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Sweden

MERGER CONTROL

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This country-specific Q&A provides an overview of merger control laws and regulations applicable in Sweden.

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SWEDEN

MERGER CONTROL



1. Overview

The provisions governing Swedish merger control are included in the Swedish Competition Act (2008:579) (the Competition Act). On substance, the Swedish merger control rules correspond in large to the European merger control regulation (EUMR), save for national rules regarding turnover thresholds.

The independent administrative authority in charge of merger control in Sweden is the Swedish Competition Authority (SCA).

2. Is notification compulsory or voluntary?

Notification is mandatory if the transaction leads to a change of control (e.g. by acquisition of sole or joint control) or a change in the quality of control (e.g. from joint to sole control), and the undertakings concerned meet applicable turnover thresholds.

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

Yes. There is a prohibition for taking steps to complete a concentration prior to clearance by the SCA, or, if no such decision is made, prior to the expiry of the SCA's review-period (see section 18 below), commonly referred to as the standstill obligation. The standstill obligation includes all actions which, whole or in part, actually or legally contribute to a change of control of the target undertaking in the concentration.

If it is necessary for the parties' compliance with the standstill obligation, the SCA may issue an injunction for the parties to respect the standstill obligation coupled with a penalty fine.

There is no formal possibility for carve-out or derogation in the Competition Act, however, the SCA has the power to grant an exemption to the standstill obligation if

special reasons exist.

In addition, in its "Guidelines for notification and assessment of concentrations between undertakings" the SCA has confirmed that where an acquisition of control occurs on a regulated market or an MTF platform so that it is not possible to notify the concentration before it is implemented, the standstill obligation shall cover all forms of utilisation of the rights deriving from the securities in question. Up on request and if needed to maintain the full value of the investment, the SCA can grant an exemption from the standstill obligation, allowing the purchaser to exercise the voting rights deriving from the securities in question, provided that this can take place without damaging competition.

4. What types of transaction are notifiable or reviewable and what is the test for control?

The Swedish merger control rules apply to transactions that lead to a change of control (or change in the quality of control) over a company on a lasting basis, as a result of;

- i. two or more independent undertakings being merged, or
- ii. one or more persons already controlling at least one other undertaking, or one or more companies which by purchasing securities or assets, by agreement or in another way acquires direct or indirect control over one or more undertakings or parts thereof.

Furthermore, the establishment of a joint venture that on a lasting basis fulfills the functions of an independent economic unit constitutes a concentration in accordance with the Competition Act.

The concept of "control" under the Competition Act is consistent with the definition set out in the EUMR and the SCA refers to the European Commissions Consolidated Jurisdictional Notice for guidance in the assessment of control. Control thus encompasses both

the power to determine the strategic commercial decisions of the target ("positive control") and the possibility to exercise a decisive influence of an undertaking and the power to veto strategic decision of the target ("negative control").

5. In which circumstances is an acquisition of a minority interest notifiable or reviewable?

An acquisition of a minority interest is subject to the merger control rules only if it involves a de facto acquisition of control, for example by veto rights, and provided that the thresholds are met. Acquisitions of non-controlling minority interests are not subject to merger control.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that apply to particular sectors?

A concentration is subject to mandatory notification in Sweden if:

- i. the undertakings concerned have a combined turnover in Sweden that exceeds SEK1 billion, and
- ii. each of at least two of the undertakings concerned has a turnover in Sweden that exceeds SEK200 million.

In case the first but not the second turnover threshold-test is fulfilled, the SCA may order the parties to notify the concentration if special reasons exist and the parties to the concentration also have the right to make a voluntary notification to the SCA.

Transactions between the same persons or undertakings that have taken place within a two-year period are treated as one and the same concentration for the purpose of calculation of turnover.

For the concept of undertakings concerned, the SCA refer to the EUMR and the European Commission's Consolidated Jurisdictional Notice for guidance.

There are no differencing thresholds that apply to specific sectors.

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

In accordance with the SCA's Guidance Paper on the

Notification and Assessment of Concentrations Between Undertakings, turnover is determined by allocating the total revenues from all lines of business for the preceding fiscal year of the undertakings concerned. The most recent settled annual accounts shall be used.

Only turnover generated in Sweden shall be included. VAT and other forms of turnover taxes as well as intra-group turnover shall be excluded.

The provisions regarding calculation of turnover are substantially the same as in the EUMR, and the SCA also refers to the European Commissions Consolidated Jurisdictional Notice for further guidance regarding the calculation of turnover.

8. Is there a particular exchange rate required to be used to convert turnover and asset values?

The European Central Bank exchange rate should be used for the calculation of turnover thresholds included in section 6.

9. In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?

If the thresholds set out in section 6 are met, the merger control rules apply to both the establishment of a new joint venture and the acquisition of joint control over an existing undertaking, provided that the joint venture perform, on a lasting basis, all the functions of an autonomous economic entity and thereby constitutes a full-function joint venture. For the concept of undertakings concerned in relation to a joint venture, each of the jointly-controlling parent companies is viewed individually as the "undertaking concerned". If joint control is acquired over an existing company, then the joint venture itself is viewed as an "undertaking concerned" together with the parents.

10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?

If one transaction includes several steps where each step means a change of control on a lasting basis, and the jurisdictional thresholds are fulfilled, all stages of the same overall transaction may be separately notifiable or reviewable. With regard to the calculation of the

turnover thresholds, where two or more transactions take place within two years between the same undertakings, these transactions are to be regarded as a single concentration.

11. How do the thresholds apply to “foreign-to-foreign” mergers and transactions involving a target /joint venture with no nexus to the jurisdiction?

The jurisdictional thresholds in section 6 apply to foreign-to-foreign mergers.

12. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

N/A

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?

A concentration shall be prohibited if its completion significantly would impede the occurrence or the development of effective competition in Sweden as a whole, or a significant part of Sweden (i.e. the SIEC-test). Factors that are taken into account include market power and economic strength, potential competition, countervailing buyer power, and potential barriers of market entry and possible counterweighing efficiencies. The circumstance that a dominant position is created or strengthened shall be especially considered in the assessment. The substantive test is thus substantially the same as in the EUMR.

14. Are factors unrelated to competition relevant?

Yes, there is a national exemption stating that the SCA may only issue a prohibition decision if the decision does not involve the setting aside of national interests of security or resources. Such an interest must nevertheless be of such a degree of urgency that it clearly exceeds the negative effects on competition concluded by the substantive assessment.

It should be noted that this exemption has not yet been subject to review by the Swedish courts and thus its

closer interpretation in relation to the substantive test is undecided.

15. Are ancillary restraints covered by the authority’s clearance decision?

The SCA’s decision to clear a certain concentration includes restrictions directly related and necessary to the concentration.

16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

There is no statutory deadline. However, notifications of concentrations must be made to the SCA before the concentration is implemented, i.e. before the acquiring undertaking starts to exercise control over the target undertaking.

17. What is the earliest time or stage in the transaction at which a notification can be made?

Notifications of concentrations may be made to SCA as soon as a party to the concentration can demonstrate the intention of implementing a concentration.

Notifications can thus be made as early as when there is a letter of intent. However, the details regarding the intended concentration must be concrete enough so that it can be used as a basis for review by the SCA. Pre-notification contact with the SCA is advantageous.

18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

Yes, the SCA encourages pre-notification discussions. It is not possible to indicate how long such discussions typically take as this is dependent on the specific circumstances of each individual case. Pre-notification contacts generally include one or more meetings in person or by telephone with representatives from the SCA.

19. What is the basic timetable for the authority’s review?

When a notification is complete, the SCA shall within 25 working days review the concentration and decide whether the concentration should be cleared or whether

a special investigation of the concentration shall be initiated (commonly referred to as “Phase I”). The SCA has the ambition to complete non-complex cases within 15 working days. If the SCA has received an offer regarding commitments from the parties to the concentration, the Phase I review can be extended with 10 extra working days.

If the SCA decides to initiate a special investigation (commonly referred to as “Phase II” review), the SCA has another three months to investigate the concentration and decide whether the concentration shall be prohibited or cleared. The Phase II review can be extended if the parties consent thereto or if there are special reasons for such an extension. If the SCA has not rendered a decision until the expiry of the Phase II review period, the concentration is considered to have been cleared.

20. Under what circumstances may the basic timetable be extended, reset or frozen?

In accordance with the above, the timetable may be extended with 10 working days during Phase I if the SCA has received an offer regarding commitments from the parties. During Phase II review, the SCA may extend the timeline with 1 month at a time if the parties consent thereto or if there are special reasons for such an extension.

During Phase I and II the SCA has the authority to freeze the timetable for the investigation, i.e. “stop the clock”, if the parties for example fail to provide requested information of essence to the SCA’s review. The SCA may also “stop the clock” during Phase I upon request by the parties.

There are no possibilities for the SCA to reset the timetable.

21. Are there any circumstances in which the review timetable can be shortened?

No. It is not possible to shorten the timetable. However, informally, a well prepared and reasoned notification may shorten the SCA’s review, depending on the SCA’s current workload and other circumstances. The SCA notes in its Guidance Paper on the Notification and Assessment of Concentrations Between Undertakings that a notification which predicts potential concerns by customers and competitors, and addresses such concerns directly in the notification, provides for an “efficient” review. In addition, pre notification contacts with the SCA often result in practical advantages and may allow discussion on timing with the SCA.

22. Which party is responsible for submitting the filing?

The party acquiring control over a target undertaking or a part thereof shall submit the filing. In case the concentration means that two or more undertakings are merged, the concentration shall be submitted by one of the two undertakings.

In cases of joint control and the creation of new joint ventures, the concentration shall be submitted by one of the parties who are acquiring control over the joint venture.

23. What information is required in the filing form?

The filing form requires basic information about the parties to the concentration, details regarding the structure of the concentration, the parties’ ownership and control, economic and personal ties, market definition, affected markets, and reasoning regarding the potential efficiency gains of the concentration.

24. Which supporting documents, if any, must be filed with the authority?

The parties’ annual accounts, the purchase agreement or share purchase agreement (including potential shareholders’ agreement), and potential market research reports or similar shall be attached to the notification. Furthermore, a non-confidential version of the notification shall be submitted (please see section 28).

25. Is there a filing fee?

No, there is no filing fee.

26. Is there a public announcement that a notification has been filed?

Yes. The SCA publishes a summary of the notification on its website when a notification is made.

27. Does the authority seek or invite the views of third parties?

Yes, the parties to the concentration are obliged to include contact details for customers and competitors on each market that is affected by the concentration which the SCA may contact during its review.

Furthermore, publication of the summary on the SCA's website aims to give customers and competitors a chance to comment on the concentration. Anyone can thus submit comments and views regarding the concentration to the SCA.

28. What information may be published by the authority or made available to third parties?

The SCA publishes a summary of the notification on its website. Additionally, the notification is made available for anyone who requests it from the SCA. The notification will upon such a request be redacted to exclude any confidential information, for example trade secrets and other sensitive information. Thus, a non-confidential version of the notification shall be submitted to the SCA together with the notification.

29. Does the authority cooperate with antitrust authorities in other jurisdictions?

Yes, for example, the SCA is a member of the EU Merger Working Group which allows the SCA to cooperate with other European competition law authorities in merger filing matters.

Furthermore, the SCA is also part of the European Competition Network (ECN) for cooperation and information exchange between the competition authorities of EU member states and the European Commission. Furthermore, the Nordic competition authorities, including the SCA, cooperate through a Nordic cooperation agreement.

30. What kind of remedies are acceptable to the authority?

The SCA accepts both structural and behavioural remedies. Compliance with remedies may be enforced under penalty of a fine.

31. What procedure applies in the event that remedies are required in order to secure clearance?

Remedies may be proposed at any stage during Phase I or Phase II.

If the SCA accepts an offer by the parties regarding remedies, the SCA will issue a clearance-decision including the accepted remedies, and couple the relevant remedies with a penalty clause.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

There is no penalty for failure to notify. If an unnotified concentration would come to the SCA's attention, the SCA may however order the parties to notify the concentration coupled with a penalty clause. In such a case, the SCA also has the right to bring an action before the Patent and Market Court to divest the concentration.

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?

The Competition Act does not prescribe any penalties for companies providing incomplete or misleading information in a notification or response to questions from the authority. However, when notifying a concentration to the SCA, the parties must formally declare that the information provided in the notification is correct, complete and true.

It shall be noted that the SCA's review period will only start upon receipt of a complete notification. Furthermore, if the SCA requests additional information from the parties, the clock can be stopped by the SCA until the notifying party provides the required information. The SCA may also couple the request for information with a penalty clause.

34. Can the authority's decision be appealed to a court?

Yes. A decision to prohibit or clear a concentration by the SCA may be appealed to the Patent and Market Court, and further to the Patent and Market Court of Appeal provided that leave to appeal is granted.

In very special cases and provided that leave to appeal is granted, judgments and decisions by the Patent and Market Court of Appeal can be further appealed to the Supreme Court. Leave to appeal to the Supreme Court is granted only in cases which are considered important for setting a precedent. The Patent and Market Court of Appeal is therefore the final instance for most cases in practice.

A decision by the SCA to prohibit or clear a concentration may be appealed by anyone who is affected by the decision. This means that no third parties who are not involved in the transaction can appeal the SCA's decision. The same rule applies to further appeals to the

Patent and Market Court of Appeal as well as to the Supreme Court.

35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment

The number of merger notifications made to the SCA has remained high during the last couple of years, with a record breaking year 2021. However, most notifications has been cleared in Phase I and in cases with no vertical links or horizontal overlaps, the SCA often clears a transaction well ahead of its Phase I deadline.

It can be noted that the SCA recently showed that it is willing to accept behavioural remedies. In February 2023

the SCA approved, with behavioural commitments, the Swedish publisher Bonnier's acquisition of the all-you-can-read magazine platform Readly. The behavioural commitments shall guarantee a continued competitively neutral treatment of publishers on Readly's platform, and specifically that the publishers get the same access to data regarding reading activities related to their own titles as today and that Bonnier does not utilise other publishers' data in an improper manner. The commitment was coupled with a conditional fine.

36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

There are no planned reforms of the Competition Act in regards to merger control provisions.

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