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The International Comparative Legal Guide to:

Merger Control 2007

A practical insight to cross-border merger control issues

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Chapter 54

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The decision-making in relation to mergers is divided between the Swedish Competition Authority (the Competition Authority) and the Stockholm District Court. The Competition Authority has jurisdiction to initially assess all notifiable concentrations. However, it may not prohibit a concentration, but has to file an application for prohibition with the Stockholm District Court. The District Court's decision may thereafter be appealed before the Market Court.

1.2 What is the merger legislation?

The merger legislation currently in force in Sweden forms part of the Swedish Competition Act (the Competition Act or the Act) from 1993 as amended. Reforms to the Competition Act are currently being considered and a Committee report with suggested changes is due to be published by 1 November 2006. As far as merger control is concerned, the Committee has *inter alia* been requested to review whether any necessary changes to the current dominance test are required and whether efficiencies of a transaction should be considered when assessing a concentration. Additionally, the Committee should consider procedural issues such as the introduction of filing fees, sanctions for not filing and the timing for filing of notifications.

1.3 Is there any other relevant legislation for foreign mergers?

No, there is no other relevant legislation.

1.4 Is there any other relevant legislation for mergers in particular sectors?

The Competition Act does not provide for any specific rules for mergers in particular sectors. Other regulatory filings may however be required under sector specific legislation.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

The notion of concentration and control within Swedish merger control corresponds to the definition given in the EC merger control rules. Hence, the transaction must bring about a lasting change in control, joint or sole, over (the whole or part of) one or several undertakings or businesses, for the Competition Act to be applicable. This includes:

(i) Legal and financial mergers, i.e. where two or more previously independent undertakings merge or two undertakings, albeit remaining separated legal entities, create one common economic unit which has a permanent, single economic management.

(ii) Acquisitions of a controlling interest, i.e. one (or more) undertaking(s) obtain, whether by purchase of securities or assets, by contract or, in certain cases, by the establishment of economic dependence e.g. through important long-term supply agreements or credits coupled with structural links, decisive influence over another undertakings' strategic decisions.

(iii) The creation of full-function joint ventures, i.e. joint ventures that perform, on a lasting basis, all the functions of an autonomous economic entity.

Transactions that bring about a change in the quality of control, i.e. from joint to sole control and *vice versa*, or a change in the structure of control of a company, i.e. increase or decrease of the number of shareholders, may also constitute a concentration in the meaning of the Act.

Internal restructurings within a group of companies are, however, *not* covered by the Act, as there is no ultimate change of control.

Control (sole or joint) may be acquired on a legal or *de facto* basis. A decisive influence over decisions that foremost protect the minority shareholders' financial interests (e.g. changes in articles of association increase/decrease of capital and liquidation) do not confer control. However, the acquisition of a minority shareholding may constitute a concentration in the meaning of the Competition Act when it enables the shareholder to determine the strategic commercial behaviour of the target undertaking, e.g. power to appoint more than half of the members of a board or when on a *de facto* basis the minority shareholder is highly likely to achieve a majority of the votes at the shareholders' meeting, e.g. because the remaining shares are widely dispersed between several

shareholders.

2.2 Are joint ventures subject to merger control?

The creation of a joint venture which on a lasting basis fulfils all the functions of an autonomous economic entity (full-function joint ventures) constitutes a concentration within the meaning of the Competition Act and the thresholds as described below are applicable. The concept of full-function joint ventures within Swedish merger control corresponds to the definition given in the EC merger control rules.

2.3 What are the jurisdictional thresholds for application of merger control?

Unless it falls under the EC Merger Regulation, a concentration shall be notified to the Swedish Competition Authority if:

(i) the combined aggregate worldwide turnover of the undertakings concerned in the preceding financial year exceeds SEK 4 billion (US$ 534.9 million or € 430 million); and

(ii) at least two of the undertakings concerned each had a turnover in Sweden the preceding financial year exceeding SEK 100 million (US$ 13.3 million or € 10.7 million).

The Competition Authority may, in special circumstances, require a concentration to be notified where the first, but not the second, criterion is fulfilled. Such concentrations can also be notified on a voluntary basis. Special circumstances can involve situations where a company systematically acquires small competitors in order to gain market power or where a large player in a concentrated market acquires a newly established player in the market in order to prevent competition.

The principles for the calculation of turnover correspond to those of the European Commission's notice on calculation of turnover. The relevant turnover to be considered relate to the annual net turnover derived from the sale of products and the provision of services related to the ordinary activities of the undertakings concerned (excluding intra-group sales, sales rebates, value added tax and other taxes directly related to turnover), for the preceding financial year. Adjustments shall also be made for acquisitions or divestments subsequent to the date of the audited accounts. Special rules apply for the calculation of turnover for credit and other financial institutions as well as insurance undertakings.

2.4 Does merger control apply in the absence of a substantive overlap?

Substantive overlap is irrelevant for the obligation to notify a concentration which fulfils the turnover thresholds described above.

2.5 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign to foreign" transactions) would be caught by your merger control legislation?

Foreign-to-foreign transactions are subject to the same legislation as transactions involving Swedish undertakings/businesses. Hence, an undertaking without local presence is required to notify a transaction as long as the thresholds are met.

2.6 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

The Swedish merger control rules are not applicable if the concentration is notifiable, or referred, to the European Commission under the EC Merger Regulation.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

The parties have an obligation to notify the transaction to the Competition Authority when the jurisdictional thresholds are met. There is no deadline for filing. However, it is normal practice to submit the notification when the concentration occurs and prior to completion *inter alia* as the validity of the transaction depends on that it is not prohibited.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

There are no such exceptions set out in the Competition Act.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing?

There are no direct administrative or criminal sanctions for not notifying a merger. Should the Competition Authority become aware of a merger that has not been notified although a notification requirement was triggered, it can order the parties to notify, subject to a fine.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

Yes, but it should be evaluated on a case-by-case basis.

3.5 At what stage in the transaction timetable can the notification be filed?

The Competition Act does not regulate when a notification can be filed. However, a notification may only be filed based on a signed agreement which is not conditional upon a circumstance over which the parties are deemed to have control, for example board approval.

For public bids, the offering document or a press release issued according to the Swedish Industry and Commerce Stock Exchange Committee's (*Sw.* Näringslivets Börskommitté) rules typically serve as a basis for notification.

3.6 What is the timeframe for scrutiny of the merger by the regulatory body? What are the main stages in the regulatory process?

The Competition Authority must, within 25 working days from receiving a complete notification, either adopt a clearance decision or a decision to initiate a special investigation. If the Competition Authority proceeds with a special investigation, it must within three

months from such a decision either adopt a clearance decision or initiate proceedings before the Stockholm District Court. This time-limit can exceptionally be extended by the Stockholm District Court if requested by the Competition Authority. The Stockholm District Court must render a decision within six months from the date the proceedings were initiated. The decision of the Stockholm District Court may be appealed to the Swedish Market Court, which must render a decision within three months from the date at which the right to appeal expired. These time limits may exceptionally be extended by the courts. However, a concentration may not be prohibited later than two years from the date the concentration occurred.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended?

A stand-still obligation enters into force when a notification is filed with the Competition Authority. There is no stand-still obligation before notification and as such there is theoretically no prohibition against implementation before notification. However, once a notification has been made, no action to consume the concentration may be taken during the initial investigation.

The Competition Act does not provide for any direct sanction in case the parties do not respect the stand-still obligation.

3.8 Where notification is required, is there a prescribed format?

There is a special form to be filled in and to which a relevant description of the parties, the transaction as well as the competitive structure of the market(s) affected by the transaction should be attached. The information to be provided in the notification is similar to that requested in the European Commission's Form CO. A Swedish version of the form may be found at the Competition Authority's website at www.kkv.se. It is mandatory to provide all relevant information requested subject to the risk of having the notification being declared incomplete. The Competition Authority may, however, accept to grant waivers upon the parties' request.

3.9 Who is responsible for making the notification and are there any filing fees?

In case of an acquisition of control, the party or parties acquiring control are responsible for making the filing. In case of a merger, all merging parties are responsible for filing.

There are currently no filing fees.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The Swedish substantive test corresponds to the former dominance test as applied under EC law. Under the Competition Act, a concentration shall be prohibited if it creates or strengthens a dominant position which significantly impedes, or is liable to significantly impede the existence or development of effective competition in Sweden as a whole, or a substantial part of Sweden.

All types of concentrations are covered by the Competition Act and the concept of dominance is generally deemed to cover both single and collective dominance (co-ordinated effects). The assessment of dominance and significant impediment to the competition is a collective evaluation of factors such as market shares and market power, financial strength, potential competition and barriers to entry.

A concentration may, however, only be prohibited if essential national security or supply interests are not set aside. There are to date no cases where this question has been discussed. Hence, the circumstances under which it would apply are unclear.

The creation of a full-function joint venture is subject to the dominance test described above. However, the Competition Authority (and the courts) is also obliged to assess the possible co-ordination of the competitive behaviour of the parent undertakings under Article 6 and Article 8 of the Competition Act. Such an assessment is conducted simultaneously and under the same procedure and time limits as the examination of the concentration itself. Should the Competition Authority conclude that the creation of the joint venture leads to co-operative effects incompatible with the Act, the concentration may be prohibited.

4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

There are no provisions in the Competition Act for the right for third parties to be heard in a merger notification procedure. However, the Competition Authority normally contacts the notifying parties' competitors and customers as part of its assessment (the parties are obliged to submit contact details for competitors and customers in the notification). Third parties may also voluntarily submit their view on a transaction to the Competition Authority. To this effect it should be noted that a short description of the transaction, the parties and the area(s) of activities is published on the Competition Authority's website after notification.

If the Competition Authority applies for an order prohibiting a transaction or imposing obligations on the parties, then third parties are allowed under the Judicial Procedure Code to intervene in the trial if they can show reasonable cause that the case affects their rights.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

The Competition Authority may, where necessary for the scrutiny of a concentration, require the undertakings concerned or other undertakings or persons to supply information, documents or other material and interview persons who are likely to be in a position where they have relevant information. The request for information and the request to appear for an interview may be made subject to fines. However, such requests must not be unduly burdensome upon the persons or undertakings that are subject to the obligation.

4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

All information submitted during pre-notification contacts with the Competition Authority is subject to absolute confidentiality until a notification is submitted. Thereafter the general secrecy provisions described below are applicable.

Anyone has the right to obtain access to the Competition

Authority's file under the general principle of public access to official records. However, the Secrecy Act provides that information shall be held secret if it relates to a party's business, innovation or R&D and if the party would suffer injury to its business if the information is disclosed. Hence, the Competition Authority will as a general rule grant confidentiality for business secrets and commercially sensitive information as long as there is reason to believe that the disclosure of the information could impede the undertaking concerned. In order to obtain confidentiality for business related information the parties should clearly mark in the notification, as well as in all other documents submitted to the Competition Authority, which information is to be considered a business secret. If access to the Competition Authority's file is requested by a third party, the Competition Authority will in general also contact the undertakings concerned to clarify the scope of business secrets.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

If the transaction is being cleared during the initial review period, the Competition Authority will issue a formal decision to that effect within 25 working days from receipt of a complete notification.

For transactions subject to a special investigation, a Court judgment will, unless the Competition Authority issues a clearance decision prior to submitting an application to the court, be handed down within six months from the date the procedures were initiated, either clearing the transaction with or without conditions, or prohibiting it.

Both the Competition Authority's decisions and the Courts' judgments are publicly announced and published.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

It is possible to negotiate remedies with the Competition Authority. If the remedies have been negotiated and accepted during the Competition Authority's review they are formalised in a decision. If they are negotiated during the Court proceedings, they will be indicated in the Court's judgment.

The Competition Authority has previously accepted both structural and behavioural remedies.

5.3 At what stage in the process can the negotiation of remedies be commenced?

Remedies may be discussed before or during the formal review process.

5.4 How are any negotiated remedies enforced?

The Competition Authority will follow up that the remedies are being correctly implemented. The Authority may also request that a voluntary remedy be combined with a penalty or a fine. Such a penalty and a subsequent order to pay it can only be ordered by the Stockholm District Court at the request of the Competition Authority.

5.5 Will a clearance decision cover ancillary restrictions?

A clearance decision will cover ancillary restrictions. The parties should indicate in the notification the ancillary restrictions that they want the Competition Authority to review in connection with the transaction. The Competition Authority generally refers to the European Commission's guidelines on ancillary restrictions with respect to the interpretation of whether a restriction may be considered ancillary.

5.6 Can a decision on merger clearance be appealed?

A decision by the Competition Authority to leave a concentration without any further measures may not be appealed. It is, however, possible to re-open a case if it is discovered that the parties or any third party have provided false information that may have had an influence on the decision making.

A judgment by the Stockholm District Court in relation to a concentration may be appealed to the Market Court. It is normally only the undertakings concerned and the Competition Authority who are allowed to appeal such a judgement. The judgement of the Market Court is final.

5.7 Is there a time limit for enforcement of merger control legislation?

The Competition Act stipulates that the authorities may not block a transaction or impose any commitments more than two years after the occurrence of a concentration.

6 Miscellaneous

6.1 To what extent do the regulatory authorities in your jurisdiction liaise with those in other jurisdictions?

The Swedish Competition Authority has regular contacts with other European competition authorities through its participation in the European Competition Network and in the European Competition Authorities Association, the latter dealing particularly with issues arising in case of referrals to the European Commission. Additionally, the Nordic competition authorities (in Sweden, Denmark, Norway and Iceland) also entertain a privileged relationship, notably within the framework of an agreement dated February 2004 regarding the exchange of confidential information in connection with *inter alia* concentrations.

6.2 Please identify the date as at which your answers are up to date.

September 2006.

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