
THE MERGERS & ACQUISITIONS REVIEW

EIGHTH EDITION

EDITOR
MARK ZERDIN

LAW BUSINESS RESEARCH

THE MERGERS & ACQUISITIONS REVIEW

The Mergers & Acquisitions Review

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This article was first published in The Mergers & Acquisitions Review - Edition 8
(published in August 2014 – editor Mark Zerdin).

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THE MERGERS & ACQUISITIONS REVIEW

Eighth Edition

Editor
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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www.TheLawReviews.co.uk

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ISBN 978-1-909830-16-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AABØ-EVENSEN & CO ADVOKATFIRMA

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NISHIMURA & ASAHI

OSLER, HOSKIN & HARCOURT LLP

PÉREZ BUSTAMANTE & PONCE

PINHEIRO NETO ADVOGADOS

Acknowledgements

POPOVICI NIȚU & ASOCIAȚII
RAIDLA LEJINS & NORCOUS
ROJS, PELJHAN, PRELESNIK & PARTNERS
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EDITOR'S PREFACE

There is cause for optimism and caution in light of the past year's events.

First, we can be tentatively optimistic about Europe. The possibility of a euro breakup appears to have faded, and European equities markets performed, on the whole, exceptionally well in 2013. Indeed, the euro/dollar basis swap has moved sufficiently to open up euro capital markets to borrowers wishing to swap proceeds to dollars; the World Bank sold its first euro benchmark bond for more than four years in November 2013, and non-European companies like Sinopec and Korea Natural Gas have issued large euro bonds in recent months. If the European economy continues to grow (and analysts are expecting growth to quicken), it is hoped that the prospect of crisis will continue to fade.

Second, though 2013 was a comparatively languid year for global M&A, the buoyancy of the credit and equity markets cannot be ignored. In terms of financing, the seeming willingness of banks to allow for looser borrower constraints, to underwrite jumbo facilities in small syndicates, and to offer flexible and fast bridge-financing for high-value acquisitions, presents a financing climate that should be particularly amenable to corporate M&A. It is also notable that continued political and economic instability did not impede the completion of some standout deals in 2013, including the *Glencore/Xstrata* tie-up and Vodafone's disposal of its shareholding in Verizon Wireless. These deals show that market participants are able, for the right deal, to pull out all the stops. After a period of introspection and careful balance sheet management, corporates may be increasingly tempted to put cash to work through M&A.

There remains, however, cause for prudence. There is considerable uncertainty as to how markets will process the tapering of quantitative easing (QE) by the US Federal Reserve. The merest half-mention by Ben Bernanke, in May 2013, of a possible end to QE was enough to shake the markets, and to nearly double the 10-year US Treasury yield in a matter of months. Emerging markets are particularly sensitive to these shocks. The oncoming end of QE may already have been priced into the markets, but there is a possibility that its occurrence will cause further, severe market disruption. In addition, there are concerns around how the funding gap left by huge bank deleveraging will be

filled, and centrifugal pressures continue to trouble European legislators. Finally, there are broader concerns as to the depth of the global economic recovery as growth in the BRIC economies seems to slow. Optimism should, therefore, be tempered with caution.

I would like to thank the contributors for their support in producing the eighth edition of *The Mergers & Acquisitions Review*. I hope that the commentary in the following chapters will provide a richer understanding of the shape of the global markets, together with the challenges and opportunities facing market participants.

Mark Zerdin

Slaughter and May

London

August 2014

Chapter 62

SWEDEN

Biörn Riese, Eva Hägg and Anna Brannemark¹

I OVERVIEW OF M&A ACTIVITY

The activity on the Swedish M&A market is picking up and it looks more promising than during the last couple of years. In particular, the IPO market has opened up, and by 9 June 2014, seven companies had been admitted for trading on NASDAQ OMX Stockholm (four IPOs and three companies previously listed on multilateral trading facilities). Also, several companies have started trading on First North and several more are in the pipeline. As elsewhere in Europe, the past few years have been affected by first the financial turbulence in 2008 and 2009 and then the sovereign debt crises and the global macroeconomic uncertainties. Confidence now seems to be rising but market players are still very alert to any new disturbing events. Following several years of low activity, there are many actors, both corporate and private equity firms, that are keen on carrying out transactions both as sellers and buyers. The current market conditions have led to more tailored sales processes with one selected bidder rather than auctions. Furthermore, it typically takes longer to complete a transaction since bidders are spending more time on the valuation and analysis of the business and any issues arising in the deal context.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

Public offers for shares in companies listed on a Swedish regulated market are, as a general rule, governed by the Takeover Act, implementing Directive 2004/25/EC. The Takeover Act is supplemented by, among other things, takeover rules issued by the relevant exchange, the statements and rulings by the Securities Council, the prospectus requirements in the

¹ Biörn Riese and Eva Hägg are partners and Anna Brannemark is a senior associate at Mannheimer Swartling Advokatbyrå.

Financial Instruments Trading Act, and general rules in the Companies Act. Since 1 July 2012, public offers for shares in Swedish companies traded on the Swedish multilateral trading facilities NASDAQ OMX First North, Nordic MTF or AktieTorget are governed by takeover rules issued by the Swedish Corporate Governance Board.

In general, the legislative environment for a private M&A deal has a practical approach and is not unnecessarily burdensome with respect to formalities. Moreover, foreign acquirers will feel quite at home in the Swedish M&A process, which to a great extent has been inspired by Anglo-Saxon practices. Deals are typically structured as acquisitions rather than mergers (although post-completion restructurings including mergers often take place). The formal requirements in relation to the transfer of shares are limited to an agreement between the parties (which may be, but almost never is, oral) followed by the payment of the purchase price against the delivery of the shares. In relation to CSD companies, a share transfer is effected through a registration on the relevant securities accounts and in relation to non-CSD companies, through the endorsement and delivery of the share certificates, or, when no share certificates have been issued, a notice to the board of directors regarding the share transfer. It can be noted that the articles of association of a private limited liability company often includes transfer restrictions that will need to be waived by the sellers in relation to the transaction.

For private M&A, Sweden offers a relatively free and unregulated market, with the framework set by general rules in the Companies Act, Contracts Act and the Sale of Goods Act. While the Companies Act governs both the internal affairs and external relations of a Swedish limited company, the Sale of Goods Act sets out the principles applicable to the sale and purchase of corporate entities. The application of the Sale of Goods Act, however, is normally negated by agreement, since the parties to M&A deals typically prefer to negotiate their own framework for the deal. The Contracts Act contains rules on the formalities of a contract, including rules on when a contract should be considered void or adjusted due to unfairness.

The merger control rules are found in the Competition Act, which has been in force since 1 November 2008.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

The Swedish Corporate Governance Board has published a proposal for revised takeover rules introducing rules on mergers and similar corporate actions. It is expected that the revised rules will be adopted by the two stock exchanges; NASDAQ OMX Stockholm AB and Nordic Growth Market NGM AB, and enter into force on 1 July 2014. Under the proposal, the shareholders' meeting of a listed company to be taken over through a merger or a merger-like process is to approve the merger by no less than a two-thirds majority, exclusive of the purchasing company's votes (this already applies to Swedish targets, which implies that the new rules would only be relevant where the target is a foreign company). Further, most of the provisions in the takeover rules are proposed to be applicable to merger processes in the same way as for takeover bids (e.g., provisions concerning equal treatment). At the same time as the new stock exchange takeover rules come into force, the Swedish Corporate Governance Board will issue an equivalent

updated version of the takeover rules for the Swedish multilateral trading facilities NASDAQ OMX First North, Nordic MTF and AktieTarget.

From 6 October 2014 the standard settlement cycle for the Swedish capital markets will be shortened from T+3 (trade date plus three business days) to T+2 (trade date plus two business days). The standard settlement period is being shortened in accordance with the Central Securities Depository Regulation (CSDR) which is expected to be published shortly and which, *inter alia*, aims to harmonise EU securities settlement cycles. The Swedish market participants have decided that T+2 will be implemented on the Swedish market on 6 October 2014, independently of the adoption of CSDR.

The Capital Requirements Directive (CRD IV) is proposed to be implemented in Sweden in August 2014. The proposal contains, *inter alia*, rules restricting the number of directorships that may be held by an individual at the same time. Even though these restrictions only apply to financial institutions that are significant in terms of size, internal organisation and the nature, scope and complexity of the activities, they have already had an impact on the composition of the board of directors also in Swedish non-financial companies. The implementation of the CRD IV package will also introduce administrative sanctions for individual directors. These upcoming rules are, however, under further consideration and the Swedish government has not yet presented its proposal.

In 2009, a government official report proposed a number of changes to Swedish corporate law with the aim of further decreasing the administrative burden and costs for private limited liability companies. The Swedish parliament has now adopted certain amendments based on a proposal from the Swedish government. The changes and amendments will enter into force as from 1 August 2014 and include that it shall be possible to subscribe for shares through payment, simplified rules in relation to minutes for wholly owned companies and the removal of the requirement for the board to adopt the work programme. However, it can be noted that a number of the proposals from 2009 will not be implemented. Hence, Sweden will continue with a paper-based share register, with the share register itself being kept by the company and any share certificates issued being bearer of rights. Also, it can be noted that the requirement that at least half of the board members of a Swedish limited liability company shall be residents within the EEA will remain.

There are a couple of legislative proposals that has not yet resulted in legislation, but still remains of interest. First, a legislative proposal regarding the liability in relation to prospectuses was presented in March 2013 (Ds. 2013:16). Today, the directors of an issuer may become liable under Swedish law for any incorrect or omitted information that has caused damages to a subscriber, but the law is uncertain as to the liability of the issuer. According to the legislative proposal, the issuer may become liable as well. The second proposal comes from a ministry publication in 2010 proposing that the current 10 per cent limit for listed companies' acquisition of their own shares shall be repealed. The proposals are still on the agenda, but the timing is uncertain.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Sweden's transparent business environment, stable economy and political environment, well-developed infrastructure and high degree of knowledge in technology have made it fairly attractive to foreign investments. Foreign investments have accounted for nearly 43 per cent of the transactions reported to Mergermarket as involving a Swedish target company between 1 June 2013 and 30 May 2014, which is a small increase compared with earlier reports. These statistics should be viewed with some caution as there is an unknown number of smaller transactions that are not included in Mergermarket reports, but which anecdotal evidence suggests include a higher percentage of domestic transactions. Foreign investments in Sweden are mainly made from the West, such as the other Nordic countries, other EU Member States, and the United States. Between 1 June 2013 and 30 May 2014, the United States has, according to data from Mergermarket, been the most active country pursuing acquisitions in Sweden, followed by Norway, Finland, Germany, the United Kingdom and Denmark. Transactions from other parts of the world than the above-mentioned are few, but have picked up compared with earlier periods. During the stated period, there have been three transactions with buyers from China and also acquisitions from South Africa, Hong Kong and Japan. Larger cross-border acquisitions of Swedish companies include Volkswagens bid for Scania and Voimapiha's acquisition of a stake in the energy company Kraftgården.

The volume of investments from Sweden in foreign countries has historically always been quite high. Buyers include listed companies as well as medium-sized and smaller businesses, which also are attracted by the opportunities available abroad. Between 1 June 2013 and 30 May 2014, Swedish companies made about 180 acquisitions abroad, according to data from Mergermarket, which correspond to about 59 per cent of all reported acquisitions made by Swedish companies during the same period. This is an increase compared with earlier reports, both in number of deals and in percentage. Most cross-border acquisitions were made in Norway, where 20 per cent of the 180 acquisitions were made. Norway is followed by Denmark, the United States, Germany and Finland. There are also examples of transactions in, among others, China, Brazil, India, South Africa and Kenya. Some of the recent transactions with Swedish buyers are SSAB's merger with Finnish Rautaruukki, Alfa Laval's bid for Norwegian Frank Mohn, SCA's acquisition of Hong Kong-based Vinda and SKF's acquisition of US-based Kaydon.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

During the last quarter of 2013 and the first half of 2014 we have again seen an increased interest in initial public offerings (IPOs) on the Swedish market, especially when it comes to smaller companies listing on multilateral trading facilities. Until 9 June 2014, seven new companies have been admitted for trading on NASDAQ OMX Stockholm: four IPOs and three companies that have switched market place from a multilateral trading facility. As mentioned, the listing activity has been high among the smaller companies with about 20 new companies being listed on the multilateral trading facility NASDAQ

OMX First North so far this year. Several more companies are in the IPO pipeline and are expected to be listed later this year.

Also when it comes to public M&A transactions, we have seen increased activity during 2014 compared to 2012 and 2013. Until 9 June 2014, there have been nine public offers for eight companies listed on NASDAQ OMX Stockholm. In the past few years there has been an increase in the number of hostile or unsolicited public offers, as well as competing offers, on the Swedish market and during 2014 we have seen several hostile or unsolicited approaches, including Volkswagen's offer for Scania, Pfizer's approach to AstraZeneca, Mylan's approach to Meda as well as Shelton Petroleum's and Petrogrand's competing hostile bids for each other.

During 2013 and 2014, the private M&A market has been picking up, although the number of transactions is not near the levels of 2006 and 2007 yet. Transactions may still take a longer time to complete due to negotiations and preparation periods but the risk appetite has increased. It continues to be difficult to predict market practice with any certainty since each deal is negotiated taking into consideration the specific aspects of the target and the parties involved. In general it can be noted that although the interest in transactions has increased, the interest to participate in structured processes such as controlled auctions remain rather low. Instead, actors aim at negotiated processes. Having said this, controlled auctions are still seen if the target company is expected to attract interest from many potential investors.

Looking into which sectors attract investments, the industrial sector remains strong; to a large extent that strength reflects the size of the Swedish industrial sector. Other sectors that have attracted investments include the consumer sector, the services sector and the energy sector. The global increase in pharma deals has also been reflected on the Swedish market. In the press, there have been discussions on further consolidation within the telecoms and the financial sectors. Although maybe of more interest at the venture capital stage, the Swedish start-up scene is becoming more and more interesting. Companies like Skype, Spotify, Klarna and King have their roots in Sweden and there are many companies hoping to become the next success. According to information from the Stockholm Business Region, Sweden has during the last year attracted about 15 per cent of Europe's tech investments. Another sector that has attracted a lot of interest during recent years – both positive and negative – is the public sector, which has been opened up to private initiatives in many ways. However, as Sweden will hold a general election in September 2014 and there may be a change in government, there is hesitation regarding further investment before it becomes known which government and what rules will continue to govern the sector.

Sweden has a number of domestic private equity houses, and international private equity houses are also interested in the Swedish market. During 2006 and 2007, the private equity houses dominated the M&A scene, but in relation to the financial crises, the number of private equity investments radically decreased. The activity is now increasing and in particular the local private equity houses are very active on the market, both as sellers and buyers. Examples include EQT's divestment of Springer Science+, EQT's listing of Sanitec on NASDAQ OMX Stockholm, Nordic Capital's divestment of Aditro and acquisition of Eurolines and Altor's investment in SATS and divestment of Max Matthiessen.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Bank funding in the Nordic leveraged acquisition finance market is still dominated by local Nordic banks but foreign banks who abandoned the Nordic market for a while slowly seem to be showing some interest again. Activity on the market as such has been quite low during 2013 and the first half of 2014 with few notable LBOs having been completed during this period. Sponsor focus appears to be concentrating more on recapitalisations and, based on currently perceived beneficial market conditions, possible IPO exists. The margins and fees for leveraged credits continue to be on the high side (although lower when compared to rates in 2012) and there does not seem to be any trend towards lower pricing at the moment. Liquidity in the bank market for good assets is high notwithstanding the recent regulatory changes, which have affected the banks' willingness and capacity to lend to lesser credits and thus continue to create new opportunities for mezzanine financing providers, who have been very rare since the financial crisis, and have allowed the debt capital markets to become a real alternative to the banks as a viable source of debt funding in the Swedish market. In addition, funds specialised in debt financing are showing increased interest in the Swedish market and are competing for mandates from time to time (willing to offer, for example, uni-tranche loans (a combination of senior and subordinated debt)).

VII EMPLOYMENT LAW

Swedish employment law is sometimes thought to be very employee-favourable and this is true to some degree, especially when it comes to matters such as dismissal. Having said that, the system is rather predictable, especially compared with some of the common law jurisdictions, and issues relating to employees and pensions seldom create large obstacles in M&A transactions, provided that the issues are addressed in a proper and timely manner. When planning a transaction, one may be required to enter into and finalise consultations with relevant trade unions before a decision concerning the transaction is taken. Although trade unions do not have the right to veto a transaction, they may delay the process. Accordingly, sufficient time should be allowed for trade union consultations. Also, an employer has quite far-reaching obligations to keep relevant trade unions informed about the development of the business. Violation of the trade union's information and consultation rights triggers liability for damages.

VIII TAX LAW

Sweden is a popular holding company jurisdiction for many multinationals. As of 1 January 2013 the corporate tax rate was decreased from 26.3 to 22 per cent. Sweden has an extensive tax treaty network and a favourable participation exemption regime. Dividends and capital gains on shares held for 'business purposes' are generally exempt from tax. Unlisted shares are generally considered held for business purposes and there is no minimum shareholding or holding period requirement. The rules also apply to shares in foreign companies provided that they are deemed to have the same characteristics as a Swedish limited liability company, without any requirement that the foreign company be

subject to a minimum level of effective taxation as long as it is a taxable entity. However, if the foreign company has low taxed profits, which generally is only deemed to be the case for companies registered in tax havens, Swedish CFC rules may apply, under which the profits may be taxed on a current basis in the hands of Swedish shareholders.

The participation exemption regime also applies to a limited liability company's holdings in partnerships resident in a country that is a member of the EEA, and to shares held through such partnerships, provided that such gains would be exempt in the hands of the partners.

Tax consolidation between Swedish entities is achieved by 'group contributions', payments between group companies that are tax-deductible for the payer and taxable to the payee. Sweden does not have tax rules on thin capitalisation and does not impose withholding tax on interest. As a result of this, it has been common for Swedish companies to be heavily leveraged, in particular for Swedish acquisition vehicles in cross-border transactions into Sweden. By way of group contributions, income of a target business in Sweden could thereby be set off against fair market interest deductions on such leverage into a Swedish acquisition vehicle.

However, as of 1 January 2013, a Swedish company can as a general rule not deduct interest expenses relating to a debt to an affiliated company. There are two main exceptions to this general rule. Under 'the 10 per cent test' interest should be tax-deductible (1) if the beneficial owner of the interest is taxed at least 10 per cent on the interest received had that been the recipient's only income; and (2) provided that the main reason for the debt is not to obtain a substantial tax benefit of the group. Under 'the commercial purpose test' interest on intra-group funding should further be deductible if the beneficial owner of the interest is resident within the EEA, or in a country with which Sweden has a tax treaty, and the debt generating the interest was mainly created for commercial reasons as opposed to tax reasons. There is no grandfathering provision and thus all existing intra-group loans are covered by the new rules as of 1 January 2013 whether or not the debt was created before or after this date.

A governmental committee has been appointed to review the corporate tax system with the aim of broadening the tax base (which in its turn could finance a further reduction of the corporate tax rate) and creating neutrality between equity and debt. Hence, it remains to be seen how interest payments more generally will be treated for future corporate income tax purposes. However, there are indications that the current deduction limitation will be replaced and that new rules restricting the deductibility on interest expenses will be introduced. The committee shall present its final report on 16 June 2014 at the latest.

IX COMPETITION LAW

The current Swedish Competition Act came into force on 1 November 2008. The Act contains the same basic prohibitions as EU competition law against anti-competitive agreements and abuse of market dominance. These may be relevant in the due diligence context where previous or ongoing violations of competition law by the target company may be identified.

In terms of merger control, the Swedish Competition Act provides for mandatory notification – provided the EU Merger Regulation is not applicable – to the Swedish Competition Authority of transactions where (1) the undertakings concerned have a combined turnover in Sweden exceeding 1 billion kronor and (2) at least two of the undertakings concerned have a turnover in Sweden exceeding 200 million kronor. In 2013, the Swedish Competition Authority decided on 45 merger filings, a small increase from 42 filings in 2012. Three cases led to a Phase II investigation, one of which was abandoned by the parties after the Swedish Competition Authority sought to ban the merger.

Even if the second turnover threshold (i.e., at least two of the undertakings concerned have a turnover in Sweden exceeding 200 million kronor) is not met, the Swedish Competition Authority may order that the merger be notified if particular reasons exist (e.g., the merger leads to high market shares on a Swedish market). Such an order was made by the Swedish Competition Authority in the above-mentioned merger that was ultimately abandoned by the parties. Since the notification thresholds were increased in 2008, there has been a slight increase of the number of cases where the Authority has used its power to order a notification below the thresholds – although these cases are still rare.

The Swedish Competition Act has been under review. As from August 2014, new rules will enter into force that are introducing a possibility for the Swedish Competition Authority to ‘stop the clock’ (i.e., temporarily suspend the review periods) when the parties to the merger do not promptly respond to the Authority’s information requests.

X OUTLOOK

The activity on the Swedish M&A market is increasing and, provided that no new major events affecting the Swedish or global economy occurs, it is expected that the activity will increase even further. During 2014, the focus is expected to remain on the IPO market but with a tail of M&A deals as well. Many private equity firms are still looking into exit possibilities and many have also raised new funds in addition to remaining rooms for investments in already existing funds. Also, as been seen on the global market, corporates have been very active on pursuing new strategic acquisitions to position themselves at the market.

Appendix 1

ABOUT THE AUTHORS

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Biörn Riese is the chairman of the board and heads Mannheimer Swartling's global M&A and insolvency practices. He has wide experience of and regularly advises on M&A matters as well as commercial and legal issues under Swedish and international corporate law. Mr Riese studied at the University of Stockholm (LLM, 1978; MBA, 1980). After service in Swedish courts and work as a law firm associate (1980 to 1983), he joined Carl Swartling Advokatbyrå as an associate in 1984 and became a partner in 1989, before becoming a partner of Mannheimer Swartling in 1990.

EVA HÄGG

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Eva Hägg is the head of the public M&A and equity capital markets practice group. She specialises in securities and company law, and has extensive experience of public company transactions, including public M&A, IPOs and capital market transactions such as stock exchange listings, the raising of capital and recapitalisation. Ms Hägg graduated with a law degree from the University of Stockholm in 1983. After service in Swedish courts, she joined Carl Swartling Advokatbyrå in 1986 and became a partner of Mannheimer Swartling in 1994. Since 2010, Ms Hägg has also served as a member of the Swedish Securities Council and is since 2014 a member of the Swedish Corporate Governance Board.

ANNA BRANNEMARK

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Anna Brannemark is a senior associate and the professional development lawyer of Mannheimer Swartling's M&A practice and has been with the firm since 1999. She specialises in M&A and company law, and has extensive experience from cross-border and Swedish transactions. Ms Brannemark studied at Uppsala University, Sweden (LLM, 1999), Oslo University, Norway, and Katholieke Universiteit Leuven, Belgium. She has been a member of the Swedish Bar Association since 2004.

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