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Getting the Deal Through Merger Control 2006 – Sweden

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1 What is the relevant legislation and who enforces it?

Swedish merger control is regulated by the Swedish Competition Act (the Act), enacted in July 1993, the rules of which are modelled on EC competition law. Konkurrensverket, the Competition Authority, has primary responsibility for the administration of the Act, whilst the assessment of the anti-competitiveness of a merger, as well as orders for divestiture and other sanctions, may be made only by the Stockholm District Court (Stockholms Tingsrätt) or on appeal by the Market Court (Marknadsdomstolen).

2 What kinds of mergers are caught?

The Act's merger control rules are based on the concept of 'concentration'. This concept is defined in a general way so as to allow a dynamic interpretation in line with EC law, including existing as well as future case law of the EC Court of Justice. More precisely, the Act prescribes that a concentration within the meaning of the Act arises in the following situations:

- Two or more previously independent undertakings merge
- One or more persons (already controlling at least one undertaking) or one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control over the whole or parts of one or more undertakings

The creation of a joint venture performing, on a lasting basis, all functions of an autonomous economic entity constitutes a concentration within the meaning of the Act.

The Competition Authority has published guidelines on the concept of concentration. These guidelines correspond with the European Commission's Notice on the concept of concentration under the EC Merger Regulation.

3 Are joint ventures caught?

The Act is applicable to all full-function joint ventures, ie all joint ventures constituting a concentration within the meaning of the Act. To the extent the creation of a full-function joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of the provisions on anti-competitive cooperation between undertakings.

The Act does not include an explicit provision to the effect that a concentration should be blocked where such coordination cannot be accepted under the rules on anti-competitive cooperation between undertakings. Nevertheless, the preparatory works indicate that the Act allows the blocking of a concentration under such circumstances.

The Competition Authority has published guidelines on full-function joint ventures. These guidelines correspond with the European Commission's Notice on the same subject.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The Act's definition of a concentration, as well as the Competition Authority's guidelines on the concept of concentration, follow the relevant rules of the EC Merger Regulation.

In short, acquisitions of minority interests are only caught by the merger rules if they include a de facto acquisition of control.

5 What are the jurisdictional thresholds?

The Act's merger control rules provide for mandatory notification where the undertakings concerned by the concentration attain a combined global turnover of more than SEK4 billion (approximately US$535 million), and each of at least two of the undertakings concerned has a turnover in Sweden exceeding SEK100 million (approximately US$13.4 million).

The Competition Authority has published guidelines on calculation of turnover, as well as on the concept of undertakings concerned. These guidelines correspond with the European Commission's Notices on the same subjects; for example, turnover attributable to sales to customers in Sweden will be the deciding factor when establishing whether the second threshold is met.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Provided the merger falls within the scope of the Act, filing is mandatory. There are no exceptions to this rule.

Even if the second threshold (ie at least two of the undertakings concerned have a turnover in Sweden exceeding SEK100 million) is not met, the Competition Authority may order, if there exist particular reasons therefor, that the concentration be notified. Correspondingly, the parties may notify such a merger voluntarily. This may be advisable if the merger leads to high market shares in the Swedish market or a substantial part thereof.

7 Are foreign-to-foreign mergers caught?

Foreign-to-foreign mergers are, in the view of the Competition Authority, caught by the Act when the turnover thresholds are met. In practice, this means for instance that the creation of a full-function joint venture with no, or limited, foreseen activities in

Sweden can still be caught by the Act's merger rules if the parent companies meet the thresholds.

8 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no pecuniary sanctions for not notifying a merger to the Competition Authority. However, should the Competition Authority become aware of an un-notified merger, it may order the parties to notify, subject to a fine. The Competition Authority has only ordered notification in a handful of cases so far.

Should the Competition Authority find that a completed merger was not permitted under the Act, it also retains the right to bring an action before the Stockholm District Court for the divestiture of the acquired entity. Failure to notify brings with it the risk of the merger being annulled ex post facto. In practice, although varying from transaction to transaction, this has so far proved a minor risk.

There are no time limits for filing under the Act. Nonetheless, there are practical advantages in early contact with the Competition Authority, as it may then commence an informal investigation prior to formal notification. Otherwise, filing may be undertaken at the time of signing the transaction agreement. An unsigned copy of the agreement or a letter of intent is currently (although the Competition Authority's policy seems to vary over time) insufficient as a basis for notification.

9 Who is responsible for filing and are filing fees required?

A merger should be notified by the merging parties or the party or parties acquiring control.

There are no filing fees (but the introduction of such fees is under investigation; see 33 below).

10 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

From the date of receipt of a complete notification, the Competition Authority has 25 working days in which to take a decision either that there are no grounds for action or that it will initiate a special investigation of the merger. The Competition Authority has 10 working days from submission of a complete notification to inform the parties whether the notification is complete.

Before the 25-day deadline for preliminary examination, no party to the concentration may take any steps to complete the merger. However, the Competition Authority may decide to waive this standstill requirement. The Competition Authority also has the power to order the parties to respect the standstill requirement, subject to a fine.

After a decision to carry out a special investigation, the Competition Authority has an additional three months in which to lodge an application with the Stockholm District Court for a prohibition of the merger. The three-month period may be extended by the Stockholm District Court providing the notifying parties agree to it or there are compelling reasons for doing so.

11 What are the issues and possible sanctions involved in closing before clearance?

Despite the fact that there are no pecuniary sanctions involved when closing takes place prior to clearance (unless the Competition Authority has ordered the parties to respect the standstill requirement subject to a fine), this nonetheless entails an obvious risk, ie that the Competition Authority and the courts will not clear the merger. In such cases divestiture of the company or purchased assets will have to take place. As mentioned above, this has so far proved a minor risk in practice.

12 Are there any special merger control rules applicable to public takeover bids?

The Act does not include any special rules applicable to public takeover bids. However, it provides that a prohibition of a merger will have no effect on the validity of acquisitions made on a Swedish or foreign stock exchange, on another authorised marketplace or at a public auction. In such cases, the buyer may instead be required to divest what has been acquired.

The Act does not contain any explicit rule similar to the one in the EC Merger Regulation to the effect that the standstill rule does not prevent formal implementation of a public bid in the sense that the acquirer may formally take over the shares as long as he does not vote for them. However, the Competition Authority takes the view that the same principle applies under Swedish competition law.

13 What is involved in and how detailed is the preparation of a filing?

Filing under the Act requires the use of a specific form, known as Form K2. The form must be filled out in Swedish, and at present no official English translation is available. The form sets out a number of questions on the parties, competitors, market conditions etc, similar to Form CO requirements for notifications under the EC Merger Regulation.

The information required by Form K2 is normally quite burdensome to obtain. It is, however, sometimes possible to secure, on an informal basis, waivers from the Competition Authority as regards certain information which the Authority deems unnecessary in the specific case. The time outlay necessary for the preparation of the form varies widely from case to case, depending mainly on whether the transaction involves any so-called affected markets, as does the size of the notification.

Discussions on waivers from the Competition Authority as regards the information required may be held during pre-notification meetings with the Authority.

14 What is the timetable for clearance and can it be speeded up?

Upon receipt of a complete notification, the Competition Authority has 25 working days in which to conduct a preliminary investigation (phase I). If there has been no decision to initiate an in-depth (second-stage) investigation at that time, the merger shall be deemed to have been cleared. Should an in-depth investigation be initiated (phase II), the Competition Authority shall, within three months, either clear the merger or file an application with the Stockholm District Court (the District Court) requesting that the merger be prohibited. If no action has been brought within that time period, the merger is deemed to have been cleared. The Court may extend the three-month period with the parties' consent, or if there are otherwise compelling reasons.

Should the Competition Authority make an application to the District Court, the District Court must come to a decision within six months. Again, this time period is subject to prolongation with the parties' consent or if there are otherwise compelling reasons.

An appeal against the District Court decision lies with the Market Court which must pass final judgment within three

months from the last day of appeal.

No measures may be taken in respect of a merger, notified or not, when more than two years have passed since the concentration occurred.

15 What are the typical steps and different phases of the investigation?

The timetables applicable to first stage and in-depth investigations (phase I and II respectively) have been described under 14. There are no set timetables for hearings, requests for information or other measures during the investigation. The Competition Authority may from time to time in the course of the investigation, as it deems appropriate, put questions to the parties and request additional information.

When the notification has been filed, the Competition Authority will normally contact competitors and other third parties listed on the notification form and invite comments on the proposed merger. Depending on the situation, comments from third parties may carry more or less weight. There is no formal distinction between different classes of third parties. No companies other than those concerned in the acquisition are treated as parties to the procedure.

16 What is the substantive test for clearance?

Under the Act, a merger shall be prohibited if it creates or strengthens a dominant position on the market, which would significantly impede, or be liable to impede, the existence or development of effective competition on the Swedish market as a whole or in a substantial part thereof. However, a merger may be prohibited only if such a prohibition does not involve "the setting aside of essential national interests of security or resources".

The dominance test resembles that employed under the 'old' EC Merger Regulation. Thus, a number of factors will be taken into account in assessing dominance, such as market shares, barriers to entry and buying power.

The rule that a merger cannot be prohibited if that would jeopardise essential national interests of security or resources, is unlikely to apply other than in very special circumstances.

17 Can a merger be challenged on oligopoly grounds (including coordinated effects)?

In accordance with the practice of the European Court of Justice, it would seem highly unlikely that a merger could be challenged under the Act on the basis of arguments showing only parallel courses of conduct typical for oligopolies. In other words, the Act's dominance test cannot be used as a tool for controlling oligopolistic behaviour. However, the Competition Authority's practice suggests that a merger could be challenged if it would create or strengthen a collectively dominant position. In other words, a merger can be challenged under the Act based on arguments relating to collective dominance, even if the Act's merger rules' dominance test (unlike the Act's provision on the abuse of a dominant position) does not refer specifically to a dominant position enjoyed 'by one or more undertakings'.

The Competition Authority has confirmed that EC case law regarding collective dominance constitutes the basis for the authority when deciding on similar questions. Reference is also made to the case law of the European institutions regarding collective dominance in the preparatory works to the Act.

In a case concerning the acquisition by the Swedish construction company Skanska AB of Gatu och Väg AB (one of Skanska's four competitors), the Competition Authority found that the merger created or strengthened a collective dominant position for Skanska and Skanska's main competitor NCC (combined market share 85, 90 and 98 per cent on the affected markets). However, following undertakings given by Skanska, the Competition Authority decided not to take any action against the merger.

18 Is there a special substantive test for joint ventures?

In addition to the dominance test, the Act provides that, to the extent the creation of a full-function joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of the provisions on anti-competitive cooperation between undertakings. As pointed out above, the Act does not include an explicit provision to the effect that a concentration should be blocked where such coordination cannot be accepted under the rules on anti-competitive cooperation between undertakings. Nevertheless, the preparatory works indicate that the Act allows the blocking of a concentration under such circumstances.

19 Apart from high market shares, what concerns may the authorities have (eg vertical foreclosure, portfolio effects, elimination of close substitutes)?

As mentioned above, the dominance test resembles that employed under the 'old' EC Merger Regulation. Thus, the Competition Authority has similar concerns as the European Commission, such as portfolio power, 'spill-over' effects (eg the possibility of using a dominant position in one market in order to create a dominant position in another market), vertical foreclosure and elimination of potential competition.

20 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

As mentioned above, elements outside the competition law field may be taken into account by reference to the criterion that the prohibition of a merger cannot take place, even should it create or strengthen a dominant position, if that would jeopardise important national interests of security or resources. The courts have not yet had the opportunity to interpret this criterion. However, obviously the situations where these exclusions can be invoked are rare.

21 To what extent does the authority take into account economic efficiencies in the review process?

The Act does not explicitly mention economic efficiencies. In practice, economic efficiencies are normally not taken into account by the Competition Authority.

22 Is it possible to remedy competition issues, for example by giving divestment undertakings?

As an alternative to a prohibition, an order for the disposal of an undertaking or a business activity in whole or in part or an order to take some other measure having a favourable effect on competition may be made by the District Court.

Negotiated solutions to problematic issues may be proposed at any stage during the procedure. The companies concerned normally present such solutions in the form of an undertaking to the Competition Authority. Structural, as well as behavioural, under-

takings are accepted by the Competition Authority. However, the Competition Authority normally favours divestments, as opposed to behavioural undertakings. Compliance with such undertakings may be enforced through a fine set by the Stockholm District Court on application from the Competition Authority, to be imposed in the event of breach of the undertaking.

23 What are the basic conditions applicable to a divestment or other remedy?

As mentioned, negotiated solutions may be proposed by the parties or the Competition Authority at any stage during the procedure. The basic conditions applicable to a divestment or any other remedy are in short that they are sufficient in order to eliminate the adverse effects of the concentration. Proposals to divest, or any other remedy, are normally presented by the parties concerned at the end of the in-depth investigation, when the parties have received the Competition Authority's 'working material' (similar to the European Commission's statement of objections).

Under the Act, a divestment order or an order to take another measure in order to remedy the competition concerns raised by a concentration must not exceed what is required in order to eliminate the adverse effects of the restriction of competition.

24 What solutions (such as a local 'hold separate' arrangement) might be acceptable to remedy local issues in a foreign-to-foreign merger?

The Competition Authority has on occasion obliged the parties to divest assets located outside of Sweden to remedy competition issues on the Swedish market.

25 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A decision by the Competition Authority not to take any action with regard to a concentration also covers restrictions directly related and necessary to the implementation of the notified concentration. There are no specific guidelines published by the Competition Authority, but the preparatory works indicate that the European Commission's notice on ancillary restraints shall give guidance in matters concerning ancillary restraints under the Act.

Form K2 allows the parties to explicitly submit the restrictions they deem ancillary to the concentration. Up to now, the Competition Authority has usually given its opinion on such submitted ancillary restraints. See further below under 33.

26 Are customers and competitors involved and what rights do complainants have?

Customers and competitors will be invited to comment on the proposed merger, see above. No companies other than those concerned by the merger are treated as parties to the procedure.

27 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Competition Authority does not publish any notices following receipt of a notification and the initiation of a procedure, but only publishes the final decision in the case (and once a notification has been filed, the notification is mentioned briefly in the Authority's case list, which is publicly available inter alia on the Authority's website). As for confidentiality, whereas the general rule in Sweden is that all documents held by a public authority are in the public domain, rules on confidentiality and business secrets are contained in the Secrecy Act. The Secrecy Act provides that information shall be secret insofar as it relates to a party's business, innovations or R&D, insofar as disclosure would cause the party to suffer injury. There must, however, be particularly strong reasons for refusing full access to the file to a party to the proceedings.

Information provided by the parties during pre-notification contacts is covered by absolute secrecy, ie without the requirement that disclosure would cause injury.

In situations where the granting of confidentiality has been an issue, the Competition Authority has adopted a generally cooperative attitude in relation to the party requesting confidentiality.

28 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition Authority itself has rather limited powers as far as enforcement is concerned. Should it consider that a merger ought to be prohibited, it will have to file an application to this effect with the District Court, which will decide the issue. The court may order that the merger should not go ahead or, if it is considered sufficient, impose other measures such as an order to divest or to take other pro-competitive action. As mentioned above, any undertaking given by the parties may be linked to a fine. Acquisitions made on a stock exchange or any other recognised market or at an auction may not be prohibited; instead the disposal of the assets acquired may be ordered.

29 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

To date, the Competition Authority has sought the prohibition of a total of five mergers, three of which occurred under the former merger rules, applicable prior to April 2000. One of the earlier cases was settled out of court, and the two others were both finally cleared by the courts. The two cases where the Competition Authority has taken action in order to block a merger since the entry into force of the substantial amendments of the Act's merger control rules in April 2000 (bringing the Swedish rules in line with the EC Merger Regulation) concerned (i) the proposed merger of the two existing Swedish giro services, the Postal Giro and the Bank Giro, and (ii) SF Bio's contemplated acquisition of its main rival in the Swedish cinema market, Sandrews Metronome Sverige. In both cases, the transaction was abandoned by the parties following the Competition Authority's action.

As noted above (see question 7), foreign-to-foreign mergers are caught by the Act when the turnover thresholds are met. The Act provides that a merger shall be prohibited if it creates or strengthens a dominant position on the market, which would significantly impede, or be liable to impede, the existence or development of effective competition on the Swedish market as a whole or in a substantial part thereof. Consequently, the decisive factor for analysing a merger (foreign-to-foreign or not) is its effect on the Swedish market. Nevertheless, it can be noted that none of the five cases mentioned above concerned a foreign-to-foreign transaction.

30 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Competition Authority may, where appropriate, contact formally or informally the European Commission or any national

competition authority. In 2003 Sweden signed an agreement with Denmark, Norway and Iceland on cooperation on competition issues. As a result of the agreement, information exchange between the national competition authorities concerned is facilitated, inter alia in the area of merger control.

Under the revised Community merger control rules, the Competition Authority cooperates with the European Commission and other member states' competition authorities within the network of competition authorities.

31 What are the opportunities for appeal or judicial review?

As noted above, the procedure moves into a judicial stage as soon as the Competition Authority wishes to block a merger. The decisions and orders of the Stockholm District Court may be appealed to the Market Court. There is also a possibility, subsequent to a decision by any of the above courts, of reviewing the decision. If the review is based on the decision having been taken on the basis of incorrect facts, the review must be requested within one year of the date of the decision.

32 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act contains no special merger rules relating to particular areas of the economy. However, such rules are sometimes contained in sector-specific legislation.

33 Are there current proposals to change the legislation?

In September 2004, a governmental committee was appointed to evaluate the potential need for amendments to the Act. The committee shall, inter alia, consider the introduction of filing fees and whether the Swedish merger control rules should undergo changes along the lines of the new EC Merger Regulation (eg a new substantive test, importance of efficiency defence, possibility to file earlier than date of binding agreement, the Competition Authority's obligation to assess ancillary restraints etc). The committee is expected to deliver its report in early 2006.

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