

Only the Swedish version is authentic

## **Guidance from the Swedish Competition Authority for the notification and examination of concentrations between undertakings**

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## Scope and aim

1. This Guidance contains information about how the Swedish Competition Authority handles concentrations between undertakings (“concentrations”) in accordance with the Swedish Competition Act (2008:579). The purpose of the Guidance is to promote awareness about the Swedish Competition Authority’s examinations, promote an enhanced level of foreseeability, and ensure the conditions for good cooperation between the parties and the Swedish Competition Authority in order that investigations can be conducted in the most effective and appropriate way possible.
2. The Guidance is based on the Swedish Competition Authority’s experiences from previous examinations of concentrations. New experiences may alter the procedures of the Swedish Competition Authority and may also result in changes to this Guidance. This Guidance replaces the guidance of 15 April 2015 (file ref. 581/2014).
3. This Guidance is not binding for the Swedish Competition Authority and it does not affect any rights or obligations for the parties or others. Special circumstances in a case may require an adaptation of or a deviation from the approach set out in the Guidance.

## Rules on concentrations between undertakings

4. This Guidance does not contain an exhaustive description of the rules on concentrations. Rules concerning the review of concentrations can be found in the Swedish Competition Act and the Swedish Competition Authority’s Regulations on the Notification of Concentrations between Undertakings under the Swedish Competition Act (2008:579) (KKVFS 2010:3) with related instructions regarding what information should be provided in the notification (“the Instructions”). For more detailed information, see also the Government Bills entitled *Ny konkurrenslag m.m* [The New Competition Act, etc.] (Government Bill 2007/08:135, Report NU 2007/08:14), *Förbättrad konkurrenstillsyn* [Improved Competition Enforcement] (Government Bill 2013/14:135), *Patent- och marknadsdomstol* (Patent- and Market Court] (Government Bill 2015/16:57, Report NU 2013/14:25), and *Ändringar i konkurrenslagen* [Changes in the Competition Act] (Government Bill 2017/18:15, Report NU 2017/18:5), as well as the Swedish Competition Authority’s website ([www.konkurrensverket.se](http://www.konkurrensverket.se)).
5. The European Union’s (EU) Merger Regulation, EUMR<sup>1</sup>, is also relevant when applying the Swedish Competition Act. Guidance for the interpretation of certain common terms and their application can be found in the European Commission’s currently applicable notices and guidelines that are available

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<sup>1</sup> Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings

on the European Commission's website ([www.ec.europa.eu/competition](http://www.ec.europa.eu/competition)).  
Note in particular:

- a) Commission Consolidated Jurisdictional Notice Under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (2008/C/95/01)
  - b) Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03)
  - c) Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03)
  - d) Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 (2008/C 267/01)
  - e) Commission notice on Case Referral in respect of concentrations (2005/C 56/02)
  - f) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03)
  - g) Guidelines on the assessment on non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07)
6. The Guidance contains references to the European Commission's guidelines and notices. These references are not exhaustive.
  7. The Swedish Competition Authority handles notifications of concentrations in accordance with the provisions of the Swedish Competition Act and the Administrative Procedure Act (1986:223).
  8. Secrecy applies to the extent provided by the Public Access to Information and Secrecy Act (2009:400).

#### **Prohibition of certain concentrations between undertakings**

9. A concentration that is examined by the Swedish Competition Authority shall be prohibited if it would significantly impede the existence or development of effective competition within the country as a whole, or a substantial part thereof. In its review, the Swedish Competition Authority

will especially take into consideration whether the concentration results in a dominant position being created or strengthened.

10. If it is sufficient to eliminate the adverse effects of a concentration, the Swedish Competition Authority may, instead of prohibiting a concentration, issue an order to a party to the concentration to, for example, divest an undertaking or a part of an undertaking, or take some other measure which has a favourable effect on competition.
11. The Swedish Competition Authority's decision to prohibit a concentration or issue an order takes effect immediately, unless otherwise indicated. The decision may be appealed to the Patent and Market Court, and to the Patent and Market Court of Appeal in the final instance.

### **What is a concentration between undertakings?**

#### **Control**

12. A concentration between undertakings arises if there is a lasting change of control of an undertaking.
13. A lasting change of control may occur through two or more independent undertakings merging or through one or more undertakings gaining control (sole or joint control) of an undertaking or parts of an undertaking. An internal restructuring within a group of companies does not constitute a concentration. Control means the possibility of exerting a decisive influence over an undertaking. Control normally exists when a party is able to exercise more than half of the voting rights in an undertaking. Control may also exist in the case of a minority stake, if this stake constitutes by far the largest shareholding. In addition, control may exist due to contractual ties, joint senior management functions, a significant influence on senior management or financial ties. Control can also be exercised through the possibility of blocking strategic decisions; i.e. having a right of veto.
14. For further guidance, see the European Commission's Consolidated Jurisdictional Notice.

#### **Joint ventures**

15. The creation of a joint venture may fall within the framework of the Swedish Competition Act's review of concentrations if two or more undertakings, i.e. parent companies, achieve joint control of an undertaking that performs on a lasting basis all of the functions of an autonomous economic entity. Please note that the term "parent company" in this context is not synonymous with the term "parent company" as defined in the Swedish Companies Act.

16. The joint venture must operate in a market and perform the functions normally carried out by undertakings operating on the same market. In order to do this the joint venture must have a management dedicated to its day-to-day operations and sufficient resources to conduct its activities on a lasting basis. Thus, a joint venture that is created solely to implement a certain temporary project is not a concentration between undertakings according to the Swedish Competition Act.
17. If an undertaking that jointly controls another undertaking acquires additional parts of this undertaking, so that it instead gains sole control, this change means that a concentration between undertakings arises.
18. For further guidance, see the European Commission's Consolidated Jurisdictional Notice.
19. When two or more undertakings create a joint venture, this may lead to a coordination that also relates to the parent companies' competitive conduct. When assessing coordinated effects, the Swedish Competition Authority will particularly note if two or more parent companies at the same time and to a significant extent are present in the same market as the joint venture or in a market that is closely related to this market. Account will also be taken of whether the coordination provides the undertakings concerned the opportunity to eliminate competition concerning a large part of the products or services in question.

### **Notification to the Swedish Competition Authority**

#### Obligation to submit a notification

20. A concentration between undertakings must be notified to the Swedish Competition Authority if (1) the combined aggregate turnover in Sweden of all the undertakings concerned in the preceding financial year exceeded SEK 1 billion (the "one billion threshold"), and (2) at least two of the undertakings concerned had a turnover in Sweden the preceding financial year that exceeded SEK 200 million for each of the undertakings (the "200 million threshold").
21. A notification shall normally be made by the party or parties acquiring control. If the concentration means that two or more undertakings acquire joint control, or if two or more undertakings are merged, the concentration shall be notified by all of these undertakings.
22. A concentration can be notified before a binding agreement has been entered into if the parties can demonstrate that they intend to implement the concentration. The plan for the proposed concentration should be sufficiently concrete, for example in the form of a principal agreement or a letter of intent

signed by the parties. Regarding public tenders, a published or binding public offer is accepted as a letter of intent. A notification shall be made before the concentration is implemented.

#### Order to notify and voluntary notification

23. If the one billion threshold is reached but the 200 million threshold is not, the Swedish Competition Authority may require a party to notify the concentration where particular grounds exist for doing so. Examples of what may constitute particular grounds include when an already strong undertaking gradually buys up small competitors or when a strong undertaking in a concentrated market acquires a newly established undertaking that could possibly challenge the position of the acquirer.<sup>2</sup> Complaints from, for example, customers and competitors may also constitute particular grounds for requiring notification, if the Swedish Competition Authority makes the preliminary assessment that the concerns expressed are of such a nature that competition could possibly be seriously impaired as a consequence of the concentration.
24. The Swedish Competition Authority may order a party to notify horizontal mergers where the merging undertakings are competitors, and concentrations with vertical links where the purchaser and the target company operate at different levels of the supply chain. For the Swedish Competition Authority's preliminary assessment it is important if, for example, the undertakings combined attain large market shares or are close competitors. If the undertakings operate at different levels regard will be given to whether one company, for example, is an important supplier of an input good upstream or a significant customer and sales channel downstream. Concerns regarding the concentration may apply to, for example, the risk of price increases or reduced supply for consumers.
25. The Swedish Competition Authority will contact the undertaking in question before making a decision about ordering an undertaking to submit a notification of concentration.
26. The Swedish Competition Authority does not provide guarantees in advance that an order to notify will not be made. It may be difficult to assess what effects a concentration may have before the concentration is made public and it is possible to make contact with different market participants.
27. A party or another participant can voluntarily notify a concentration when the one billion threshold is reached, but the 200 million threshold is not. In that way the parties themselves can start the time limits for the review in situations where they consider the Swedish Competition Authority may issue

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<sup>2</sup> See Government Bill 1996/97:82 p. 10 f. and Government Bill 2007/08:135, p. 201 f.

an order to notify. A voluntary notification may be appropriate in, for example, cases where the parties are aware that they have high market shares or may attain high market shares as a result of the concentration, or that the concentration may be expected to generate relevant criticism from customers or competitors.

#### Undertakings concerned

28. The “undertakings concerned” are normally the merging undertakings or the undertaking(s) that acquires control over another undertaking together with the undertaking over which control is acquired. For further guidance, see the European Commission’s Consolidated Jurisdictional Notice.

#### Turnover

29. “Turnover” for the preceding financial year means the turnover of the undertakings concerned for all goods and services. The latest adopted annual accounts should normally be used, even in cases where any of the undertakings concerned have a split financial year. In the event of a change of the financial year, the turnover may need to be adjusted so that it refers to a 12 month period. If the undertakings concerned form part of a group of companies, the group’s aggregate annual turnover shall be used when calculating annual turnover. If the acquisition pertains to a part of an undertaking, a corresponding calculation of turnover shall relate to the part acquired. For further guidance, see the European Commission’s Consolidated Jurisdictional Notice.
30. Several transactions between the same persons or undertakings, whereby parts of one or more undertakings are acquired during a two-year period, shall be treated as one and the same concentration between undertakings for the purposes of calculating the turnover. It is sufficient that the transactions are conducted between undertakings that belong to the same respective groups, even if they are not conducted between the same legal persons.

#### **Notification and referral to the European Commission or to the Swedish Competition Authority as well as notification to several Member States within the EU**

##### EU dimension

31. If a concentration between undertakings has an “EU dimension”, a notification shall be made only to the European Commission and not to the Swedish Competition Authority. An “EU dimension” may exist if the aggregate turnover of the undertakings concerned exceeds EUR 2.5 billion and the undertakings are engaged in business activities in several Member States. For further guidance, see Article 1 of the EU Merger Regulation.



## Referrals

32. The examination of a concentration may, under certain conditions, be referred from the European Commission to a national level or from a national level to the Commission.
33. If a concentration has an EU dimension but impacts competition in a distinct market in Sweden, the European Commission may refer the concentration to the Swedish Competition Authority at the request of the parties before it has been notified to the Commission. If the concentration has already been notified to the Commission, the Swedish Competition Authority can instead request that the Commission refers the concentration to Sweden. See also articles 4(4) and 9 of the EU's Merger Regulation and the Commission Notice on Case Referral of concentrations.
34. A concentration that *per se* lacks an EU dimension may in certain cases still be examined by the European Commission. If the concentration can be examined according to national legislation in at least three Member States, the notifying party may request referral to the European Commission before the national authorities are notified of the concentration. After a notification has been made to the Swedish Competition Authority, the Authority may request a referral to the Commission if the concentration has the potential to affect trade between Member States. See also Articles 4(5) and 22 of the EU's Merger Regulation and the Commission Notice on Case Referral of concentrations.
35. The parties are encouraged to consider in advance whether it may be appropriate to request a referral to the European Commission or to a Member State. A referral that is requested in advance normally functions more smoothly and is less resource-intensive than a request for referral from the competition authorities after the concentration has already been notified.

## Notification to several Member States

36. The national competition authorities within the EU have a working group together with the European Commission, referred to as the "EU Merger Working Group". The purpose of this cooperation is, among other things, to facilitate and streamline the examination of concentrations that are subject to notification in several Member States, referred to as "multi-jurisdictional concentrations". The working group has produced best practices for cooperation in such concentrations.<sup>3</sup> These best practices also refer to other relevant documents that have been developed over the years between the competition authorities regarding, among other things, exchange of

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<sup>3</sup> EU Merger Working Group, Best Practices on Cooperation EU between EU National Competition Authorities in Merger Review, 8 November 2011, [http://ec.europa.eu/competition/ecn/nca\\_best\\_practices\\_merger\\_review\\_en.pdf](http://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf)

information on multi-jurisdictional concentrations and principles for cooperation in connection with referrals in accordance with Articles 4(5) and 22. All documents can be found on the Commission's website.<sup>4</sup>

37. In a multi-jurisdictional concentration the parties should strive to synchronise the timing of notifications in different countries and also facilitate communication between the competition authorities concerned prior to the notification. It may also be appropriate both before and during the examination to ensure that the different competition authorities have access to the same information where possible. One way of doing this may be to allow competition authorities to exchange confidential information through a waiver.<sup>5</sup> This way a situation can be avoided where the competition authorities come to different conclusions regarding effects or commitments, despite there being similar competitive conditions.

## **Review periods**

### **Complete notification**

38. The review period for the examination of the concentration does not commence until the notification is complete. A notification is complete when the information that is to be provided according to the Instructions<sup>6</sup> has been received by the Swedish Competition Authority.
39. In order to improve the prospects of the notification being complete from the start, the parties should make prior contact with the Swedish Competition Authority. See more about this below in the section 'Pre-notification contacts'.
40. Regarding the Swedish Competition Authority's procedures for an incomplete notification, see below in the section 'Processing by the Swedish Competition Authority'.

### **The 25-day time limit (Phase 1)**

41. Once the notification is complete the Swedish Competition Authority shall decide within 25 working days whether to carry out an in-depth investigation of the concentration or to take no further action (Phase 1).

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<sup>4</sup> <http://ec.europa.eu/competition/ecn/mergers.html>

<sup>5</sup> See for example Appendix A, ICN Model Waiver Form, <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>, which is also an appendix for Best Practices, [http://ec.europa.eu/competition/ecn/nca\\_best\\_practices\\_merger\\_review\\_en.pdf](http://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf)

<sup>6</sup> See the Swedish Competition Authority's provisions on notification of concentration between undertakings according to the Swedish Competition Act (2008:579), (KKVFS 2010:3)

42. The 25-day time limit is temporarily suspended if one or more Member States request that the concentration be referred to the European Commission. See Article 22(2), third paragraph of the EU Merger Regulation.
43. If the Swedish Competition Authority has received a proposed commitment within the 25-day time limit with a view to the authority clearing the concentration, Phase 1 shall be extended to 35 working days.
44. In simpler cases, the Swedish Competition Authority may reach a decision considerably earlier than the 25<sup>th</sup> working day. By simpler cases the Swedish Competition Authority refers to such concentrations that do not involve any horizontal or vertical relationships between the companies in question, or where such relationships clearly cannot result in competition being impeded on any market. It is the ambition of the Swedish Competition Authority to decide on such cases within 15 working days.

#### The three-month time limit (Phase 2)

45. The Swedish Competition Authority has three months from the time of the decision to initiate an in-depth investigation to decide whether to take measures against the concentration. Before the Swedish Competition Authority adopts a prohibition decision or issues an order, the undertakings concerned shall be given the opportunity to comment on the Authority's draft decision. See more under the section 'Draft prohibition decision or order'.

#### Extension of the three-month time limit

46. With the consent of the parties, the Swedish Competition Authority may decide to extend the three-month time limit in Phase 2 by a maximum of one month at a time. If there are extraordinary reasons, the Swedish Competition Authority can extend the time limit without consent from the parties.

#### Suspension of the time limit

47. If a party in a concentration has not complied with an order from the Swedish Competition Authority to, for example, provide certain information or documents that are required for the review, the Authority may suspend the time limit in phase 1 or phase 2, known as "stopping the clock". The time limit recommences from the first working day after compliance with the order. Non-compliance with the order may, for example, involve the requested information not being submitted at all or being submitted late, or the information being false, incomplete or misleading. See more about orders under the section 'Gathering information'.
48. The Swedish Competition Authority can also suspend the time limit during phase 1 upon the request of a party to the concentration for as many working

days as the Authority decides. This possibility can, for example, be used if it becomes apparent to a party to the concentration that the Swedish Competition Authority envisages problems with the concentration which the undertaking has not highlighted. The party may then require more time to demonstrate that those problems will not arise, in order to have the concentration cleared during phase 1.

49. As described in paragraph 47 above, “Stopping the clock” is a temporary suspension of the time limit. The time limit recommences as soon as the party has complied with the Swedish Competition Authority’s order. Correspondingly, a request from a party to suspend the time limit should be reserved for situations where the party can in a reasonably concrete manner account for the information it intends to produce, and in what way this information is expected to lead to the concentration being cleared during phase 1. The efforts and the time required for the party to provide this information should be limited.

#### Working days

50. Working days pertains to days that are not public holidays under the Act on Public Holidays (1989:253) and that are not Saturdays, Midsummer’s Eve, Christmas Eve or New Year’s Eve.

#### Prohibition on implementation

51. Notifications of concentrations between undertakings should be made before the concentration is implemented; see the last sentence of paragraph 22 above.
52. Before the Swedish Competition Authority has made a decision to clear a concentration, the parties and other participants to the concentration may not, without special consent from the Swedish Competition Authority, take any actions to partially or fully implement the concentration. This prohibition applies throughout the Swedish Competition Authority’s examination (Phase 1 and 2). If it becomes necessary to ensure compliance with the prohibition on implementation, the Swedish Competition Authority may issue a prohibition or injunction to the parties or other participants in the concentration.
53. When an acquisition of control occurs in a regulated market (exchange) or an MTF platform<sup>7</sup> in such a way that, in practice, it is not possible to notify the concentration before it is implemented, the Swedish Competition is of the view that the prohibition on implementation covers all forms of utilisation of the rights related to the securities. Before the 25-day limit has lapsed, the Swedish Competition Authority can, upon request by the purchaser, grant

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<sup>7</sup> For a more detailed definition of the terms regulated market and MTF platform (multi-lateral trade platform or multi-trading facility), see chapter 1 §4 b of the Securities Market Act (2007:528)

exemption from the prohibition so that the purchaser can exercise the voting rights which accompany the securities in question, if this is needed in order to maintain the full value of the investment and this can take place without damaging competition.

54. The parties should note that certain actions prior to a concentration between undertakings, such as exchanging sensitive business information or coordinating behaviour on the market, can violate the prohibition against anticompetitive agreements in the Swedish Competition Act and in the Treaty on the Functioning of the European Union. This applies regardless of whether or not the concentration is subject to notification.

### **Pre-notification contacts**

#### Advantages of pre-notification contacts

55. The review period for the Swedish Competition Authority to make a decision on a concentration commences on the day on which a complete notification is submitted to the Authority. Pre-notification contacts increase the prospects of the notification being complete from the start.
56. Through pre-notification contacts, the Swedish Competition Authority and the parties can identify at an early stage what questions or circumstances may need to be specifically investigated during the examination or, in certain cases, even prior to notification. This may involve formal issues such as which undertakings are to be regarded as “undertakings concerned” or whether the case actually involves a concentration between undertakings according to the Swedish Competition Act. It may also involve questions concerning the legal assessment of the concentration between undertakings.
57. Pre-notification contacts well in advance of the notification, thorough drafts of the notification and meetings involving representatives of the undertakings will enhance the ability of the Swedish Competition Authority to identify complicated cases at an early stage, allocate resources in the form of a complete project team and plan which investigative measures should be taken.
58. Thorough pre-notification contacts can result in a complicated case not requiring an in-depth investigation, or the Swedish Competition Authority’s and the parties’ time and resources being spent on the most central issues in the case from a competition perspective. The earlier in the investigation that the Swedish Competition Authority has access to relevant information and documents, the more efficient the examination can be.

#### The extent of the obligation to submit information

59. In connection with pre-notification contacts it is possible to discuss the extent of the obligation to submit information according to the Instructions. The question of which information should be submitted for a complete notification is dependent upon the relevant market definitions in the case in question.
60. Guidance regarding market definition can be obtained from previous rulings made by the courts, the Swedish Competition Authority and the European Commission. If the parties' understanding of a relevant market deviates from previous rulings it may, in order for the Swedish Competition Authority to assess the effects of the concentration, also be necessary to provide information according to these previous market definitions. The parties should also provide specific reasons why they consider a different assessment should be made in the case in question. Prior to submitting a notification, the parties should also consider whether there are other alternative market definitions that may be relevant to report.
61. For an effective examination of the concentration, it is of great value if, during the pre-notification contacts with the Swedish Competition Authority, the notifying parties attempt to anticipate negative comments that may arise from, for example, customers and competitors, and submit relevant information to counter these when making the notification.
62. The pre-notification contacts also give the Swedish Competition Authority an opportunity to anticipate to a certain extent the need for further details from the parties prior to the pending examination, beyond what is required for a complete notification according to the Instructions. The Swedish Competition Authority's examination can be performed more effectively if the parties submit such information in connection with submitting the notification.
63. The Swedish Competition Authority may grant an exemption from the requirement for information if certain details are not available or are not necessary for the Authority's examination.

#### The form of pre-notification contacts

64. The pre-notification contacts may involve one or several meetings between the parties to the concentration and Swedish Competition Authority officers. These meetings may sometimes be replaced by a telephone conference. In these meetings, the parties should be represented by company representatives who have good knowledge of the market conditions and by legal experts.
65. In order for a pre-notification meeting to be constructive, the Swedish Competition Authority needs to receive supporting documents at least three

working days prior to the meeting. These can, for example, take the form of a memorandum describing the concentration and the operations of the parties involved or a draft notification. In the pre-notification meetings the participants should discuss which types of information, statistics or other data on the markets are available externally or internally, and whether the parties intend to present such data in order to demonstrate any factual circumstances. In cases where economic analyses may be carried out, it is appropriate to have a discussion on methodological issues at the earliest stage possible. See also the section Specific information on economic analysis in concentration cases.

#### Secrecy in pre-notification contacts

66. Pre-notification contacts regarding proposed concentrations can be made before the concentration has become public. Pre-notification contacts are subject to absolute secrecy according to the Public Access to Information and Secrecy Act. Secrecy also applies to submitted documents and the identity of the undertakings. When a final notification is submitted, the pre-notification case is closed, with reference made to the new case. After this, secrecy applies to information about business or operational circumstances of private parties etc. if it can be assumed that disclosure of the information would cause damage to the private party. In pre-notification cases that do not lead to a notification on concentrations between undertakings, absolute secrecy continues to apply. See more on secrecy under the section Public access to information and secrecy.
67. The parties may also have pre-notification contacts with the Swedish Competition Authority before a request for referral is made under Articles 4(4) or 4(5) of the EU Merger Regulation. Absolute secrecy also applies to these cases until a final notification has been made in accordance with the European Commission's Form CO and the concentration is published on the Commission's website, or a notification has been made to the Swedish Competition Authority.

#### Preliminary assessments

68. The assessments provided to the parties by the Swedish Competition Authority in connection with a pre-notification meeting are only preliminary. Depending on the circumstances of the individual case the Swedish Competition Authority may make different assessments once the notification has been received by the Authority.

## **Processing by the Swedish Competition Authority**

### Submission of a notification

69. A notification can be submitted or sent to the Swedish Competition Authority in paper form, or preferably by email to [konkurrensverket@kkv.se](mailto:konkurrensverket@kkv.se). If the email notification (electronic notification) is extensive, it may need to be divided up into several emails.
70. A notification that is received through email is considered as being received on the date the email reaches the Authority. The review period commences on the next working day, which is counted as day 1.
71. For an electronic notification to be considered complete from the date on which it was submitted to the Swedish Competition Authority, the original copy of a signed declaration (see Section E of the Instructions) must be submitted to the Swedish Competition Authority within three working days. However, other documents do not need to be submitted in paper form when the notification has been made electronically. In order to avoid unnecessary printouts, please state in the email whether the notification, or parts of it, will also be submitted in paper form.
72. When a notification is submitted through email, all appendices should be attached to the email as separate files and not in one single PDF. It is preferable if the summary (see section D of the Instructions, KKVFS 2010:3) is submitted as its own appendix and attached in a separate file.

### The language of a notification

73. The information requested in the Swedish Competition Authority's regulations should be submitted in a compilation in Swedish. However, it is normally not necessary to translate transfer agreements, annual reports and other documents.

### Non-confidential version of the notification

74. Many concentrations generate public interest and it is not unusual for journalists, customers or competitors to ask for details of a notification. For this reason the notification should indicate those parts that, in the opinion of the notifying party, are subject to secrecy under the Public Access to Information and Secrecy Act (2009:400) as well as the reasons for the request for secrecy. A non-confidential version of the information about the concentration provided under section C in the Instructions should be attached to the notification from outset.

### The notification is received

75. When the notification is received, two officers are normally appointed, one of whom has the main responsibility for the case. If the notification has been



preceded by pre-notification contacts, the Swedish Competition Authority will attempt, as far as possible, to ensure that the officers involved in these prior contacts also participate in the continued processing of the case. In more complicated investigations and for decisions on in-depth investigations, a special project team is appointed.

76. The summary of the concentration attached to the notification is published on the Swedish Competition Authority's website. The purpose of the publication is to inform the general public about the concentration and to provide, for example, customers and competitors with the opportunity to submit opinions to the Swedish Competition Authority.
77. To begin with, the officers will review the notification to see if any mandatory information or documents are missing in accordance with the Instructions. If, during this initial review, it turns out that something is missing, the Swedish Competition Authority will promptly request supplementary information from the notifying party, with reference to the relevant item in the Instructions. Once the requested information or documents have been received by the Swedish Competition Authority, the Authority will provide information about the new date which is provisionally the last date for a decision in Phase 1. If deficiencies are gradually brought to light as the case progresses, the Swedish Competition Authority will request supplementary information. The principle that this must be done promptly also applies in this case. The 25-day limit does not commence until the notification is complete. The Swedish Competition Authority strives to discover and draw attention to any deficiencies at an early stage of the processing of the case.

#### Complete and incomplete notification

78. A notification is complete once all the information has been submitted in accordance with the Instructions. The Swedish Competition Authority can make a decision on an individual case despite mandatory information not having been provided. This applies if the information is not available or not necessary for the Swedish Competition Authority's examination of the concentration.
79. If information is missing in the notification the Swedish Competition Authority can also in certain situations give the notifying party an opportunity to promptly supplement the notification, without this affecting the date of completeness of a notification. A precondition for this is that the information is of such a nature that it does not affect the ability of the Swedish Competition Authority to effectively start to investigate the effects of the concentration. Incomplete address and contact details for the parties or a missing annual report are examples of this. In such cases, a notification may be supplemented without it affecting the date of the complete notification, under the condition that the supplementary information is provided without

delay (normally within one working day from when the deficiency has been pointed out). However, several minor inadequacies in the same notification may together cause such a delay to the work of the Swedish Competition Authority that the notification may only be considered complete once supplementary information has been provided.

80. Some information is in principle always of importance in order for the Swedish Competition Authority to be able to start an investigation. It is, for example, important that the notification contains the information and documents required by the Swedish Competition Authority in order to establish that the Authority has the jurisdiction to investigate the concentration, as well as a correct and complete description of the market. It is also important that the parties' market definition relates to earlier precedent and general knowledge concerning the sector.
81. If the parties' market definition deviates from earlier precedent or general knowledge concerning the sector, the notification should explain the reasons for this. It may then also be necessary to submit information in accordance with previous market definitions or general knowledge of the sector. If several different market definitions appear to be plausible, the notification should also describe alternative market definitions that may be relevant. In cases where the parties' market description is misleading or if market definitions deviate from previous precedent or general knowledge of the sector without a reasonable explanation, the notification will be considered incomplete.
82. The notification will also be considered incomplete if it lacks contact details for customers, competitors and – for the markets concerned – suppliers, or if the contact information has such deficiencies that the Swedish Competition Authority is unable to use it. See below under the section specific information about contact details.
83. If, in advance of the notification, parties feel uncertain about what information they should provide or if they have difficulty in producing certain information, they can have a discussion with the Swedish Competition Authority during the pre-notification contacts regarding the obligation to provide information in the concentration in question. If the parties have requested and received an explicit waiver for the submission of certain information, the Swedish Competition Authority may nonetheless need to receive this information at a later stage. However, a notification will then only be declared incomplete if the parties have attempted to mislead the Swedish Competition Authority.

84. If a notification is incomplete when it is received by the Swedish Competition Authority, this means that the 25-day limit will not commence until the notification has been supplemented with the missing information.

#### Special information about contact details

85. The quality of the contact details that has been provided is of great significance for how quickly the Swedish Competition Authority is able to contact the right persons and move the investigation forwards. Seeking out the right contact persons can in some cases take a long time, particularly if the notification has been submitted in connection to long weekends or holiday periods. In a worst case scenario this may lead to the Swedish Competition Authority not having enough time to receive satisfactory documentation on which to base a decision during phase 1.
86. Reference to "info@" or customer service addresses should be avoided since they almost never prove to be useful when the Swedish Competition Authority tries to contact the company in question. A direct number to contact persons is also considerably more effective than a switchboard number.
87. In certain cases it may be relevant to provide several contact persons within the same company, e.g. if a customer has different purchasing managers for the product categories that are supplied by the party.
88. Regarding competitors, it may be difficult to always provide a particular contact person. In order for the notification to be complete it is therefore not necessary to name specific contact persons for competitors in cases where the parties do not know of a suitable contact person. Instead, a reference can be made to a high ranking representative of the company.

#### Gathering information

89. The Swedish Competition Authority has the right to gather the information that the Authority needs in order to examine the concentration.
90. Therefore, the Swedish Competition Authority may request information and documents from the parties in addition to the information required for a notification to be complete according to the Instructions. This may relate to, for example, business plans, operational plans, customer and market surveys, consumer surveys, competitor analyses, information about certain market segments, cost data, price series data and contact details for more customers and competitors than stated in the notification.
91. Information and documents can also be obtained from a third party. A third party refers to customers, competitors, suppliers, trade associations, public authorities etc.

92. Information can be obtained in different ways, e.g. through written questionnaires, telephone interviews, physical meetings and interviews. The Swedish Competition Authority may also request information through a formal order. Such an order may be combined with a penalty of a fine for non-compliance.
93. If parties do not comply with an order the Swedish Competition Authority can temporarily “stop the clock”, i.e. suspend the statutory time limits for phase 1 and phase 2 respectively. The time limit recommences on the first working day after compliance with the order. See also above in the section “Suspension of the time limit”.

#### Decision in Phase 1

94. A decision to clear the concentration in Phase 1 is in simpler cases made by the manager for merger control or by the head of unit or someone else who has the power to make decisions according to the Swedish Competition Authority’s working procedures.
95. The Director General makes the decision in more complicated cases, when the decision is conditional upon commitments from the parties’, and when the decision entails that the Swedish Competition Authority initiates an in-depth investigation (Phase 2). Present during a case presentation before the Director-General are among others the Chief Legal Officer and the Chief Economist of the Swedish Competition Authority as advisors to the Director General.

#### The continued examination in Phase 2

96. In phase 2 the investigation becomes more in-depth with a focus on analysing more closely whether the theories of harm that have been identified can be confirmed. The economic investigation and analysis in Phase 2 are often extensive. It is also relatively common for the Swedish Competition Authority to conduct larger customer or consumer surveys.
97. If during Phase 2 the Swedish Competition Authority finds that the concentration between undertakings will not significantly impede effective competition, the ambition is to, as quickly as possible, bring the case up in a presentation before the Director-General with the purpose of leaving the concentration without any actions being taken.
98. If the concentration is found to be problematic from a competition standpoint, the Swedish Competition Authority will produce a draft decision about a ban or an order. Attached to this draft is the evidence and other relevant documents that the draft is based on.

#### Presentation of evidence and adopting a position on submitting a draft decision

99. Before the draft decision is presented for the Director-General to adopt a position, an internal presentation of evidence takes place. This is a quality assurance procedure whereby the project team at the Swedish Competition Authority receives critical opinions on the content of the investigation from experienced officials from the legal department and the chief economist's department who have not participated in the investigation, including the chief legal officer and the chief economist.
100. After the presentation of evidence the case team has a few days to process and evaluate the opinions that have emerged before the presentation before the Director-General, in which the chief legal officer and chief economist will participate. At this point the Director General will decide if the Swedish Competition Authority will send a draft prohibition decision or order to the parties to the concentration.

#### Communication

101. For concentrations which are cleared within 25 working days, the Swedish Competition Authority will normally not communicate documents in the case file that have been provided by third parties. The parties can always ask for access to the register of case file appendices to individual documents while the case is being processed.
102. To the extent that communication has not taken place earlier, communication will take place in conjunction with the Swedish Competition Authority sending a draft prohibition decision or order. In the event that additional documents are added, these will be communicated on an ongoing basis.
103. Documents that a party has access to within the framework of the communication are made subject to a secrecy examination pursuant to the Public Access to Information and Secrecy Act. See more information below in the section 'Public Access to Information and Secrecy'.

#### State of play meetings

104. If a concentration risks resulting in competition problems, the Swedish Competition Authority normally offers state of play meetings on two occasions during the examination of a concentration:
- a) Within 15-20 working days after the notification has been submitted to the Swedish Competition Authority. This meeting is held if there is anything that arises during the investigation that suggests that the Swedish Competition Authority may need to decide on an in-depth investigation.

- b) Within 10 working days after a decision on an in-depth investigation. The purpose of this meeting is to facilitate the planning of the continued investigation.

105. In addition to the state of play meetings on these two occasions, the parties will also be offered an oral hearing in cases where a draft prohibition decision or order is sent, see below under the section Oral hearing.

106. If needed, additional state of play meetings may be held.

107. The parties and their counsel should be present in the state of play meetings.

108. In some cases a physical state of play meeting can be replaced by other contacts with counsel and the parties.

#### Draft prohibition decision or order

109. A draft prohibition decision or order is normally sent to the undertakings concerned four to five weeks prior to the deadline for the in-depth investigation. In connection with this, the parties are also granted access to the documents that have been added to the case file by anyone other than the parties and that have not been communicated earlier in the investigation. In order to make it easier for the parties to see the information on which the Swedish Competition Authority's preliminary position is based, the Authority will make efforts to refer to the relevant documents in the draft.

110. The seller is not an undertaking concerned or a party. However, if the target company comprises assets (acquisition of assets and liabilities) and is not a legal person, the seller may receive the draft decision on behalf of the target company.

111. The parties normally have two weeks to submit comments on the Swedish Competition Authority's draft decision. The parties should also clearly explain in their comments which parts of the draft are undisputed and, if applicable, which documents they base their objections on.

112. If the parties wish for the Swedish Competition Authority to further develop and explain parts of the draft decision, special meetings can be arranged for this before the time limit for responses expires.

#### Oral hearing

113. In connection with the Swedish Competition Authority sending a draft prohibition decision or an order against a concentration, the Authority will invite the parties and their counsel to an oral hearing. Participants in the oral hearing include the Director General, the chief legal officer and the chief economist of the Swedish Competition Authority.

114. An oral hearing for concentrations is a formalised meeting where the parties are given the opportunity before the decision-maker, the Director General of the Swedish Competition Authority to supplement and develop certain aspects of the arguments that the parties have already presented in their written comments on the Authority's draft decision. Time shall be given for questions about clarifications of the written and oral responses to the draft decision. Thus, the oral procedure increases the opportunities for the parties' to have their case as well addressed as possible. The parties can state in advance how much time they think they will need to deliver their presentation, but the oral hearing should normally not take more than half a day.
115. The oral hearing normally takes place within three working days from when the parties have submitted their written comments on the Swedish Competition Authority's draft decision. It is held by a chairman appointed by the Director General and minutes are taken. The minutes will form part of the documentation used during the final presentation of the case.

#### Final decision in Phase 2

116. A final decision in Phase 2 is made by the Director General following a case presentation in which the chief legal officer and chief economist will also participate. The decision can involve the concentration being cleared with or without commitments, or the Swedish Competition Authority prohibiting the concentration or ordering the parties to the concentration to take certain measures with a favourable effect on competition, see item 10 above.
117. The decision made by the Swedish Competition Authority takes effect immediately, unless otherwise indicated. It may be appealed to the Patent and Market Court at Stockholm District Court.

#### **Specific information about economic analysis in concentration cases**

118. Economic analysis is of great importance when assessing the effects on competition of a concentration. For this reason, the Swedish Competition Authority may, for its analysis of an individual case, require access to qualitative and quantitative economic information both from the parties and from third parties.
119. Examples of quantitative information that may typically be requested include market shares and cost data, as well as time series including sales data in the form of volumes sold, turnover and price. Examples of qualitative information include product characteristics, relationships with customers and suppliers, distribution flows, customer and market surveys, consumer surveys, competitor analyses, historical entry to and exit from the market, barriers to entry and business strategies.

120. In order for the Swedish Competition Authority's investigation to be as quick and efficient as possible, the parties should be prepared, in conjunction with pre-notification contacts or early on in the investigation, to report on what economic information is available, how it has been collected, the software used, what data sets and reports can be generated from internal databases etc.
121. When the Swedish Competition Authority requests economic information in a case, it is useful if the request for information can be combined with one or more meetings or telephone conferences where the situation is discussed with people responsible at the undertakings concerned. This may for example relate to how alternative analyses should be formulated considering the availability and quality of information, or the technical formats for the provision of data sets. This work is made easier if the parties present examples of data so that the Swedish Competition Authority can determine what information is available and how it can be used.
122. In connection with the parties submitting data, the parties should account for:
- a) How the information was collected, the time periods during which it was collected and what it is generally used for.
  - b) What different variables measure and which assumptions form the basis of the preparation of the data.
123. At the request of the Swedish Competition Authority the parties should also be able to account for:
- a) How reliable the information is and propose how problems relating to quality could be corrected.
  - b) Which institutional relationships the Swedish Competition Authority should be aware of in order to be able to interpret the information correctly.
124. In the same way as the Swedish Competition Authority uses economic analyses in its investigation, the parties may wish to present arguments on the basis of their own economic analysis. A precondition for the Swedish Competition Authority being able to assess the relevance and importance of this analysis is that it can be verified and replicated. This presumes, among other things, that the parties report and submit the assumptions, deductions, calculations, programme codes and data sets that form the basis of the analyses, as well as references to previous research on which the analysis is based. The importance of the Swedish Competition Authority being able to



verify and replicate the analysis applies to both econometric and theoretical analyses.

### **Efficiency gains**

125. A concentration may entail efficiency gains which, in certain cases, counteract the concentration's negative impact on competition. The relevant benchmark for the assessment of claimed efficiency gains is that consumers should not be worse off as a result of the concentration. The efficiency gains should also be merger-specific and be verifiable.
126. In order for the Swedish Competition Authority to be able to consider efficiency gains in its investigation, it is important that parties provide information supporting this to the authority at an early stage. It is not certain that all efficiency gains that the undertakings concerned perceive as such can be considered in the competition law assessment.<sup>8</sup>
127. For further guidance on what efficiency gains can be considered, see the European Commission's Guidelines on the assessment of horizontal mergers.

### **Undertakings threatened by bankruptcy and other counterfactual scenarios**

128. The basis of the examination of the effects of a concentration is a comparison between the competition conditions that would result from the notified concentration and the conditions that would have prevailed if the concentration had not been conducted. In most cases it is relevant to compare the concentration's impact on competition with the competition conditions that exist at the time of the concentration, where the undertakings concerned are assumed to continue as independent market actors (the counterfactual scenario).
129. However, under certain circumstances it may be relevant in the assessment to consider future changes in the market that are expected to occur in the absence of the concentration, i.e. another counterfactual scenario than the competition situation which exists before the concentration is conducted. This may for example entail the acquired undertaking, if the concentration does not take place, going bankrupt or winding up because there are objectively no conditions for continuing to operate the undertaking. In such cases it is no longer relevant to compare the concentration's effects with a situation in which the acquired undertaking is presumed to continue as an independent market actor.
130. In order for another counterfactual scenario than the one that exists at the time of concentration to be considered, it is important that the parties inform

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<sup>8</sup> See the Commission's Guidelines on the assessment of horizontal mergers, p. 76-88, on efficiency gains benefiting consumers and being merger-specific and verifiable.

the Swedish Competition Authority at an early stage about this and provide relevant supporting documents and evidence to the Authority.

## **Commitments**

### **General**

131. If a party provides a voluntary commitment during the processing of a concentration that eliminates the competition concerns that have been identified, the Swedish Competition Authority may decide to clear the concentration. This commitment may be made subject to a penalty of a fine for non-compliance.
132. A non-confidential version of the proposed commitments should be submitted, which can be issued in conjunction with the Swedish Competition Authority's market test or form the basis of what the Authority may communicate in external contacts. Unless the Swedish Competition Authority has received it earlier in the case, the parties must also provide a list of the contact details for the stakeholders to which the Swedish Competition Authority may refer in conjunction with the market test.
133. The Swedish Competition Authority may refrain from market testing proposals for commitments which the Authority believes would not be able to eliminate the competition concerns identified in the case.
134. For further guidance on commitments, see the European Commission's Notice on remedies acceptable.
135. Any proposed commitments, additions to these and exact time limits are issues that the Swedish Competition Authority and the parties may discuss in each individual case. However, it is important that the parties take into consideration the points stated below concerning the preconditions for commitments during Phase 1 and Phase 2 respectively.

### **Commitments during Phase 1**

136. The parties should note that a decision concerning the opening of an in-depth investigation of a concentration may be made earlier than the 25<sup>th</sup> working day. Consequently, if the parties are considering submitting commitments with the purpose of the concentration being cleared during the course of Phase 1, they should give notice of this and ensure that the commitments are presented to the Swedish Competition Authority as early as possible.
137. Commitments during Phase 1 can only be considered if the competition concerns are clear and easy to correct.

## Commitments during Phase 2

138. Commitments during Phase 2 should have been received by the Swedish Competition Authority no later than three weeks prior to when the time limit for the final decision expires. If commitments are provided at a later stage during Phase 2, for example in connection with an oral hearing, the parties should at the same time submit a written consent for an application to extend the time limit, in order to enable the Swedish Competition Authority to conduct a market test and assess whether the commitments will eliminate the competition concerns.
139. If an extension of the time limit has been granted, the commitments should be presented to the Swedish Competition Authority no later than three weeks before the new time limit expires.

## Public access to information and secrecy

### General

140. Secrecy applies at the Swedish Competition Authority to the extent provided by the Public Access to Information and Secrecy Act (2009:400).
141. In accordance with Chapter 30, Section 2 of the Public Access to Information and Secrecy Act, absolute secrecy applies to information pertaining to the provision of advice before a notification of a concentration, i.e. pre-notification contacts. Secrecy protection covers information relating to purchasers and sellers, business and operational circumstances, etc. In this context the "provision of advice" means all forms of information, consultation and guidance, including advice, which may arise between an undertaking and the Swedish Competition Authority prior to a notification of a concentration.
142. When a notification of a concentration is received by the Swedish Competition Authority, secrecy under Chapter 30, Section 1 of the Public Access to Information and Secrecy Act applies. Secrecy applies to documents and information about a private party's commercial and operating conditions, inventions or research results, if it may be assumed that disclosure of the information would cause damage to the private party.
143. Secrecy does not prevent the parties from gaining access to file pursuant to Chapter 10, Section 3 of the Public Access to Information and Secrecy Act. If, with respect to a general or individual interest, it is of particular importance not to disclose to the parties information contained in the materials which is subject to secrecy, the Swedish Competition Authority may provide information about the materials in some other way to the extent that this is required for the parties to be able to exercise their rights and provided that this can take place without serious damage to the interests that the secrecy is

to protect. The Swedish Competition Authority may, for example, allow the parties' counsel to access information subject to secrecy through a data room procedure, see the next section.

144. In order to protect information subject to secrecy, the Swedish Competition Authority may allow the parties or their counsel access to this information with reservations pursuant to Chapter 10, Section 4 of the Public Access to Information and Secrecy Act, which limits the recipient's right to forward the information or utilize the information. Such reservations may refer to, for example, the persons who may access the information, the way in which the information is to be stored, what the information may be used for and what will happen to the information once the case is closed. A reservation does not prevent parties from utilizing the information within the framework of the concentration review. Those who disclose information that they are obligated to keep secret pursuant to a reservation may be sentenced for breach of professional confidentiality pursuant to Chapter 20, Section 3 of the Swedish Penal Code.
145. The Swedish Competition Authority's secrecy assessment involves a difficult balancing exercise between a number of opposing interests, including a party's right to defence and the protection of business secrets held by the parties and third parties. The Swedish Competition Authority always strives to reach a correct assessment as part of this balancing exercise. This means, for example, that the parties' access to file usually increases as the investigation progresses.

#### Data room procedure

146. In some cases the Swedish Competition Authority may provide a party with access to file for information subject to secrecy through a data room procedure. This means that some information from the Swedish Competition Authority's case file is made available in a room inside the Authority's premises (the data room) which only a close circle of persons can access. The purpose of providing a party access in this manner is to protect commercially sensitive information subject to secrecy, but at the same time allow parties to check, for example, the economic analysis that has been conducted by the Swedish Competition Authority in the case.
147. Granting access to information through a data room procedure is particularly appropriate in cases where the Swedish Competition Authority has used quantitative data for statistical and economic analyses in the investigation. Such information may come from both parties and third persons and typically comprises extremely business-sensitive information.
148. The data room procedure is normally made available once the Swedish Competition Authority has sent a draft prohibition decision for comments.

Normally the Swedish Competition Authority makes the data room available for three working days in a row after the undertaking has received the Swedish Competition Authority's draft prohibition decision and before the time limit for the parties' comments has elapsed. If necessary, the Swedish Competition Authority can provide further access. The Swedish Competition Authority decides on exact times for access for the particular case in question, in consultation with the party.

149. Access to the data room and use of the information is regulated through the Swedish Competition Authority making a decision on reservations pursuant to Chapter 10, Section 4 of the Public Access to Information and Secrecy Act. The decision contains information on which rules apply to the use of the data room. Access to the data room is normally granted to the parties' legal and/or economic counsel, with someone from the Swedish Competition Authority being present in the room. Prior to getting access to the data room, the counsel should confirm in writing that they have taken note of the terms and conditions. The Swedish Competition Authority will also inform the counsel about how the data is structured before the analysis starts.
150. The data room is equipped with the hardware and software that the Swedish Competition Authority deems appropriate for the analysis. Computers in the data room do not have a network connection, and external communication during the access to the data room is prohibited. Own computers, telephones or other communication equipment may not be used in the data room, nor any storage media. Information in the data room may neither be printed nor copied in any format. However, in accordance with the terms and conditions that are detailed in the decision on reservations, the counsel may prepare a written report or analysis for the parties about the information in the data room.
151. If during their access to the data room the counsel prepares a written report or analysis for a party, the report should be subject to a secrecy review by the Swedish Competition Authority before it can be taken out from the data room. A copy of the report is made for the Swedish Competition Authority's case file. In some cases, the report prepared by the counsel can also be provided with reservations pursuant to Chapter 10, Section 4 of the Public Access to Information and Secrecy Act.