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Co-operative Antitrust in Remedy Design – Note by Sweden

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More documentation related to this discussion can be found at: oe.cd/card.

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1. Introduction

1. This contribution examines the experience of the Swedish Competition Authority (SCA) in the design of remedies using the example of three different merger investigations. In particular, it focuses on the question of cooperation with parties and third parties and the role of market tests when designing remedies.

2. The legal framework for remedies in mergers

2. If a question has arisen as to the SCA intervening against a merger according to Chapter 4, Section 1 of the Swedish Competition Act,¹ remedies proposed by a party involved in the merger may lead the SCA to take no further action.² For the SCA to refrain from taking action in light of such commitments, the remedies must fully resolve the competition issues identified and must be comprehensive and effective in all respects. However, in order for the SCA to accept the remedies, they must also be proportionate, meaning they should not go beyond what is necessary to address the specific competition issues.³ Furthermore, the remedies must be capable of being fully implemented within a short period of time.⁴ Remedies may be made subject to a fine in the event of non-compliance.

3. Market tests can be used to gauge the views of third parties to proposed remedies. The SCA may, however, refrain from market testing proposed remedies that it deems would not be able to remedy the competition issues identified in the case.

4. If the parties consider submitting remedies aimed at the SCA taking no action against the merger in phase 1, they should notify the authority of this and ensure that the remedies are submitted to the SCA as early as possible.

5. Remedies during phase 2 should be submitted to the SCA well in advance of the deadline for the final decision. If remedies are submitted at a late stage during phase 2, for example in the stage of an oral hearing, the parties should at the same time provide written consent to an extension of the deadline to enable the SCA to conduct a market test and assess whether the remedies solve the competition issues.⁵

¹ See an English version of the Swedish Competition Act here: https://www.konkurrensverket.se/en/competition/laws-and-rules/swedish-competition-act/#Chapter_4_Control_of_concentrations

² Chapter 4, section 4, Swedish Competition Act

³ This follows from section 5 of the Swedish Administrative Act (2017:900) which sets out the principles of legality, objectivity and proportionality, stating that a measure must never go further than necessary and may be taken only if the intended result is reasonably proportionate to the inconvenience or harm expected to arise for the person affected.

⁴ Cf. Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, para. 9

⁵ The Swedish Competition Authority's guidelines for notification and assessment of mergers p. 31-32 available here (in Swedish only):

3. Merger case examples

6. The following cases are presented to exemplify the SCA's engagement with parties and third parties in the design of remedies.

3.1. Strålfors / 21 Grams⁶

7. In November 2024, PostNord Strålfors AB (together with its subsidiaries, "Strålfors") notified the SCA of its intended acquisition of sole control over 21 Grams Holding AB (together with its subsidiaries, "21 Grams"). Both parties are active in the market for postal services.

8. During the SCA's investigation, information emerged indicating that the acquisition could result in anticompetitive effects in the markets (i) for intermediary services for physical and digital customer communications in Sweden,⁷ particularly in light of Strålfors gaining control over 21 Grams' software for postage optimisation through the concentration, and (ii) post distribution services.

9. Findings from the investigation also indicated that barriers to entry in the market were relatively high and that there was insufficient countervailing buyer power to offset the potential negative effects on competition that the concentration may cause in the intermediary segment of post distribution.

3.1.1. The initial remedies presented by the parties and the first market test

10. Shortly after the SCA informed the parties of its preliminary assessment about potential competition problems, the parties presented a first proposal of remedies. In short, the initial remedies presented focused on three main aspects:

- non-discriminatory ("FRAND") access to the postage optimisation services for other intermediaries,
- continued access to optimisation-based services for end customers (senders), and
- implementation of internal information barriers to prevent the dissemination of sensitive information.

11. Compliance with the remedies was also suggested to be monitored by an independent trustee with the power to review operations, handle complaints and require corrective actions.

12. Through the first market test and the feedback received, the SCA determined that the initial remedies presented by the parties would not be sufficient to address the competition issues which had been identified. From the responses received, it emerged that market participants generally did not consider the remedies sufficient to ensure competition or to ensure that postage optimisation services would continue to be offered to customers. It was also implied that the remedies did not sufficiently guarantee that Strålfors would be able to act independently with regard to the relevant services, without influence or interference from the parent company PostNord.

https://www.konkurrensverket.se/globalassets/dokument/konkurrens/ovriga-dokument/vagledning_foretagskoncentrationer_2025.pdf

⁶ Case no. 947/2024

⁷ I.e. printing/enveloping and distribution of physical and digital post.

3.1.2. The second market test and the procedure for implementing remedies

13. As a result of the feedback received from the first market test, a second market test was conducted based on a revised proposal of remedies. The SCA communicated the feedback from this market test to Strålfors and several revised proposals for remedies were later submitted.

14. The final proposed remedies were deemed as an appropriate way to address the remaining competition issues, and based on the information the SCA had already received through the previous market tests, the SCA decided that an additional market test would not be carried out.

15. The final remedies which were approved by the SCA included a functional separation, meaning that Strålfors would be organisationally separated from Postnord's distribution and make decisions independently from the rest of the Postnord Group. In addition, the remedies regulated Strålfors' conduct in several dimensions. This included an obligation to offer postage optimisation services on FRAND-terms, which will allow competing intermediaries to use these services after the acquisition. Strålfors was also required to offer intermediary services for physical and digital customer communications in Sweden that use 21 Grams' postage optimisation software to all of its end customers.

3.2. Arla Foods / Milko⁸

16. In June 2011, the SCA was notified of a merger between Arla Foods and Milko. Both parties were cooperative dairy associations that handled raw milk for their members and were involved in the production and sales of dairy products.

3.2.1. The SCA's assessment of the failing-firm defence

17. During the SCA's investigation, the question of a potential "failing firm" defence was examined, which ultimately had a bearing on the subsequent remedies proposed. It emerged that Milko was in a very difficult financial situation and was likely facing bankruptcy in the absence of a merger with Arla Foods. The SCA therefore concluded that the first criterion for a failing firm defence was deemed to be met.⁹ According to the SCA's assessment, however, it remained unclear whether the second criterion—whether less anti-competitive alternative buyers had been thoroughly explored by Milko—had been fully investigated. Under the circumstances, it had also not been demonstrated that the third criterion for a failing firm defence—namely, that Milko's assets would inevitably exit the market in the absence of the merger—was fulfilled. On the contrary, during the SCA's investigation, several parties had expressed an interest in Milko's Grådö dairy facility as well as in some of Milko's brands. In conclusion, the SCA found that not all the conditions for a failing firm defence were met and, shortly after this conclusion, a discussion on approving the merger through remedies started.

3.2.2. Assessment of Arla Foods' remedy proposals

18. In October 2011, Arla Foods offered remedies concerning the divestment of the Grådö dairy and certain brands and assets of Milko related to the production of fresh

⁸ Case no. 445/2011

⁹ In its assessment of a failing firm defence, the SCA applies the criteria set out in the European Commission's Notice: Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 5.2.2004), paragraphs 89–91.

products and associated trademarks. The voluntary remedies were tested by the SCA, which gathered feedback from ten market participants, including the parties' closest competitors and other potential stakeholders. The feedback received primarily concerned the acquirer's ability to access local raw milk supplies. However, from its investigation the SCA knew that there were farmers interested in supplying raw milk to another player than the merged entity. Third parties could also provide useful insights into what a divested dairy should include in order to ensure its viability and competitiveness.

19. Arla Foods later proposed revised remedies which included a divestment of the Grådö facility including staff. The SCA also requested information to assess whether the minimum price for the Grådö facility stated in Arla Foods' voluntary commitments actually constituted a cautiously estimated scrap value, i.e. the amount the assets would fetch if sold by a bankruptcy trustee.

20. Following the information received, the SCA made the assessment that it could not be ruled out that a merger involving the takeover of staff may be associated with future costs such as accrued pension rights for staff at Grådö. However, Arla Foods stated that in the event of a transfer of the Grådö facility, no liabilities relating to past periods would be transferred to the buyer. This type of cost or liability should therefore not affect the scrap value stated by Arla Foods.

21. Consequently, the SCA concluded that the concentration would not result in a worse competitive structure in the relevant markets than would have prevailed after a bankruptcy liquidation of Milko's assets and approved the remedies and left the merger unchallenged.

22. Milko's brands included in the remedies were quickly sold to various players, while the sale of the Grådö dairy facility was eventually handled by the monitoring trustee. The price received for the dairy by far exceeded the estimated scrap value.

3.3. Kronfågel / Lagerberg¹⁰

23. In June 2015, the SCA received a notification regarding Kronfågel Holding AB's (Kronfågel) acquisition of Lagerberg i Norjeby AB (Lagerberg). Both companies were active in the slaughtering/production and sale of chicken products in Sweden.

24. The SCA identified two relevant markets where the acquisition risked significantly impeding competition: the sale of rotisserie chicken and chilled chicken products to the grocery retail sector in Sweden. The SCA noted that even prior to the acquisition, Kronfågel was already the single largest player in both the rotisserie chicken and chilled chicken segments. Following the concentration, the SCA noted that Kronfågel would attain a market share that clearly exceeded that of its largest competitor, Guldfågeln. The SCA deemed that Lagerberg, as the third-largest player, played an important role in maintaining competitive pressure. This pressure would disappear if the concentration were approved, which the SCA believed could result in higher prices for consumers.

3.3.1. *Kronfågel's proposed remedies were deemed insufficient*

25. During the investigation, Kronfågel submitted remedies aimed at facilitating the expansion or market entry of other chicken producers. Kronfågel also presented a possible taker of the proposed remedies. The remedies entailed *inter alia* an annual slaughter and delivery of up to one million chickens, raised by Kronfågel's growers, to one or more

¹⁰ Case no. 472/2015 (notification of intended acquisition) and case no. 52/5016 (summons application)

operators. The SCA tested these remedies by asking a number of stakeholders to respond to specific questions. The SCA primarily sought information to assess whether the remedies would be sufficient for the new player to establish itself in the market and replace the competitive pressure previously exerted by Lagerberg within a reasonable period of time. The responses to the market test provided a clear indication that this would not be the case. Most of the respondents considered that the content of the remedies would not have a particularly significant impact on the competitiveness of the market. A large number of respondents stated *inter alia* that the volumes proposed in the remedies were too low.

26. A second market test was conducted after Kronfågel submitted a revised proposal for remedies to the SCA. The revised remedies also included the divestment of a slaughterhouse to another company. However, the SCA concluded that this proposal also failed to restore effective competition. One factor was the strong relationship between chicken producers and chicken breeders, where a chicken breeder would be reluctant to end its relationship with a large established producer for a new small entrant. The SCA therefore decided to bring an action to prohibit the concentration before the Stockholm District Court. In March 2016, Lagerberg announced it had found another buyer, and Kronfågel withdrew its notification following the decision not to proceed with the transaction. As a result, the SCA withdrew its case, and the District Court closed the proceedings.

4. Engagement with parties

27. The question of timing is important when it comes to engagement with parties and any potential remedy proposals. In some cases, parties have proposed remedies after the SCA has presented its statement of objections. In other cases, parties have proposed remedies at an early stage, before firm objections have been articulated. There are potential risks and benefits with each. On the one hand, early engagement by parties can contribute to a constructive dialogue and greater opportunities for market testing, which can increase the likelihood of appropriate remedies being found. On the other hand, the earlier the remedies are submitted, the harder it can be for the competition authority to assess their potential impact on the markets concerned and the likelihood of them eliminating the issues identified. As noted above, remedies in phase 1 can only be considered when the competition problems are clear and simply to remedy. The power to “stop the clock” of the statutory deadlines for merger review can be an important tool to ensure that potential commitments can be adequately market-tested and assessed, especially when commitments are offered late in proceedings.

28. As reflected in the OECD recommendation on merger review,¹¹ structural commitments are, as a rule, preferable to behavioral ones.¹² One reason for this is the difficulty in monitoring compliance with behavioral commitments, even in cases where breaches of commitments could result in a fine. As shown above, the introduction of structural remedies has been one method explored by different parties in order to strengthen the viability of remedies proposed.

29. Another important issue exemplified by the cases above is the importance of the competition authority communicating why remedies have been rejected as insufficient, in

¹¹ OECD, Recommendation of the Council on Merger Review, [OECD/LEGAL/0333](#)

¹² Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004

order to provide clarity to the parties about where proposed remedies could be improved. This can also speed up the process of designing appropriate remedies.

30. It can be challenging for a competition authority to identify clear minimum requirements for remedies proposed by parties in a scenario where remedy proposals could in theory eliminate the issues identified but where there are complex market structures or technical aspects that would make effective monitoring practically difficult. Market testing can be instructive in such cases.

5. Engagement with third parties

31. As shown in the case examples above, market tests have a central role in the consultation of third parties about the design of remedies. Market tests can either be conducted by openly publishing draft remedies and inviting comments, or by issuing mandatory information requests to market participants. The latter option can be used to ensure engagement with the process.

32. There are various examples of market tests impacting the SCA's ultimate assessment of the effectiveness of remedies. For example, the SCA has in its investigations faced objections from third parties in initial market tests which have called into question the proposed remedies' capacity to resolve the competition concerns. Third party contacts also provide important insights in the dynamics of the market, which may help the authority to assess the remedies. As exemplified in the cases above, this may ultimately lead to remedies being strengthened or, as in the Kronfågel/Lagerberg case, to the conclusion that the remedies remain insufficient.

33. One general challenge that competition authorities face when assessing the effectiveness of remedies through a market test is to distinguish between legitimate criticism of the ability of remedies to alleviate competition concerns and a general distrust of the acquisition or to the parties involved, for example where trust within the industry is likely to be low. In the examples described above, Strålfors, Arla Foods, and Kronfågel all held very strong positions within their respective industries, and Strålfors was owned by the former postal monopolist and incumbent PostNord. While the general distrust towards such players may to a certain extent be disregarded, it is important to ensure that it does not in itself jeopardise the effectiveness of the remedies, something the SCA was particularly aware of in Strålfors/21 Grams.

34. Further, it is not unusual that third parties expect remedies to correct problems in the market that are independent of, and unaffected by, the merger. As an introduction to the market test, a short description of the identified competition problems in the case helps third parties to understand and focus on what the proposed remedies are supposed to solve. Questions should cover different aspects in an objective way and encourage motivated answers.

35. Still, the characteristics and dynamics of a market before the merger may contribute to the ability, or non-ability, of remedies to alleviate competition concerns. In Kronfågel/Lagerberg, the remedies could not restore the competitive pressure from Lagerberg that would disappear due to *inter alia* the volumes required, the strong relationships between producers and breeders and the risks involved for a breeder to switch to another producer. In Arla Foods/Milko, on the other hand, the remedies were intended to restore only the merger-specific effects compared to a situation where Milko was to become bankrupt, and there were credible potential buyers to the assets that would be divested and farmers interested in supplying raw milk to a new owner of the dairy.

36. In the same vein, it is also important for competition authorities to develop an appropriate framework in each case for weighing the representations by parties against the views of third parties. For example, in Arla Foods/Milko, the SCA had to weigh high expectations from some potential buyers on what should be included in the dairy divestiture, including guaranteed supplies of raw milk, against the picture painted by a bankruptcy trustee of the likely proceedings in case of bankruptcy, where all assets would probably be sold off as quickly as possible. Third parties may call for terms and conditions that could provide a leverage or transfer commercial risks in a way that may distort normal commercial negotiations in the future.