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Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Sweden --

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This note is submitted by Sweden to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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1. Pre-merger notification regime

1.1 Obligation to submit a notification

1. Mergers above certain turnover thresholds must be notified to the Swedish Competition Authority (the SCA) before they are implemented. [1]

2. The geographic nexus of the turnover to be considered is Sweden. A merger shall be notified to the SCA, if (1) the combined aggregate turnover in Sweden of all the undertakings concerned exceeds the 'total turnover threshold', *and* (2) the turnover in Sweden for each of at least two of the undertakings concerned exceeds the 'individual turnover threshold'.

1.2 Standstill obligation

3. During the first investigation period (25 working days), the parties are automatically prohibited from implementing the merger ('standstill obligation'). The standstill obligation no longer applies if the SCA, before the expiry of this period, decides to issue a clearance decision without any further actions. If the SCA decides to proceed to an in-depth investigation (three months), there is no automatic standstill obligation during this phase of the investigation. However, the Stockholm City Court may, at the request of the SCA, prohibit the parties and other participants in a concentration from taking any measures to put the concentration into effect. Such a decision may be taken only if a prohibition against implementation is motivated by a public interest stronger than the inconvenience caused by such a measure.

4. In a report published in December 2013[2], the SCA has pointed out that in an international comparison of investigative and decision-making powers, it is apparent that Sweden in certain respects has less effective enforcement tools than other Nordic countries, the EU and OECD Member States. One area is the rules for standstill and sanctions against 'gun jumping', where the view is stricter internationally than in the Swedish legislation. For example, the SCA has raised the issue why there is no automatic standstill obligation in cases where the SCA has found reason to enter into an in-depth investigation, something that in itself indicates that the merger may be potentially harmful to competition. In order to increase efficiency and effectiveness of the law enforcement task, the SCA has suggested several measures including decision-making powers for the SCA in order to prohibit a merger, a legal requirement for cooperation, and sanctioning possibilities for non-cooperation in the SCA's investigations.

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1 The legal definition of a notifiable operation in the Swedish Competition Act is a 'concentration', which is defined as a change of control in an undertaking on lasting basis where (1) two or more previously independent undertakings merge, or (2) either 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 of the whole or parts of one or more other undertakings. The creation of a joint venture, which on a lasting basis fulfills all the functions of an autonomous economic entity, also constitutes a concentration within the meaning of the Swedish Competition Act (SFS 2008:579), Chapter 1, Article 9.

2 The Swedish Competition Authority, *Konkurrensen i Sverige 2013* (2013:10).

2. Review of mergers falling below notification thresholds

2.1 Injunction to notify and voluntary notification

5. If the total turnover threshold is met but not the individual turnover threshold, the SCA may request a notification if there are particular grounds. Examples of what may constitute 'particular grounds' include situations when an already strong undertaking acquires small competitors one by one, or when a strong undertaking in a concentrated market acquires a newly established undertaking that could possibly challenge the position of the acquirer in the future. Complaints from, for example, customers and competitors will not in themselves constitute 'particular grounds' for requesting a notification, but may lead the SCA towards a preliminary assessment that the merger could possibly be harmful to competition.

6. A party or another participant in a merger has the right to voluntarily notify the merger if it exceeds the total, but not the individual, turnover threshold. In that way, the parties themselves can initiate an investigation by the SCA in situations where they consider it likely that the SCA could potentially request a notification. In case of a voluntary notification, the same time limits apply for the investigation as in mergers falling under the mandatory notification rules.

7. Sweden applies the 'SIEC-test'[3], and a merger shall be prohibited if it significantly impedes effective competition within the country as a whole, or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position. If it is sufficient to eliminate the adverse effects of a merger, a party, instead of being subject to a prohibition, may instead be required (1) to divest an undertaking, or a part of an undertaking, or (2) to take some other measure having a favourable effect on competition. An obligation may not be disproportionate to the harmful effects created by the merger.

8. As regards prohibition or remedies, the law makes no difference between mandatory notifications, notifications required by the SCA or voluntarily submitted notifications. However, when the SCA requires a notification of an already implemented merger, there may be a difference as to what remedies would be practically workable and effective.

9. There are no other provisions under the Swedish Competition Act allowing the SCA to investigate mergers than the above-described. However, mergers have turned up in cartel investigations as, for example, a tool for allocating customers or geographic markets between competitors.

2.2 Review of mergers falling below the individual turnover threshold

10. When merger control was introduced in 1993, there was only one total turnover threshold. The individual turnover threshold was introduced in 1997, in order to reduce the burden for parties and the SCA of many notifications of harmless mergers where a large company acquired a small one. The right to request (and voluntarily submit) a notification below the individual threshold was introduced at the same time, in order to maintain the possibility to intervene in case a merger below that threshold could be harmful to competition.

11. Between 1997 and 2009 the SCA used the possibility to request a notification only twice. However, as from 2010 the SCA has taken a more pro-active approach and used this possibility more frequently; two cases in 2010, one case in 2011 and one case in 2013. Three of these cases were subject to an in-depth investigation and one eventually to court proceedings. The transaction was then abandoned by the parties.

[3] Significant Impediment to Effective Competition.

12. In *Assa Abloy/Prokey* (2013), it came to the SCA's knowledge in December 2012 that Assa Abloy AB intended to buy Prokey AB. Assa Abloy is the dominant company within the Swedish lock sector. Assa Abloy owns the company Copiax, which is Prokey's only competitor in the wholesale services market for locksmiths. Should Assa Abloy acquire Prokey, Assa Abloy would gain a monopoly position. Prokey did not fulfill the individual turnover threshold for mandatory notification. However, in January 2013 the SCA required a notification from Assa Abloy. The SCA found Copiax and Prokey to be each other's closest competitors. If competition between the two companies would end, Assa Abloy would have both the opportunity and the incentive to raise prices for Copiax' and Prokey's customers. For competing manufacturers, Assa Abloy's acquisition would entail worsened opportunities to sell through Copiax and Prokey. This meant that Assa's dominance would become even greater, and that the range of competing lock products might decrease. The SCA therefore initiated court proceedings in order to block the acquisition. Assa Abloy made a procedural objection that was rejected by the court. Shortly thereafter, Assa Abloy abandoned the transaction.

13. Possibly, the SCA´s more pro-active approach has led to an increased awareness among the business community and more voluntary notifications in cases of substantial interest.

14. In *Eniro/Teleinfo* (2011), both companies were active in operational businesses such as number enquiry and other information services via voice and SMS. Eniro made a voluntary notification of its intended acquisition of Teleinfo. The SCA found that the proposed merger could have harmful effects on competition. When the parties were informed that the SCA intended to initiate court proceedings in order to prohibit the merger, they decided to abandon the deal shortly before such proceedings were to be initiated.

15. In *KPA Pensionsservice/SPP Liv Pensionstjänst* (2013), KPA made a voluntary notification and the SCA examined the effects of the proposed acquisition on competition in the market for procured administration of collectively agreed occupational pensions in the local government sector in Sweden. As a result of the transaction the merged entity would constitute the largest player in the market and face competition from only one other company. Therefore the SCA initially expressed concerns that the proposed transaction could harm competition and decided to open an in-depth investigation. However, during the in-depth investigation SPP demonstrated that it would not continue to operate in the market for procured administration of collectively agreed occupational pensions in the local government sector, regardless of whether the merger was completed or not. The in-depth investigation also showed that there were no alternative buyers of SPP. Therefore, the most likely alternative scenario to the proposed transaction would be the exit of SPP from the market. The reduction of the number of competitors in the market would thus occur anyway and would not be caused by the acquisition itself (the counterfactual scenario). As a result the SCA concluded that the acquisition would not significantly impede effective competition in Sweden or in any substantial part thereof. The acquisition could therefore be cleared by the SCA.

2.3 Mergers falling below the total turnover threshold

16. The SCA has no powers to investigate a merger falling below the total turnover threshold (below one billion SEK). Lately, the SCA has become increasingly aware of potential concerns in markets with a total turnover just above or below one billion SEK.

17. In *Scandorama/Ölvemarks* (2012), a cartel case against two bus traveling companies, the companies had the intention to merge in the future and eventually did so, resulting in a very high market share in Sweden for bus journeys to Europe. The total turnover threshold for merger review was not met. Before the merger, the two competitors had been found guilty of a cartel arrangement on, for example, prices, discounts and departures.

18. In a pending case, where the SCA is investigating an alleged cartel in the market for transport services, there has been a number of fairly recent acquisitions, resulting in a monopoly in a narrow market segment, and possibly facilitating a division of the market between competitors. The total turnover threshold was not fulfilled, so it would not have been possible to investigate or prohibit the mergers.

19. In November 2013, the SCA received a complaint from the Swedish Forest Industries Federation against a planned transaction, where the Swiss group Omya intended to acquire four Ground Calcium Carbonate (GCC) plants from Imerys. The four plants were situated in Sweden, France, Italy and US. GCC is a substance used in the pulp and paper industry. According to the complaint, Omya is the world market leader in GCC with a market share of 50 per cent. The market share in Europe was estimated to above 70 per cent and Omya already had a monopoly in, for example, Finland and UK. The merger would probably lead to a monopoly in Sweden as well.

20. Public figures showed that the total turnover of the buyer and the target company in Sweden was just about one billion SEK. Therefore, the SCA turned to Omya and Imerys in order to receive more accurate figures attributable to the Swedish market[4]. In parallel, the SCA sent a request for information to other national competition authorities within EU, in order find out of whether the merger had been notified in any other EU Member State. In the end, it turned out that the transaction fell below all notification thresholds, including the Swedish ones. Of course the possible outcome of any review of the merger is unclear, but it was quite obvious that negative effects could not be ruled out *prima facie*.

21. The above examples show that even mergers falling below the total turnover threshold may constitute a threat to effective competition in smaller markets. Another concern of the SCA is that in some cases where the total turnover threshold is fulfilled, but not the individual one, the level of concentration in the market is usually so high that the SCA in practice would only be able to investigate a three-to-two, or two-to-one, merger.

2.4 Differences in practice or procedure for the investigation of transactions not being notified under the mandatory notification procedure

22. When the SCA requests a notification, the starting point for the review is different than for mergers following the mandatory notification procedure.

23. First, the merger may already have been implemented to some extent. In any case the parties, contrary to mergers falling under mandatory notification, have no standstill obligation before the notification. The SCA must therefore rapidly get a picture of what actions the parties have already taken and make sure that they agree on a standstill, stopping any further integration until a notification is made and the mandatory standstill during the first investigation phase is activated. Normally, the SCA contacts the parties before a formal request to notify is made. During these contacts, implementation and standstill provisions form part of the discussion. If necessary, the SCA may request the court to prohibit the parties and other participants in the merger from taking any further measures to implement the merger. However, so far the SCA has not found such an action necessary.

24. Second, when a merger has already been implemented, the seller may not have any interest or obligation towards the buyer to provide information or to contribute in other ways to a smooth and effective investigation. Therefore the SCA may have to take a more active stand as regards involving the seller, though this has not been a practical problem in any of the cases the SCA has reviewed so far.

[4] The SCA refers in its Regulations on the Notification of Concentrations between Undertakings (KKVFS 2010:3) to the European Commission's Jurisdictional Notice as regards which undertakings are 'undertakings concerned' and how the turnover is to be calculated.

25. Third, an interesting consequence of investigating an already implemented merger is that it may be possible to, at least to a certain extent, make an *ex post* analysis of the effects of the merger.

26. Last, an already implemented merger may be difficult to "undo" or remedy, should the investigation show that the merger is harmful to competition. However, in the cases reviewed by the SCA, this has not been a problem since the mergers that in the end were deemed to be harmful never had been implemented.

3. Review of mergers that should have been notified but were not

27. A failure to notify a merger is not subject to penalties in itself. If the SCA becomes aware that a merger has been implemented without the required notification, the SCA may request the parties to notify the merger *ex post* subject to a fine.

28. In principle, the law makes no difference as regards which obligations or remedies that may be considered in a case where the merger has already been implemented compared to a standard merger review procedure, where the parties observe the standstill obligations and no implementation has taken place. In the preparatory works to the Swedish Competition Act, it is stressed that the parties bear the risk for any implementation carried out before the merger has been cleared. However, an already implemented merger in most cases clearly would be more complicated to remedy. There is yet no example how the court in practice would decide on remedies in an already implemented merger.

29. There are no specific time limits for the SCA making a request to notify, however there is a definite time limit for any actions against a merger. A prohibition or an obligation may not be imposed more than two years after a merger has occurred. This two years limit is important to bear in mind also when investigating the possibility to request a notification falling below the mandatory notification thresholds (see above) as well as when considering a new investigation of an already cleared and implemented merger (see below). The SCA must consider not only the time necessary for its own investigation but also the stipulated time periods in the Swedish Competition Act for the Stockholm City Court as regards the judicial process and the Market Court as regards an appeal of the decision of the first instance.

30. The obligation to notify before implementing the merger was introduced as late as in 2008. Before that, if the merger had not yet been implemented, the standstill obligation post notification was the same as today. Since 2008, the SCA has noted at least one case where the buyer had failed to notify a merger which occurred one year earlier, though it probably had no adverse effects on competition. However, from time to time the SCA receives telephone calls from lawyers asking what would happen if a company would fail to notify a merger or if the merger would be implemented prior to notification or before the SCA has taken its decision. In these cases, the SCA may only confirm that there are no direct sanctions against such measures, even if the parties of course bear the risk that an already implemented merger will eventually be prohibited. The SCA cannot rule out that some companies may consider gun jumping and initiate certain measures to pursue the merger, like coordinating certain features or strategies, or even fail to notify.

31. Therefore, in the above mentioned report, the SCA also stresses that it is not satisfactory that the parties may fail to notify without any sanctions, in particular since a merger may not be prohibited more than two years after it occurred.[5]

[5] The Swedish Competition Authority, *Konkurrensen i Sverige 2013* (2013:10).

32. It should, however, be noted that premature integration between competitors, like for example exchange of detailed information or coordination of strategies, may be subject to antitrust rules. In the already mentioned cartel case *Scandorama/Ölvemarks* (2012), the Stockholm City Court did not accept the objection that such activities had only formed part of the parties' preparation for an intended merger.

4. Subsequent review of previously cleared and consummated mergers

33. If the SCA has decided to clear a merger, court proceedings in order to prohibit the merger may be initiated only if the decision of the SCA was based on false information from a party to the concentration or other participants. Just like in cases where a merger should have been notified but was not, the law makes no difference as regards which remedies that may be considered. There is still a definite limit of two years after the merger occurred to take any action against the merger. It should be noted that there are no direct sanctions against the provision of false information. The SCA has never taken action to initiate a second review of an already investigated and cleared merger.