¹⁰ See Article 1 of Act 1998:112.

¹¹¹ See Article 2 of Act 1998:112.

¹¹² Gustafsson, K E & Hadenius, S. Swedish Press Policy. The Swedish Institute, Stockholm 1976.

¹¹³ Some of the low periodicity newspapers were once dailies. The difference between newspapers, published once a week and magazines, published once a week lies in the magazine character of the latter.

(Taltidningsnämnden) pays grants to newspapers that publish a spoken version of their printed edition. There are three types of talking newspapers: radio talking newspapers, cassette newspapers and artificial-speech radio-transmitted newspapers¹¹⁴. The rules are set out in a Decree on Government support for radio and cassette newspapers. It should be added that radio stations are not entitled to get subsidies to similar products.

The press subsidy system has followed other technological tracks. For a limited period secondary newspapers¹¹⁵ according to the qualifying definition, can apply for subsidies to establish internet papers¹¹⁶. Decisions are made case by case by the Press Subsidies Council.

b) Periodicals/Magazines

For a period of eight years, 1977–1984, state support was offered to organisational **10.80** magazines¹¹⁷. The support was aimed at periodicals published by voluntary organisations (religious, political, temperance groups, etc.), economic organisations (producer and consumer co-operatives, trade and commercial associations, etc.), and labour and professional unions. The organisational press was regarded of the greatest importance to the democratic process.

In order to prevent commercial mass-appeal magazines and special-interest magazines **10.81** attractive to advertisers, and thus with no economic difficulties, a rather tight definition of a organisational magazine was made¹¹⁸; periodicals containing more than 50 % advertising did not qualify for support, the publications must be distributed by mail directly to the reader, and so on. The same rules applied to publications in other languages than Swedish, i.e. the immigrant press.

2. Music

As previously mentioned¹¹⁹ the National Council For Cultural Affairs (Statens Kulturråd) is **10.82** responsible for allocating grants to different cultural fields of activity. These include also the music sector to which subsidies are granted for the following purposes:

- regional and local orchestra institutions,
- county music organisations,
- independent music groups,
- musical societies that arrange events,
- production and release of sound recordings.

¹¹⁴ Decree (1988:582).

¹¹⁵ In principle, a secondary newspaper is a newspaper with a bigger competitor at its place of issue. In practice, it is the same as number two newspapers, because there are no three-newspapers towns in Sweden any longer.

¹¹⁶ For further details see the web-site of the Swedish Press Subsidies Council at <http://www.presstodsnamnden.se>

¹¹⁷ The support was administrated by the Press Subsidies Council.

¹¹⁸ Prop 1976/77:99.

¹¹⁹ See above, part II, 6. b).

Though there are these different categories of grants, no individual criteria with regard to specific “music markets” are given by the Council.

3. *Film*

Applications to the National Board of Film Classification may be filed either from video 10.83 retailers and television channels wishing not to distribute pornographic films that have not been approved by the board, or from video companies for video recordings that have not been approved for children. So far, other technical changes in the media field have not affected the definitions of “public events” or “general gatherings”.

However, the question of prior scrutiny of e-cinema has been raised. It is said that e-cinema 10.84 performance cannot be clearly stated to be neither film nor video, neither television nor satellite broadcasting. Anyhow, this is a practical matter of scope of the Board and not a matter of a market definition.

Another definition might be seen in the description of the task of the National Board on Film 10.85 Classification, referring to moving picture media.

4. *Broadcasting*

In terms of broadcasting, sector specific practice does not constitute market definitions. This 10.86 is also reflected by the fact that the Radio and Television Authority does obviously not develop own criteria regarding to different “broadcasting markets”.

V. **Common Factors and Differences between these Market Definitions and the Market Definitions used in Application of the Competition Rules**

As already mentioned, the relationship between competition law and the constitutional rules on the freedom of press and speech remains rather uncertain¹²⁰ in Sweden, at least when bearing in mind that it has to be analysed on a case-by-case basis. This is based on the possible conflict between the regular application of Competition law to activities of media companies, like for example newspapers¹²¹ by the competent authority and the constitutional freedoms.

Apart from the fact that several cases have been closed already during the first stage of investigations without explicit analyses of the sectors concerned, which renders comparison more difficult, also the underlying approaches of the two legal fields can be perceived as differing to such a great extent that “identity” of “market” definition occurs rather incidentally. Under the new regime of the Electronic Communications Act, due to the character of this set of legal rules as (pre-)designed at EC-level, in this restricted area increasingly common factors will become apparent.

¹²⁰ As to uncertainties concerning the application of Swedish merger control rules in the media sector, B. Mullaart/A. Gahnström, “Revised Swedish Merger Control Rules—Harmonisation with Community Law”, [2000] 21(7) E.C.L.R. 317 (318).

¹²¹ L. Widén/S. P. Lindeborg, “Competition Law in Sweden”, in: F. Vogelaar/J. Stuyck/B. van Reeken, *Competition Law in the EU, its Member States and Switzerland*, at p. 395 (446).

VI. The (possible) Impact of this Non-Competition Framework and Practice on the Work of the Competition Regulator, in particular when defining the Relevant Markets.

The regulation by the Swedish state of the media is, by and large, made medium by medium. **10.87** With a slight exaggeration, there are water-tight shoots between the media. There are no linkages between the different media authorities with the exception of the Press Subsidies Council and the Talking Newspapers Council. Even within an authority each field covered by the authority might be treated separately.

There are no linkages between the media authorities and the competition authorities. The Competition Authority's main role in this connection is to give submissions to proposals dealing with media issues.

For each medium the definitions are made with the objectives of the **10.88** support/stimulation/regulation in mind. The aim is to create instruments as effective as possible for the tasks of allocating/stimulating/regulating. For example, the selective press subsidies are allocated almost automatically to the secondary newspapers, while supports to cultural magazines are made case by case.

Recently, the Ministry of Culture commissioned the Competition Authority to make an **10.89** analysis of media concentration in perspective of a potential regulation¹²². Presumably the mandate was given as consequence of the refusal by the Parliament to accept a law on media concentration, and in order to exhaust the possibilities of introducing regulation on concentration. Hence, the Competition Authority becomes engaged partly, as its task is to survey and analyse the level of competition in this sector, in a process that might lead to (additional or different) future media regulation.

However, the submissions and anticipatory verdicts by the Competition Authority, so far, show that its concepts of markets, competition and concentration are different to those of the media authorities¹²³.

¹²² Spring 2003. www.kkv.se, commissioned by the Ministry of Culture, 2002-12-12 (KK 2002/2710 ME) to be finished on the 3rd of November 2003 at latest.

¹²³ According to the interpretation applied within the scope of the present study.