

constructing markets by law
-the coming into being of the Swedish Competition Act-

Abstract

The fundamental stance that underlies this paper is that markets are partly performed by the institutional frameworks that regulate them. One such institution with particular impact on the working-out of market practice is antitrust legislation.¹ This law stands out in comparison to many other facets of the legal framework as it is merely orienting in character, and much is left for law-enforcing authorities and courts to interpret and enact. The working-out of law can furthermore be considered as a translation process (confer Latour (1983)) according to which ideas are translated into law design that subsequently is translated into law application as seen in the ruling of courts. Such ruling, thus constituting newly formed practice, is then translated into new ideas, design, and practice. This paper is concerned with the first of these translations, how ideas on markets and competition are turned into Swedish law.

Ten years ago Sweden gets a new legislation on antitrust. The Competition Act (SFS 1993:20) then coming into force constitutes a radical break with the past as it draws on the so-called principle of 'prohibition'. In the old law the ruling principle is that of 'abuse' which is less constringent in character as opposed to the principle of prohibition that since long is the loadstar both for US- and EU-legislation in the area. The revised Swedish law mirrors a tangible refocusing process of the dominating political party at the time in favor both of competition itself and of the European Union. Following Sweden's joining of the Union the new law on antitrust is passed on very fast and much as a blueprint of EU-ideas, something constituting a major contrast with how such legislation usually evolves.

This paper discusses how some ideas concerning markets and competition are transformed into antitrust legislation as seen in the law section concerned with abuse of dominant position. Such translation has got two major aspects that will be considered. Its dynamic aspect is concerned with the very process as such whereas the static one deals with which particular

ideas that are taken on by the legislator. Such an account foreshadows the value endemic to an performative ontology (as furthered by Callon (1998)) according to which theory and practice are not separate but closely affiliated entities that construct each other.

Introduction

Despite the relative scarcity that characterizes the attention paid to the unfolding and maintenance of markets few if any would question the role of prevailing institutional frameworks in this regard (confer Lachmann (1971), North (1990), Swedberg (1994). This holds also as some choose to emphasize just how markets as institutions are realized as an outcome of ongoing and recurrent performative efforts by a wide variety of actors (confer Hayek (1948 (1945/1946)), Callon (1998)). This latter market view is much akin to the process whereby the architect realizes her ideas by letting them materialize on the drawing-table as opposed to how a market, much like in economics, is discovered just as the walls of Pompeji are uncovered by the archeologist (confer O'Shaughnessy (1995)). One relevant institutional framework for the performing of markets is the regulatory system as found in market legislation. And a key component of such regulation is antitrust law. As recurrently observed there is however not an undisputed connection between the letter of competition law itself and the way in which this legislation works out in the courts as verdicts (confer Heilemann (2000) for an account of the Microsoft antitrust case). Quite some interpretation, reformulation and restructuring is required in order for the court to be able to submit its ruling. For one thing the ideas that inspire the legislator in the first place matter. For another the preparatory works and other verdicts exercise an impact. And once established, every ruling will exercise a similar impact by finding its way in other court rooms. This particular performance of the market can be depicted as a three-phased process of translation where each phase in separate and jointly with the two others 'construct' the market (confer Fernler and Helgesson (2001)).

1. *Translation as law design*, how are ideas about the market translated into law?
2. *Translation as application of law*, how are laws about the market translated into courtroom practice by means of verdicts?
3. *Translation as feedback*, how are market practices as court rulings translated into other practices/ideas?

¹'Antitrust law/legislation' is here used synonymously with 'competition law' and similar.

The theoretical foundation of this paper is the notion of the market institution as, from a regulatory perspective, performed by a number of successive and interconnected translations as depicted right above. The main source of inspiration here for how such translations stabilize/destabilize a scrutinized phenomenon is the anthropology of science and techniques as brought forward by Latour (1983) in his account of Louis Pasteur's efforts in the 1880s to present an anti-anthrax vaccine for cattle.² Such a translation furthermore tears down the barriers that exist between the different guises of a particular phenomenon, such as the design, the application and the feedback of antitrust law. In the case of Pasteur the main barrier is found between the 'small within' and the 'big outside' – the 'theoretical' laboratory at Ecole Normale Supérieure in Paris subject to scientific manipulation and the 'ambiguous practical' cattle grazing the meadows of Beauce. By means of scientific translation Pasteur manages first to transfer the anthrax microbes to his laboratory and then to retransfer them back to the farm in Pouilly le Fort in a manipulated format that allows him to immunize the cattle.³ The obvious parallel is how the design of antitrust law impacts the performing of markets by means of court proceedings that subsequently carry test case value for other cases as well as for the development of law itself. Latour furthermore highlights how each individual translation means that the guise of a phenomenon is slightly altered without however suffering from a complete transformation. In the very same manner the neoclassical idea of the market and competition is subject to a revision by every translation where bits and pieces are subtracted and added. The letter of the law by no means exactly replicates neoclassical theory and the ruling of the court in a similar manner does not replicate law. But at the same time these different guises 'idea-practice-idea-practice...' do not constitute different variants of markets separated by insurmountable barriers but only different translations of one and the same, be it ambiguous, particular phenomenon.

... [I]t is enough to say that each translation from one position to the next is seen by the captured actors to be a faithful translation and not a betrayal, a deformation, or something absurd.⁴

²'Translation' is just one of several possible labels to this process. 'But what word can be used that could help us to describe what happened, including this revision leading to the breaking down of inside/outside dichotomies? I have used several times the words "translation" or "transfer," "displacement" or "metaphor," words that all say the same thing in Latin, Greek, or English' (Latour (1983)).

³The translation is now the following: "If you wish to understand epizootics and soon thereafter epidemics, you have one place to go, Pasteur's laboratory, and one science to learn that will soon replace yours: microbiology" (Latour (1983)).

⁴Latour (1983)

This paper illustrates market construction as a ‘type-one’ translation where the design of the Swedish Competition Act is subject to a particular ideological framework, that of neoclassical economics. First of all some roots of antitrust legislation are presented prior to a recapitulation of Swedish law. The definition of the ‘relevant market’ with some particular impact on article 19 that discusses abuse of a dominant position is then drawn upon as a case of illustration. Thereafter the discourse turns to how neoclassical ideas are translated into law design and some possible implications thereof.

Some roots of antitrust legislation⁵

In contrast to most other elements of contemporary law, antitrust legislation stands out in the sense that it is a relatively recent phenomenon with no counterpart in ancient Roman law. It is, just like sections of family law, more orienting than precise in character than what most other parts of Western legislation are. There is hence good reason to believe that the very much interpreting character of this law renders the pursuit of the market thereby in particular obvious and thought-provoking from the perspective of successive translations. The translations themselves thus illuminate how the market is pursued in a way that other law does not give rise to. Or, as put to words by one Swedish official state report in the area (SOU 1997:20, p 61).

It is obvious that the challenges of interpretation and application are unavoidable as general clauses of prohibition, such as The Competition Act, are applied.

The last 100 years or so mean that antitrust legislation experiences a progressive and at times rather drastic development. Before that Western national economies only display scattered regulation in the area such as some bans on price cartels. Following the progress of the ‘freedom of business activity’ principle (that encompasses freedom of contract and a complex network of commercial privileges bestowed upon guilds and similar) even this limited regulation is however curtailed in mid-19th century. Authority intervention is mainly limited to the gathering and distribution of information with respect to individual company conduct and business *itself* is seen as the main surety for the functioning of markets.

⁵This section draws, where otherwise not stated differently, on Carlsson et al (1995, pp 21-22), Bernitz (1996, pp 16-20), Konkurrensverket (1998, pp 7-10, 1999, pp 9-12),

This all changes with the advent of the maturing industrial revolution in the 19th century as it is being recognized that restraints to competition must be regulated in order for the expanding market economies to function as intended. This is mostly experienced in the United States where the coming into being of the giant business corporation is the major impetus for the framing of federal antitrust legislation.⁶ Ever since the Sherman Act is passed in 1890 American competition policy (with its distinct emphasis of prohibition-via-sanctions of harmful behavior) serves as a role model for most other Western legal frameworks. This holds in particular from the 1950s and onwards.⁷ A clear-cut exception is the small Nordic economies, the legal frameworks of which for a long time are guided by the principle of abuse, than the principle of prohibition. This ‘Nordic’ principle argues that authorities may interfere with restraints on competition only in individual observed cases and in order to affect what might prevail in the future. The other principle of prohibition states that certain business behavior that harms competition is unlawful and prohibited also when pondered upon ex-post. Tangible sanctions can then be imposed in the form of liability for damages in the case of conduct already undertaken. This influential ‘American’ principle also characterizes the Clayton and Federal Trade Commission Acts (appearing in 1914 and treating the control of mergers and the formation of a federal authority for monitoring and enforcement purposes) and the Robinson-Patman Act (of 1936, discussing various vertical restraints on competition, for instance price discrimination).

The Swedish experience is in consequence, until rather recently, much different from the predominant ‘American’ philosophy of antitrust legislation. It is not until the mid-1920s that Swedish authorities acquire the formal, though in practice marginal, right to scrutinize companies that hold dominant market positions. It is only some twenty years later that the authorities gain ground as the first real act on competition is passed (however dealing only

⁶[United States] antitrust legislation is part of “the American heritage” and constitutes a central part of the American legal system, mostly as a fundamental constitution for business’ (Bernitz (1996, p 17)). This central position is then something rendering its relative impact more tangible in the US than in most other countries.

⁷The Sherman Act states that ‘... every contract, combination ..., or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal’ (referred in Bernitz (1996, p 17)). The practical application of the Act is however also guided by the so-called *rule of reason* meaning that minor restraints on trade might be allowed in the individual case, but no one is in the position to obtain such an exception on beforehand from authorities. There is an explicit spirit of threat in this legislation (dating back to older legal practice) that encompasses both the risk for defendants to incur heavy damages, and the forced breaking-up of companies. This latter option is closely associated with the Fate of the Standard Oil corporation in early 20th century and also lies at the heart of the present-day case United States vs Microsoft Corporation.

with surveillance issues). From this point in time it becomes possible to scrutinize companies in order to gather information and a register on cartels is also introduced. In 1953 the first Swedish law on competition, the Restraint on Competition Act, is passed which means that prior works in the area are formalized and expanded upon. The ruling principle tells that identified individual cases of abuse are to be dispensed with via negotiations. For the very first time two different prohibitions tied to sanctions also come forward, a ban on resale price maintenance, and a ban on bidding cartels. This law is subsequently revised and some 30 years later it results in the Competition Act, a law holding on to the former 'abuse' rules but complementing them by also encompassing the option of control concerning company acquisitions. In 1993, finally, Sweden gets a new and totally revised Competition Act (SFS 1993:20), the passing of which follows the country's decision to join the European Union. The very impetus of this brand new legislation is corresponding European Community law, as seen in the passing of the Treaty of Rome in 1957 (that in itself gains inspiration from the German *Gesetz gegen Wettbewerbsbeschränkungen*). In the spirit thereof this new Swedish law is much 'sharper' in adhering to the principle of prohibition according to which sanctions (in part administered by a new authority, The Swedish Competition Authority, *Konkurrensverket*), directly follow from unlawful conduct.

Some contents of Swedish antitrust legislation

Just like European Community antitrust legislation, the Swedish text (SFS 1993:20) revolves around two major restraints to competition that are banned, collaboration between companies (article 6) and abuse of a dominant market position (article 19). There are then a number of sanctions tied to unlawful company conduct in breach of articles 6 and 19. For one thing agreements made are not valid under civil law, for another companies can be forced under penalty of a fine immediately to discontinue the thus unlawful conduct. Such behavior can also entail liability and the imposing of competition fines. In addition to these two main sections the Swedish Competition Act is also applicable in the case of merger control via article 34. Hereby the courts can prohibit acquisitions that either create or strengthen a predominant market position to the detriment of efficient competition.

[Article 19]

Any abuse by one or more undertakings of a dominant position on the market shall be prohibited. Such abuse may, in particular, consist in

1. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
2. limiting production, markets or technological development to the prejudice of consumers;
3. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
4. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial usage have no connection with the subject of such contracts.

Figure 1; Article 19 of the Swedish Competition Act⁸

Article 19 of the law furthers that once it can be established that a company (or an association of companies) occupies a dominant market position, and this position is gained from by means of abuse, it is unlawful. That is to say, dominance is a first necessary though not sufficient prerequisite for the article to be applicable. It is not abusive to be dominant per se. But the way in which this, a position of market power, might in fact be used ‘horizontally’ and/or ‘vertically’ *to the disadvantage of others*, is. As it appears the relevant section of law contains three parts/prerequisites that all must be scrutinized for abuse of a dominant position to be established. Firstly there is a market that has to be decided upon. Thereafter dominance therein must be clarified. And finally this dominance must be abused, something exemplified in four different ways. As learned from the text, abuse itself can be of two types. There can first be so-called ‘exploitative abuse’ according to which an own market position is drawn upon to directly further one’s own interests. *Customers are hurt*. This is what is alluded to in the first two examples delineated in article 19 which embrace unfair pricing/trading and the pursuit of market foreclosure. There can then be abuse that is ‘exclusionary’, something implying that *competitors* are directly hurt by someone that draws on a strong market position. As seen in the last two examples of the article this prevails in case of unfairly dissimilar trade conditions and the imposing of tie-in clauses. That is to say, both direct (exclusionary) and indirect (exploitative) harm to other sellers is covered by the article. Competition can hence be hampered both ‘immediately’ by (exclusionary) action as such and also ‘in the long run’ by the negative side-effects that some (exploitative) conduct might have on potential competition by impacting the market structure (Carlsson et al (1995, p 334), Bernitz (1996, p 58), Korah (1997, p 4), Wetter et al (1999, p 419)). As observed by Korah

(1997, pp 6, 89) the implication thereof is that both actual *and potential* competition is protected by the article thus putting customers and competitors at equal weight as potential victims of abuse.

In Continental Can ... the Court interpreted article 86 [the current article 82 which corresponds to the 'Swedish' article 19] not only as a provision under which the conduct of firms already dominant which harmed consumers directly could be regulated but also as one forbidding the weakening of any remaining potential competition by a firm already dominant, as this might harm consumers in the longer term,... Even if potential competition exists on the supply side, competitors may not be able to enter the market if consumers are locked in to an existing product by the costs of switching, lack of information, contractual commitments.

As said, in order to establish abuse it is first necessary to define what is the relevant market and thereafter to see whether a potential defendant is dominant therein. That is to say, the definition of the relevant market is a first necessary prerequisite when this section of law is to be applied. But it is not easy. In the following this topic will serve as the case illustrating Swedish antitrust legislation and translations associated therewith.

An adequate market delimitation presupposes a careful judgment of a number of different circumstances the implications of which vary subject to the conditions prevailing in a specific case. A particular fact that is decisive for the ruling in one case could be fully insignificant in another. The delimitation of a market is however no precise science and it is, just as the Market court has furthered, often possible to make several delimitations none of which appears as the solely correct one. ... The market and market conditions change(s) over time and the delimitation could vary depending on the parties to a case or the particular measure that is subject to scrutiny.⁹

The formal ground for defining the relevant market is not found in the letter of the law itself but in the general advice regarding so-called petty agreements provided by The Swedish Competition Authority (KKVFS 1993:2, referred by Bernitz (1996, p 126)). These provisions mirror the corresponding guidelines provided by the European Community legislation (European Commission (1997)). And as argued by Wetter et al (1999, pp 63-64), the relying on European Community law is of particular importance here. This is so since there is not much Swedish legal practice in the area and the preparatory works, as scrutinized below, do not provide much guidance either except for reference to European Community practice.

There are four main preparatory works that matter. Two of them lay the foundation for the new law (SFS 1993:20) and two suggest a revision of this law. The 'original' works are the

⁸Excerpt from The Swedish Competition Act (SFS 1993:20) (Konkurrensverket (2000))

government bill *Proposition 1992/93:56* (on new competition legislation) and the adjacent committee report *Näringsutskottets betänkande 1992/93:NU17*. Later works suggesting a slight revision of the law are the government bill *Proposition 1997/98:130* (on amendments to the Competition Act) and the adjacent committee report *Näringsutskottets betänkande 1997/98:NU09*.

The relevant market definition is commented upon only briefly in the original government bill as it is merely established that '[t]his market delimitation is arrived at by deciding on the one hand the *product market* and on the other the *geographic market*. Products that are mutually substitutable with reference to properties, price, use, the opinion of consumers and other customers and de facto substitution opportunities et cetera belong to the same product market' (*Proposition 1992/93:56*, p 85). It is clear that there are both demand and supply considerations at hand even though the former seem to take on a discretionary role. The bill obviously does not emerge in a vacuum but it is subject to preceding works. Since the law underway breaks with the old principle of abuse and instead adheres to the prohibition principle these works however carry relatively minor weight. This is in sharp contrast to how legislation normally emerges. There *is* a preceding official state report (SOU 1991:59), labeled Competition for increased societal welfare. But it is commissioned only in 1989 prior to Sweden's decision to join the European Union. And in consequence it really does not matter. In most aspects it is simply not relevant for the government bill and the only suggestions made use of are those that pertain to the introduction of competition damage fees and control of company acquisitions (confer the official state report SOU 1997:20, p 43). A new government bill, *Proposition 1997/98:130* (Amendments to the Competition Act) is passed a few years after the new Competition Act is put to work. This new bill appears in light of the official state report SOU 1997:20, called The Competition Act 1993-1996. This government bill suggests merely slight changes to article 19 by means of an editorial elucidation concerning the market concept as the original wording 'the Swedish market' is altered to 'the market' (*Proposition 1997/98:130*, p 26). The adjacent committee report, *Näringsutskottets betänkande 1997/1998:NU09*, sees no reason to oppose the ideas of the government bill as regards the proposed amendment of article 19.

⁹Wetter et al (1999, pp 62-63)

The principles for market delimitation are not really discussed at large, be it in the preparatory works or in doctrine. Practice is rather undeveloped and the Swedish Competition Authority has not issued any general advice that pertains to market delimitation according to the Competition Act. That is why the Commission Notice on the definition of the relevant market for the purposes of Community competition law plays an important function of guidance for the application of the Competition Act.¹⁰

As seen, the preparatory works accounted for above do not say much about the nature of the relevant market save for a recapitulation of European Community law and its contrasting of the product and the geographic markets respectively. It is then obvious that these preparatory works do not emerge as part of a ‘consequential structure’ since, following Sweden’s rather sudden change of mind in joining the European Community, and different parliamentary majorities (Sweden held general elections in 1991, 1994, and 1998), the original official state report (SOU 1991:59) does not connect to what is to emerge as the new Competition Act (SFS 1993:20). That is to say, whereas the official state report adheres to the old principle of abuse, the subsequent Department of Industry Memorandum (Ds 1992:18) leaves this behind and goes on to fully embrace prevailing European Community legislation which means drawing on the prohibition principle. The role of these preparatory works can be commented upon in yet another way. As observed upon by Bernitz (1996, p 29), the rather shallow character of these works is very much in line with the European tradition that the law aspires at joining forces with. The obvious advantage thereof is that it paves the ground for a progressive development of Swedish legal practice, the downside of which obviously is that there are no national handrails whatsoever to cling to, something in particular disturbing regarding the Swedish experience (confer Holgersson (1998)).

In all brevity the new [Swedish] Competition Act implies that EC competition law has been transferred to Swedish law with respect [however] to some adjustments called for by ... the national conditions and the significantly smaller size of the Swedish market. ... It is most likely the case that Sweden today is the EU member state whose national competition law corresponds the most to the community law on competition. ... Hence the Swedish Competition law mostly appears as adopted EC law.¹¹

There is then no doubt that ‘following ... [its] precedence, direct applicability, and direct effect, EC law constitutes an important part of Swedish law’ in the area (Wetter et al (1999, p 45, author’s translation). The major difference between the two frameworks is that whereas the former only applies to trade the effects of which occur *between* two member states, the latter prevails only for trade with effects *within* Sweden. In practice these two instances of law

¹⁰Wetter et al (1999, pp 63-64)

¹¹Bernitz (1996, pp 20-21, 28)

are obviously very much interconnected. The pursuit of national law can hardly go against what would be a reasonable interpretation of European Community law. If now, following these arguments there is not much of Swedish guidance to get in understanding how to delimit the relevant market but only European Community practice, what can then be learned from there?

The European role model

*Market definition is a tool to identify and define the boundaries of competition between firms. ... The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved ... face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining their behaviour and of preventing them from behaving independently of an effective competitive pressure.*¹²

The market as...

... SUBSTITUTABILITY OF DEMAND,
From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere.

... SUBSTITUTABILITY OF SUPPLY,
[Substitutability of supply] requires that suppliers be able to switch production to the relevant products and market them in the short term ... without incurring significant additional costs or risks in response to small and permanent changes in relative prices.

... PRODUCT MARKET,
A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

... GEOGRAPHIC MARKET,
The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

... for instance two soft drinks with similar tastes...	... for instance two qualities of paper...
... for instance the alley where there are two convenience stores...	... for instance the square where there are two pizza restaurants...

Figure 2. Identification of the relevant market (The European Commission (1997, pp 2, 3, 4, author's examples))

As seen the market is defined from product and geographic criteria. It is also obvious how the concepts of 'market' and 'competition' seem to be part of one another and how the identification of competitors has a decisive impact for how market boundaries are found. These boundaries are then discussed from the perspective of the product market/the

geographic market on the one hand and on the other from eventual substitutability in demand and supply respectively. Potential competition is however not really considered. ‘Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, both in terms of products/services and geographic location of suppliers’ (The European Commission (1997, p 3)). This is illustrated in the table above wherein four mutual overlapping considerations identify the relevant market. Historical substitutes, elasticities, consumer preferences, switching barriers and price discrimination are among the factors that are deemed crucial for establishing the product market. The geographic market is in a similar vein exemplified by attention paid to price differences, the nature of demand, customer opinions, prevailing geographical spread of demand and flows of products and transports. Whereas the product market is more demand-oriented supply-side issues plays more of a role for the geographic market. In consequence product markets are furthermore typically discerned via substitutability in the eyes of consumers whereas the area served by a supplier and applicable transportation costs more often are found in definitions of the geographic market. This also renders the former somewhat more difficult to grasp than the latter.

In one sense the problem of product market definition is less tractable than that of geographic market definition. Often geographic market definition is a function of cost of transportation, and this is an objective number that can be measured. By contrast, product market definition is often a function of consumer taste, and taste cannot be measured so easily. ... But over a broad range of cases, product definition depends on substitutability in consumers’ eyes, and since consumers utility cannot be measured by some easily identified criterion, such as cost of transportation, the market definition question can become very difficult.¹³

In the notice it is furthermore obvious that substitutability is far more important on the demand than on the supply side. The alleged reason is that demand in this sense is more immediate than supply that needs more time to work out and also requires some ab initio demand effects. That is to say, as observed by Korah (1997, p 13), that demand substitutability works out faster than its supply equivalent (consumer response is faster than supplier adaptation). Wetter et al (1999, p 65) agree therewith and posit that this is so ‘as it normally constitutes the most immediate and workable restriction of companies’ ability to exert influence’ by means of how customers react to a price increase undertaken by an incumbent supplier. Do they stay on or do they switch to another seller? As soon as

¹²The European Commission (1997, p 1)

investments, strategic decisions or long time is required in order to switch from the production of one product to another supply-side considerations tell that two compared products then cannot be part of the same market.

In order to establish the thus crucial degree of demand substitutability it is possible to draw upon an experiment of thought, the so-called SSNIP-test, wherein it is envisaged how a company's profitability is impacted by a small (in the range of ten to fifteen per cent) but sustainable relative price increase for a particular product. The foreseeable customer reactions thereupon are then decisive for identification of the market boundaries. In case it is likely that customers switch to another product or to a supplier located somewhere else, and thereby render the price increase unprofitable (resulting from a loss in sales volume), products and supplier areas whereto customers switch are then part of the relevant market. This experimental process is then repeated for more and more products and suppliers until an undertaken price increase does not mean any sales loss and in consequence proves profitable.¹⁴

Identical or similar characteristics are however neither necessary nor sufficient for the products to be substitutable as the substitutability to a large extent depends on how the customers judge different characteristics. ... In addition to the cross-price elasticity also price elasticity could matter since inelastic demand foreshadows the absence of substitutes.

The notice also provides some guidance as regards how practically to go about in order to identify the relevant market. It is emphasized that the circumstances in the very individual case, distinguished as empirical facts, shall be judged with an open mind where all data carries equal weight. In practice it is possible to come up with a number of discernible alternative relevant market definitions one of which is ultimately chosen where one or several products are found. The Commission also observes that even though historical facts are always part of any judgments made it is crucial to take into consideration the general tendency towards market integration that is at the very heart of the EU-idea itself. Korah (1997, p 84) furthers that rather narrow market definitions are often found by the EU court. She illustrates this with a few examples involving truck tires that was found to be a market on their own following the absence of supply substitutability because of the entry barriers

¹³Hovenkamp (1994, p 89)

¹⁴Wetter et al (1999, pp 70, 73), see also the ensuing quote (bold text in original)

constituted by the costs for setting up a relevant production plant. Bernitz (1996, p 56) agrees that antitrust law in general applies rather narrow market definitions, something obviously increasing the prevalence of interpreted market dominance. A telling example thereof (recapitulated by Wetter et al (1999, p 62)) is how a relevant market in Sweden is defined as ‘all information regarding adjustment values for Bosch diesel pumps’. The overall recapitulated customer-bias of above furthermore appears obvious in the case of *Continental Can* elaborated upon by Carlsson et al (1995, p 340). In this case glass bottles and aluminum cans are seen as being part of the same market with reference to their functional value for consumers (and not their physical supply-based properties). There is however one example which more than others serve as *the precedent par preference*. It tells about whether bananas constitute a market of their own or whether they are merely a sub-entity of the fruit market in general. And it very much refers to consumer characteristics.

*In United Brands the Court confirmed the Commission’s view that bananas were in a separate market from apples and oranges, partly because the very young or old and infirm could not manage other fruit, although there was no way of discriminating against these people. In fact, they were protected from high prices by the loss of sales to healthy people that would result if the price of bananas were raised. They eat far more bananas than do the young, old and sick. ... In its decision, the Commission was concerned about the need of the young, the old and the infirm who may have difficulty eating other fruit.*¹⁵

As observed by Carlsson et al (1995, p 340), ‘other fresh fruit display [in the eyes of consumers] only to a limited extent substitutability with bananas’. That is, the market is defined according to basic customer needs, and what is more, these needs seem to constitute the objective of protection for the ruling court.

Translation as law design

The preceding pages provide an overview of some elements of Swedish antitrust legislation as illustrated by the definition of the relevant market that follow from article 19 on abuse of dominant position. This letter of the law inclusive of adjacent comments and preparatory works then constitutes, in the language of this paper, the outcome of a ‘type-one’ translation wherein ideas about the market are translated into law, ‘translation as law design’. Subsequent translations (not further commented upon in this paper) first involve how such law is translated into courtroom practice via verdicts (confer Kjellberg and Liljenberg (2003)) and

¹⁵Korah (1997, pp 13, 81)

then finally how such court rulings feed back into other courtroom practice/other law design as legislation is eventually altered. The main idea is that the market, from a regulatory perspective, is 'produced' by the unfolding of such a three-phased translation that encompasses a tight interlinkage between what is normally labeled 'theory' and 'practice'. Here they produce each other and successively go on to reformulate that part of the market institution which is law.

The above recap of the Swedish Competition Act thus embodies the putting to use of some particular suggestions about markets and competition. This means that neither the law itself nor the comments thereupon arise in a vacuum. It is, quite the contrary, some preconceptions and ideas about market and competition that are more inspiring for the legislator than others. It is possible to say that the legislator 'translates' her world of ideas in the area of market and competition and that the outcome of this translation is what can be drawn upon as the letter of the law itself is studied and reacted upon by others. That is to say, in just the same manner as Pasteur's efforts regarding the anthrax microbes translate between the laboratory and the meadows, the meadows and the laboratory, we can distinguish how some fundamental market assumptions perform the market by means of law design that thereafter constitutes the basis for further translations. Such translations are then done by laymen, by business organizations and authorities and, not least, by the superior legal instance in the area, the Market court. Given this a variable ontology (confer Kjellberg (2001)) it is obvious that the sub-entities in such a world must be somehow stabilized by its actors in order for them to attain a social order that enables some reasonable reduction of uncertainty (confer Hayek (1948 (1945/1946))). But it is also obvious that such stabilizations can only be temporary as the fundamentals thereof, the 'interpretative rounds' as foreshadowed here by means of translations, are most fluid in character. The market as a focal phenomenon then appears in different guises which are both interconnected by frames of meaning and separated by barriers, the latter of which are torn down as each new translation appears (confer Latour (1983)). This is however not a straightforward exercise, something that readily appears as comments about the very issue of relevance here, the definition of the relevant market in accordance with article 19 of the Swedish Competition Act, is looked into. That is to say, the challenges endemic to the 'translation as law design' scrutinized here mean that there exists a wide variety of translations, a plethora that tentatively renders regulatory efforts burdensome in particular. A tentative explanation as furthered here has it that this ambiguity in part stems from the fact that the ideological frame whereupon the translation is based, neoclassical

economic theory, is not very well suited to take on this endeavor. This is so as this school of thought, that is put to a use which it is not designed for, does not set out to understand the market or competition. This is hardly a very original observation (confer Albinsson-Bruhner (1993), Neale (1970)) but the manner in which is spoken out here, as a phase of translation, might be.

In this last section of the paper these ambiguities will be discussed from a translation-perspective based upon three major assumptions following right below. Thereafter the translation as such is discussed as a function of its static and dynamic aspects. The section concludes by relating some possible implications thereof.

1. The ideological point of departure for the legislator is neoclassical economic theory.
2. Such neoclassical theory hardly discusses the market.
3. Such neoclassical theory hardly discusses competition.

It is most obvious how neoclassic economic theory is the source of inspiration for the legislator in the realm of antitrust.¹⁶ The reason for this can always be pondered upon but it is obvious that the overarching success of neoclassical economics in Western societal thought carries some major weight here. This is for instance discerned (as observed by Morgan and Hunt (1994)) in the fact that the lions's share of social science academics learn about the fundamentals of neoclassical microeconomics' (and not so much about the alternatives thereto) as once taught by Cournot, Jevons och Walràs. In consequence it is not surprising that the lawyer who typically impacts law design will act according to this particular paradigm. This is readily seen in a number of law sections and comments thereupon. Consider as a case in point how 'neoclassical' elasticities are drawn upon a lot and how various bonds between economic actors (as paid attention to by sociologists) are not very salient. As regards the particular Swedish circumstances and the coming into being of the Competition Act in 1993 one could look into the particular academic institutions that are allowed to sound their

¹⁶Confer Hovenkamp (1994, p 2) and Bernitz (1996, p 12). '[A]ntitrust policy makers are quite stodgy about adopting new theory. The economics applied in antitrust decision making is quite conventional, "applied" economics.' 'An evaluation of the Competition Act from a public economy perspective can only be done in the long run. The law should be judged from an international perspective and in light of partly wavering economic theory'. '... [The official Swedish delegation of efficiency argues in 1991 that, in relation to restraints to competition and social welfare that] '[a]lso with modern economic theory...' (SOU 1997:20, pp 55, 56).

opinion during the circulation for consideration of the Department of Industry Memorandum (Ds 1992:18). It is the faculty committee of law at Stockholm University and the law faculty board at Uppsala University (the government bill *Proposition 1992/93:56* on new competition legislation, p 224). But could it be so that the tangible neoclassical dominance in the field mirrors the absence of alternatives? Hardly so. Firstly, there are obvious alternatives within the neoclassical field but outside of the predominant perfect competition paradigm. Consider for instance Chamberlin's ideas in the fields of monopolistic competition which means it is always 'imperfect'. But there are also other facets of the social sciences that have paid due interest in the area of competition. As a case in point consider sociology as apparent in the works of Weber (1968 (1922)) with Burt (1992) as a contemporary follower.

It is furthermore evident that neoclassical theory lacks a fundamental treatment of the market concept as this institution very seldom is subject to discussion (confer Swedberg (1994, p 257)). The market is of course alluded to, but then mostly in passing and in a rather superficial manner that does not serve as an input to further analysis. In the same way as for competition, the market appears as a byproduct to the theory of price, for instance as the rational choice of individual actors is discussed (confer Kirzner (1973)). One could thus posit that the neoclassical market is the invisible context by means of which other phenomena are scrutinized. But this frame of reference itself is hence hardly subject to further analysis. Two consequences follow. Firstly the market appears, in the words of the economist Demsetz (1982, p 6), as an 'empty generic conceptualization'. Secondly, the market becomes a most elastic and contingent concept that takes on different guises depending on the use to where it is put. As phrased by the economist Tirole (1995 (1988), pp 12-13), the market becomes an 'empirical difficulty'.¹⁷ This difficulty is most striking as the market simply appears as the demand curve that can be derived from the quantity demanded of a product at a certain price as income, price of similar products and product characteristics and consumer preferences are held constant (Mansfield (1982, pp 86-87, 110-112)). It is however not unequivocal that it is demand that is decisive for the nature of the market. It could be that supply is more important. Or that both matter. This ambiguity stems from the fact that the market concept occasionally is mixed up with the concept of industry (Nightingale (1978, p 36), Scherer och Ross (1990,

¹⁷This is most obvious in a study made by Thin (1960, p v) whose book *Theory of Markets* allegedly is about 'a general study ... of pricing in three different markets – perfect competition, perfect monopoly, and imperfect competition'. The market is hence seen as identical with various structural definitions of competition.

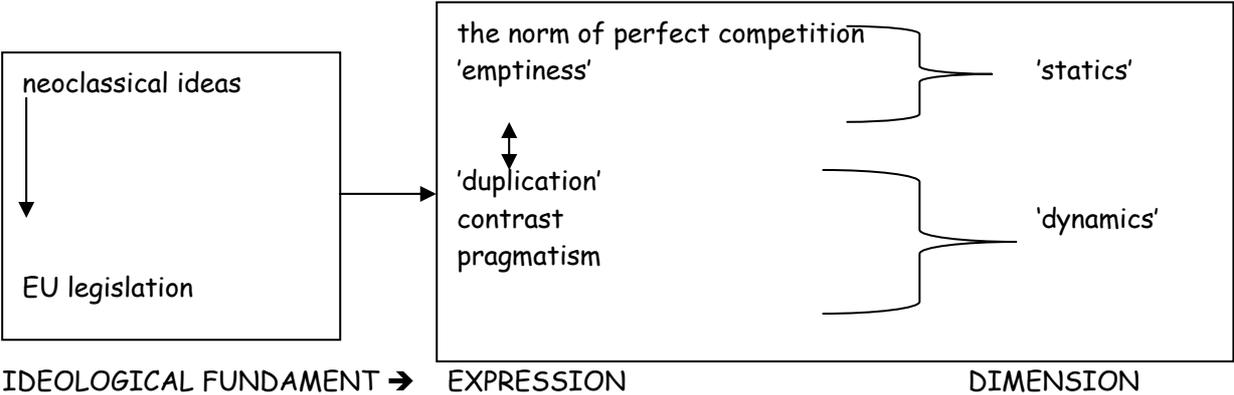
pp 73-75)). At a closer look it seems as if an industry is or should be supply-defined whereas the market is a concept where both supply and demand has got a role to play. It is hence important to pay attention to *both* technology *and* consumer demand, the latter expressed as cross-price elasticity between two products.

One consequence of this ambiguous status of the market in the neoclassical discourse, wherein it on the one hand seems to be identical to an industrial supply structure, and on the other is the exclusive territory of one product, is that there is a very close affinity between a likewise restrained view of competition. As furthered by McNulty (1968, pp 641, 645), ‘the failure to distinguish between the idea of competition and the idea of market structure is at the root of much of the ambiguity concerning the meaning of competition.’ In a similar way Stigler (1987, pp 531, 533) claims that ‘the merging of the concepts of competition and the market was unfortunate, for each deserved a full and separate treatment.’ That is to say, *their close to joint conceptions have contributed to the blurring of both*. According to Stigler the market is ‘an institution for the consummation of transactions’ whereas competition is ‘a rivalry between individuals’. His view converges with that of McNulty concerning the need for a distinction between the market and competition, but differs interestingly enough concerning which is the more conditional. Whereas Stigler posits ‘that even today a market is commonly treated as a concept subsidiary to competition’, McNulty (1968, p 645) posits ‘that competition has been conceived of as a concept subsidiary to that of the market rather than the other way around’.

In light thereof it is hardly surprising that the concept of competition does not receive very much of attention in neoclassical theory. The reason for this omission is the predictive purpose of positive economics by means of which clean and powerful models are built. And once strong predictive power is strived for it is crucial to start out with making clear and distinct assumptions that often may be quite ‘unrealistic’ (confer Friedman (1953)). These assumptions typically deal with relative product homogeneity and the number of actors concerned in addition to the typical action pattern that governs the conduct of these actors. And, quite like a paradox, these fundamental assumptions also mean that one presumes what ‘is’ competition. By making these assumptions that deal with certain market characteristics, one has a priori decided upon which are the structural characteristics of the concept of competition. In consequence competition is equivalent to a particular market structure and then there is not much left to analyze concerning competition itself. After making these

assumptions markets are then typically described as regards their competitive structure and only thereafter can other phenomena, typically pricing, be discussed. A given market structure labeled perfect competition then implies that price is a parameter and that it will close in on the marginal cost for producing a certain goods and that individual buyers and sellers will have no power to influence this price. When instead a monopoly structure is at hand price will tend to home in above this level since the seller can afford to offer to the market fewer products so that marginal revenue and marginal cost will coincide. Competition is hence treated not in itself but only as a structural input to price theory. But not really more than that.

As the three major assumptions regarding the role of neoclassical theory for antitrust legislation and this school’s rather shallow interest for market and competition by now are brought forward, what then about the translation at hand concerning the Swedish Competition Act? It is possible to emphasize two particular aspects of this translation, the dynamic and the static. And both seem rewarding as one reaches out in order to understand the translation. Dynamics are embodied in the process whereby ideas are taken on and are being integrated into a partly revised formalized institutional frame, the new Competition Act. The static aspect of the translation is found in how it manifests the momentary outcome of the said process. Law design, although not carved in stone, thus temporarily stabilizes the translation which is scrutinized here.



Figur 3. The translation as a function of its static and dynamic aspects

As regards the dynamic aspect, the process whereby Sweden gets a new antitrust legislation, a few things stand out. Firstly, the law is not ‘designed as a natural phase in national law development’ (Bernitz (1996, p 20)). Quite the contrary it constitutes a definite break by suddenly abolishing the thitherto prevailing ruling principle of abuse. Secondly, this happens

in a rather abrupt manner thus mirroring a drastic political reorientation in relation to the European Union membership and the role of competition for societal development. Thirdly, these two features imply that EU-legislation in the area not only inspires but also guides, in a most tangible manner, the coming into being of the new law in light of the relative vacuum that prevails at the time. The process whereby the translation comes by hence deviates in a most tangible manner from what by custom generally is at hand as regards law revision and introduction. In the conventional case such a procedure takes much longer time, something following from the conservatory character of law itself. The process normally involves the lengthy preparation of an official state report following some governmental instructions that thereafter inspires a department memorandum which after a circulation for consideration constitutes the basis for the government bill that finally is subject to the ultimate committee report. In the case of the new Competition Act there is a preceding state report, Competition for increased welfare (SOU 1991:59) but as it is written based on instructions that reflect the former principle of abuse it is mostly left unattended in the department memorandum that in part replaces it (Ds 1992:18, The government bill 1992/93:56, New antitrust legislation, p 216). This very fact, that the department memorandum thus deviates from the official report suggestion, is not very common but must hence be judged in light of the referred political reorientation. Still this revised thinking does not seem very controversial as a well-spread consensus is at hand, both politically and among those who voice their opinion about the department memorandum thus put to circulation for consideration. Some representatives of the agricultural sector are however more sceptical as are a few industry representatives who fear a widespread bureaucracy as EU-rules are put to work. *To sum up it is hence possible to discern how the dynamic aspect of the translation is characterized by lots of pragmatism implying unusual speed, a sharp contrast in relation to the past, and closeness to the EU-view and a tangible consensus void of major controversies.*

Closely connected with the static aspect of the translation, its de facto outcome, is then the linkage to neoclassical ideas and how this very bond is expressed. On the one hand there is the fundamental emptiness that the translation has to handle. This follows from what is posited above, that neoclassical theory does not really discuss neither the market nor competition. On the other hand there are obvious neoclassical remnants and influences that could be highlighted. These two issues are discussed in the following.

There are very tangible traces of neoclassical economics in the legislator's work. On an

overarching level (not really discerned a lot in the discourse on the relevant market) it is obvious that the norm aimed at by the legislator is an 'atomistic' market imbued with perfect competition. This means that the sheer number of buyers and sellers are much more important than the manner in which they eventually connect to each other over time. It also seems important that market knowledge is as well spread-out as possible and that as much freedom to act prevails in each individual situation. Impediments thereto shall hence be fought against. In a different language one could say that the individual transaction is the nexus of attention whereas the relationship that the transaction gives rise to when repeated gets less appreciation. And not only this. These relationships are furthermore seen as less desirable since both horizontal and vertical connections constitute deviations in relation to the desired ideal state of an atomistic market characterized by freedom of action. This ideal state is also characterized by so-called static efficiency according to which a low price counts more than innovative thinking. In addition to the fact that the relevant section of law is taciturn as regards what is really meant by the market concept, and how this is seemingly mixed up with competition, there are a few distinct neoclassical remnants that stand out more than others. A salient concept is substitutability that is attended to/measured by means of different quantitative so-called elasticities (confer Perloff (2001, pp 46-59)). These can be of different kinds. Whereas price-elasticity of demand scrutinizes how much demand is impacted by a change in price, cross-price elasticity of demand pertains to how demand for a product is affected as the price of another product is altered. This is most obvious as the legislator discusses how the product market can be delimited (a high cross-price elasticity of demand means that two products are part of the same market). Supply elasticity is not as a salient concept but it is also an established concept from microeconomics. The drawing on 'supply and demand' and not on 'sellers and buyers' or 'suppliers and customers' is also a tangible sign of the roots. It is true that the legislator discusses specifically the consumer in a number of places but the impression is still that this very much represents demand via so-called preferences, more than as a genuine attention paid to customer needs (that more of a business-oriented discourse might had done). This clear-cut analytical perspective is also discerned as markets are discussed in relation to one another. The very point of departure, where the position is that markets can in fact be kept apart by means of identifying 'the relevant market' thus represents something else than a discourse pertaining to how markets are interconnected. 'Market share' and 'switching barrier' are expressions oftentimes used there. Another salient feature is the discussion of 'products and services', something demonstrating that pure physical issues play a decisive role. More of a customer needs-based view would most likely,

in the spirit of Chamberlin's (1969 (1933)) discussion of monopolistic competition, have treated composite offers.

With the ideas of positive economics in mind (as articulated by Friedman (1953)), according to which the construction of strong predictive models for pricing in different ideal-typical contexts are the main concern, this very theory faces a huge challenge when it comes to serving as an impetus for legislation. Economics did not emerge with legislative aspirations as its main purpose and should maybe not, accordingly, be judged in light thereof. That is to say, its pure instrumental power in an empirical setting is per definition severely restrained, in part because of its 'unrealism' as discerned in the assumptions that underlie the idea of perfect competition. It is of course possible to draw attention to its weak explanatory power in this regard (confer Hausman (1981)). But this is not the same as saying that it is 'weak' when put to a use where it is not really intended, at times by those who lack an adequate training in the area concerned. This is similar to stating that a mountain cabin is probably less apt to host big parties than are castles, something thus holding very much for neoclassical economics and the manner in which its ideas are drawn upon by the legislator. This is of course not to say that there are not economists who, from one time to the other, ascribes to this theory empirically applicable characteristics (a problem), but in that case it is most likely far from the original pretensions of neoclassical economics. The emptiness that is discussed here is hence 'institutional' in the sense that it cannot be otherwise given the context wherefrom it emerges. To pursue a very much elaborated and exhaustive discourse would most likely curtail its analytical strength and in part thus oppose some of the fundamental reasoning that is endemic to the neoclassical school. Still, despite all this the legislator uses neoclassical theory and its perfect competition paradigm as a point of departure for her efforts in designing and discussing the letter of the law. In consequence it is obvious that many of the problems that antitrust legislation has to cope with in its meeting with business logics is attributable to this *misfit* between the purpose of theoretical ideas and the practice of the practice.

When summarizing how translation appears as law design compared to how the market appears in the Competition Act the following is evident.

- The relative emptiness of neoclassical theory and its norm of perfect competition characterizes the static aspect of the translation. Some expressions that mirror the neoclassical framework are the emphasis of a few concepts such as 'elasticity' and 'supply/demand'.

- The dynamic aspect of the translation is characterized by, in addition to the general closeness to the EU-view, a distinct break with the past, relative consensus, and pragmatic implementation.

A few conclusive implications

The translation here accounted for, as market ideas are turned into design of antitrust legislation, is not unproblematic. This is so since several features thereof imply that the ‘Pasteurian’ barriers (in the language of Latour) to be overcome in the translation process are considerable. One facet of these barriers is made up by the scientific aim of neoclassical economics, prediction, that stands out in comparison to descriptive and/or normative accounts that are closer to market practice (confer von Wright (1971)). In essence this means that neoclassical economics is put to a use that it is not really intended for. The way in which the new Competition Act contrasts with traditional Swedish antitrust legislation, and its closeness to EU-law and practice, constitute other factors that heighten these barriers between idea and law. That is to say, the barriers had tentatively been lower had the revised legislation been closer to preceding law (as a case in point there would most likely have been a preceding official state report) and/or had there been some corresponding Swedish practice to comment upon and learn from. As it is now EU-practice hardly constitutes a very solid frame of reference to rely upon, in particular as such a frame is made necessary by the very character of antitrust legislation. Two illustrations of these barriers follow.

Consider first how the original government bill (*Proposition 1992/93:56* on new competition legislation, p 56) relies considerably on EU-practice by singling out its major role.

By means of coordination with the rules of the Rome Treaty lots of guidance for the application of the new Swedish antitrust legislation shall however be found in the practice of the EC-court, but also in the practice of other countries that adhere to the prohibition principle. That is why already at the moment of introducing [the new law] there will be available considerable legal practice with major impact also on the relevant Swedish legislation. Legal practice should in the future be able to rely on EC-practice.

Ponder also upon how this in fact turns out to be a problem, as spoken out by the official state report that looks into the experience made during the first few years of the Swedish Competition Act, something seemingly holding in particular for establishing the relevant market (SOU 1997:20, p 55, 115).

[T]he opinion which is foreshadowed in the comments obtained by us is that the lack of guiding court

rulings is troublesome.... As a plausible explanation to ... [why few cases pertaining to section 19 on abuse of dominant position have been opened] ... we are among other things told that it is difficult to establish what is the relevant market...

Then look into the consequences of this ambiguity as illustrated by the Market court case MD 2001:4 wherein Scandinavian Airlines System is accused of abuse of dominant position by the Swedish Competition Authority following its Frequent Flyer Program EuroBonus (confer Kjellberg and Liljenberg (2003)).¹⁸ Whereas the defendant SAS stays close to EU-practice in their arguments, the Swedish Competition Authority argues that this is largely irrelevant.

*There is no single legal EC-ruling where a divergent market identification has been made than the one furthered here. The EC-practice that prevails in the area is then not only comprehensive but also entirely unequivocal. That is why there is no opportunity for national authorities in the member states to deviate from the thus stated principles in a case like this where the antitrust legislation of the EC and national antitrust law are applicable in parallel.*¹⁹

*A case is decided upon by starting out in the conditions that are at hand in the individual case. To be able to judge the actual case regarding the delimitation of the relevant market there is in consequence only limited guidance to be had from the EC-court and the rulings made by the Commission in individual cases of concentration and exemption. A market delimitation made by the Commission concerning habits on a certain part of the European market does not really matter when a habit that impacts the Swedish market is pondered upon.*²⁰

In its ruling the Market court, thus seemingly going against the preparatory works accounted for above concludes, much as does the Swedish Competition Authority, that ...

*... [t]he rulings by the EC-court ... and the decisions made by the Commission that SAS refers to then cannot serve as a guidance in the case [as SAS 'occupies a unique position on the Swedish airline market as a whole']. ... That the relevant market is established in this way does not entail, in the opinion of the Market court, that the uniform application of EC-law is put in jeopardy or that it is in any other way opposes EC-legislation.*²¹

As this paper now comes to an end it is obvious that not much is furthered which is really new in essence. Its potential contribution lies in how the subject of translation is drawn upon in order to show how the market can be performed by the regulatory system that is labeled antitrust legislation. For a full appreciation of how this approach lays bare things that otherwise are not seen it is obviously necessary to put forward all three translations as envisaged here ('as law design'/'as application of law'/'as feedback') in parallel.

¹⁸Yes, this implies a 'type-two' translation as practical application of law not further commented upon here.

¹⁹MD 2001:4, pp 13-14

²⁰MD 2001:4, pp 24-25

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²¹MD 2001:4, pp 47, 48

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