Alleged abuse of a dominant position - the delivery offsetting and marketing contributions of Arla

The decision of the Swedish Competition Authority
The Swedish Competition Authority will not investigate the matter further.

The matter
Background
On October 12 2015, the Swedish Competition Authority received a tip from an individual regarding alleged anti-competition market activities on the part of Arla Foods AB (Arla). Later, a tip was also received which alleged that Arla in certain cases had made offset payments to grocers, on condition that Arla was granted an exclusive delivery relationship with these grocers. According to the tips, these actions had allegedly had the effect that undertakings in competition with Arla had not been able to establish new delivery relationships and, in certain cases, had been forced to terminate existing delivery relationships with grocers.

The undertaking
Arla is Sweden’s largest producer of dairy products and part of the farmer cooperative Arla Foods Amba, with operations and members in several European countries. Dairy products are central components in the product range available in groceries and include a large number of different products.

The investigation of the Swedish Competition Authority
The Swedish Competition Authority has formerly investigated certain rebates applied by Arla to grocers. These investigations have not led to any actions on the part of the Swedish Competition Authority. As a result of the tips mentioned above, the Swedish Competition Authority again saw cause to review Arla’s rebates and also to investigate the alleged conditional payments.

The Swedish Competition Authority has collected information from Arla on what types of rebates the undertaking offers grocers in Sweden. Arla has stated, i.a., that they offer a rebate in the form of delivery offsetting to all grocers that purchase perishables with direct delivery. Delivery offsetting is on condition that a delivery exceeds 500 kg, and grows with increasing volumes. Delivery offsetting is based on average delivery weight, excluding cooking fat, and is calculated on a weekly basis, offsetting the next invoice after delivery. Furthermore, as of January 1 2016, Arla offers its grocer customers rebates for flexible delivery and efficient conditions on delivery sites. According to Arla, the rebates reflect savings that arise for Arla through the customers’ purchases.

As regards the alleged offset payments for exclusive delivery relationships between Arla and certain grocers, the Swedish Competition Authority has collected information from a number of parties in the grocery trade regarding all conditional and unconditional remuneration and rebates received from Arla.

**Grounds for the decision**

**Legal grounds**

In Chapter 2 Section 7 of the Swedish Competition Act (2008:579), and in article 102 in the Treaty on the Functioning of the European Union, TFEU, it is stated that abuse of a dominant position is prohibited. Such abuse may, in particular, consist of the dominant undertaking limiting production, markets or technical developments to the prejudice of consumers.

**Dominance**

The Swedish Competition Authority has not found it necessary to determine if Arla has a dominant position.

**Abuse**

Abuse is an objective concept relating to the behaviour of a dominant undertaking which is such as to influence the structure of a market where, as a result of the very presence of the dominant undertaking, the degree of competition is weakened and which, through the undertaking’s recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of the commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.  

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2 See the judgment of the Court of Justice in case C-85/76, Hoffman-La Roche v Commission, EU:C:1979:36, § 91.
A loyalty rebate which, by offering financial advantages, tends to prevent that the customers of the dominant undertaking make all or most of their purchases from competing undertakings can amount to an abuse of a dominant position.3

Factors that may be important for assessment are if the rebate is retroactive or incremental, if it is individually tailored or applied in a standardized manner, as well as the length of the rebate’s reference period.4 Another significant factor can be if the pricing on the part of the dominant undertaking entails a risk that an as-efficient-competitor is driven from the market.5

The investigation shows that Arla’s delivery offsetting, including the extras for flexible delivery and conditions on delivery sites, is standardized in the sense that it is accessible to and equal for all customers which fulfil the criteria. Further, it has a small element of retroactivity, as it is calculated on a weekly basis and offsets the invoice of the following week. The Swedish Competition Authority makes the assessment that Arla’s delivery offsetting is not, in other particulars, designed in such a manner that it means that as-efficient-competitors run the risk of being driven from the market. Thus, the investigation of the Swedish Competition Authority does not, overall, show confirmation that the delivery offsetting can lead to anti-competitive foreclosure.

An undertaking with a dominant position can also abuse this position by forcing purchasers to make all or most of their purchases solely from the dominant undertaking.6

The investigation of the Swedish Competition Authority has not confirmed that Arla has made payments to grocers on the condition of exclusivity.

Conclusion
Given what has come to light in this investigation, the Swedish Competition Authority is of the opinion that there is no reason to prioritize further investigation. The Swedish Competition Authority therefore writes off the matter from further handling.

The decision of the Swedish Competition Authority to perform no further investigation does not constitute a standpoint regarding the question of if the conduct of Arla is in breach of the rules on competition.

3 See, e.g., the judgment of the Court of Justice in case C-23/14, Post Danmark, EU:C:2015:651, § 27.
5 Ibid § 61.
6 See, e.g., the judgment of the Court of Justice in case C-85/76, Hoffman-La Roche v Commission, EU:C:1979:36, § 89–90.
Separate action
The decision of the Swedish Competition Authority to perform no further investigation of the competition problem called into attention cannot be appealed. This follows from Chapter 7 Section 1 of the Swedish Competition Act.

Undertakings affected by the conduct can, however, independently bring action before court to have the matter tried in accordance with Chapter 3 Section 2 of the Swedish Competition Act.

A separate action on prohibition regarding anti-competitive cooperation between undertakings as per Chapter 2 Section 1 of the Swedish Competition Act or abuse of a dominant position as per Chapter 2 Section 7 of the Swedish Competition Act or in accordance with Article 101 or Article 102 TFEU is brought by an application for summons to the Patent and Market Court.

This decision has been made by the Director-General. The case was reported by competition counsellor Staffan Martinsson.

Dan Sjöblom

Staffan Martinsson

This decision is published on the Competition Authority’s website.

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Arla Foods AB