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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Disentangling Consummated Mergers – Experiences and Challenges – Note by Sweden

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This document reproduces a written contribution from Sweden submitted for Item 6 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/disentangling-consummated-mergers-experiences-and-challenges.htm>

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1. Introduction

1. This contribution reproduces in part certain aspects of the Swedish contribution to the 2014 Competition Committee *Roundtable On Consummated and Non-notifiable Mergers* that remain relevant today. It also provides updates to take account of more recent legislative and case developments and offers further conclusions that can be drawn from these, particularly with respect to the Swedish rules regarding voluntary or ordered notification of mergers that fall within the Swedish regime's residual turnover threshold.

2. Since the Swedish Competition Authority has limited direct experience of remedies for consummated mergers, this contribution focuses primarily on the legal framework in Sweden relating to mergers that are not subject to mandatory notification, and discusses its relevance for the assessment of consummated mergers.

2. Mandatory merger notifications

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

3. Review of mergers falling below mandatory notification thresholds

3.1. Order to notify and voluntary notification

4. If the total turnover threshold is met but not the individual turnover threshold, the SCA may order a notification if there are particular grounds to do so. 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 ordering a notification, but may lead the SCA towards a preliminary assessment that the merger could possibly be harmful to competition.

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

5. 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 order a notification. In case of a voluntary notification, the same time limits apply for the investigation as in mergers covered by the mandatory notification rules.

3.2. Relevance for the review of consummated mergers

6. Provided the above-mentioned residual threshold is fulfilled, the SCA retains the possibility to order the notification of and review a consummated merger. This power exists both in the case of gun-jumping cases, i.e. when the merger should have been filed according to the mandatory notification thresholds, and in cases where only the residual threshold was fulfilled, provided particular grounds exist to order a notification.

7. The time limit for a prohibition decision to be issued by the SCA is two years after the merger occurred. This means in practice that the time limit for the SCA to order a notification is considerably shorter than two years, taking into account the time limits for merger control in phase 1 (25 days) and phase 2 (three months) which must precede a prohibition decision.

4. Substantive test for consummated and unconsummated mergers

8. The substantive test applied to all mergers, whether unconsummated or consummated, is the same. 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.

5. Revisiting previous merger decisions

9. If a decision by the SCA to clear a merger was based on incorrect information provided by a party to the merger, the SCA may decide to initiate a phase 2 investigation. Likewise, if the court overturns a prohibition or commitment decision, the case may be heard again if a party has provided incorrect information about facts of material importance for the court's judgement. The SCA must first apply to the court to hear the case again within a year from the final judgement. None of these scenarios has materialised in the Swedish merger regime.

6. Remedies for consummated mergers

10. In the Swedish merger regime, 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. A remedy may not be disproportionate to the harmful effects created by the merger. As regards prohibition or remedies, the law makes no difference between mandatory notifications, notifications ordered by the SCA or voluntarily submitted notifications.

11. The SCA does not have direct experience of remedies in the context of consummated mergers. In theory, consummated horizontal mergers may prove more

difficult to disentangle than purely vertical mergers where a divestment may be simpler. However, it should also be borne in mind that the time limit for prohibiting a merger in Sweden discussed above means that it is not possible for a merger to be revisited many years after the event.

12. In the case of Swedbank – Svensk Fastighetsförmedling discussed below, the court of first instance ruled that the consummated merger was to be prohibited, with the consequence that legal acts to consummate the merger were considered void. The parties initially appealed that decision, but ultimately the situation was resolved when the parties rescinded the merger and rolled back the transaction.

6.1. Swedbank Franchise AB – Svensk Fastighetsförmedling

13. In December 2013, the company Swedbank Franchise AB acquired its largest competitor Svensk Fastighetsförmedling AB (SFAB). The buyer's subsidiary and the target company both provide franchise concepts for real estate agents in Sweden.

14. The transaction provided the buyer with a 50 per cent share in a website for online advertising of objects for sale through real estate agents called Hemnet. In addition, franchisees of the target company and the buyer's subsidiary also belonged to an estate agent association which at the time owned 25 per cent of the website Hemnet.

15. The turnover thresholds for mandatory notification in Sweden were not fulfilled and the deal was closed the same day as it became public.

16. The franchisees of the companies in question together conveyed approximately 40 per cent of the real estate objects sold by private persons/consumers in Sweden. In a number of the Swedish municipalities, which in most cases constituted the franchise area as well as the relevant geographic market for real estate agent services, the market shares attributable to the franchisees of the parties was substantially higher. Additionally, Hemnet was far the most important website for real estate advertising in Sweden.

6.1.1. Standstill before notification

17. After a meeting with the SCA in January 2014, Swedbank Franchise declared that it would make a retroactive voluntary notification. The SCA would otherwise have ordered a notification.

18. This raised challenging questions regarding how to ensure an effective standstill period before and during the merger assessment in this specific scenario. A standstill period applies from the date of notification. However this did not encompass the period from the meeting with the Authority and the actual date of the voluntary notification. This set of circumstances was not foreseen in the Swedish Competition Act.

19. The SCA therefore needed to act to raise this question at the meeting, after which Swedbank agreed to inform the franchisees of the relevant companies of the intention to notify the merger, and agreed to instruct the organisations of the immediate standstill.

6.1.2. Issues relating to standstill during the merger assessment

20. The notification was made two weeks later, triggering the legal standstill. However, concerns were raised regarding the Hemnet website. The new ownership structure in Hemnet meant that certain strategic decisions could now be made that would not have been possible before the merger. The SCA therefore applied to the court to prohibit Swedbank Franchise, under penalty of a fine for default, from exercising SFAB's voting rights in

Hemnet and in the estate agent association Mäklarsamfundet, one of the other owners of Hemnet during phase 1.

21. At the time of the merger assessment, the SCA was obliged to apply to the Court for a further standstill period during phase 2, but a subsequent amendment to the Competition Act now means that a standstill period applies automatically during phase 2.

6.1.3. Outcome of the case

22. In December 2014, the Stockholm District Court sided with the Swedish Competition Authority and blocked the merger, which meant that the parties were obliged to reinstate the situation that had existed prior to the merger. The parties appealed the judgment, but after the main hearing in the appeal court, they decided to rescind the merger. The target company was instead purchased by the franchisees of Svensk Fastighetsförmedling.

7. Evaluation of the SCA's review of mergers not subject to mandatory notification

23. In its 2021 report on competition and procurement enforcement,² the SCA undertook an evaluation of its review of mergers not subject to mandatory notification. Some of the conclusions from this evaluation are included here to offer context to the deliberations that may be involved for those jurisdictions that have implemented, or consider implementing similar regimes.

7.1. Methods for prioritising and selecting mergers not subject to mandatory notification

24. The SCA receives about 20-25 tip-offs per year concerning mergers, some of which may concern the same transaction. Tip-offs come from different parties such as competitors, costumers or consumers. It rarely happens that law firms provide tip-offs. The SCA also gathers information about mergers from media monitoring. In certain circumstances, additional investigative measures are taken in order to determine whether there are special grounds for ordering a party to notify a merger.

25. The SCA is currently evaluating whether further routines for identifying potentially problematic mergers could be appropriate for implementation in the Swedish system. Possible methods that can be considered include, for example, i) implementing a more systematic monitoring of media and press releases from companies, ii) further collaboration with other national and international agencies, iii) a more clear focus on industries where problematic acquisitions can be expected, or iv) targeted information efforts. Another possible consideration would be to implement the model that exists in Norway where there is an obligation within certain industries to disclose potentially harmful acquisitions. This would require a legislative amendment, but would have the advantage of avoiding the possible delay that relying on information from the media entails.

² Swedish Competition Authority, Report 2021:1, https://www.konkurrensverket.se/globalassets/dokument/informationsmaterial/rapporter-och-broschyrer/rapportserie/rapport_2022-1.pdf

7.2. The SCA's use of the power to order the notification of a merger

26. The power to order a notification of a merger has been used relatively sparingly by the SCA in recent years, which confirms the SCA's position that it is a power that should be applied judiciously and only in cases where particular grounds exist.

Table 1. Statistics of merger notifications (2013-2021)

	2021	2020	2019	2018	2017	2016	2015	2014	2013
Notified mergers	135	80	74	80	80	74	61	67	49
Of which the SCA ordered on particular grounds	0	0	1	0	0	0	0	0	1
Of which voluntary notifications	1	1	4	1	2	2	2	1 ³	1

7.3. Outcomes of mergers not subject to mandatory notification

27. This section compares the outcomes of voluntary and ordered notifications with mergers that were subject to mandatory notification.

Table 2. Outcomes of mergers not subject to mandatory notification assessed by the Swedish Competition Authority, 2010-2021

	Voluntarily notified	Ordered	In total
Number of notifications	20	5	25
Of which cleared in phase 1	15	1	16
Of which cleared in phase 2	1	3	4
Of which stopped ⁴	4	1	5

28. The majority of the voluntarily notified mergers, 15 out of 20, were cleared in phase one.⁵ One of the five mergers that the Swedish Competition Authority ordered was cleared in phase one. The proportion of mergers not subject to mandatory notification that went on to an in-depth investigation in phase two was significantly greater than the corresponding proportion for mergers subject to mandatory notification. For voluntary and ordered notifications, 25 and 75 per cent respectively went to phase two, while the proportion of mergers subject to mandatory notification that went to phase two during the same period was approximately three per cent.

29. Four of the five voluntarily notified mergers that went to phase two were not implemented due to the fact that the parties terminated the transaction after the Swedish Competition Authority either communicated an objection to the transaction or filed a

³ This case was voluntarily notified after the parties were informed by the SCA that it was planning to order notification.

⁴ For the sake of this contribution, cases that are "stopped" include cases where the parties have withdrawn their notification after the Swedish Competition Authority has communicated objections to the merger, either before or after summons application for a prohibition has been submitted to a court. None of the mergers has been cleared with commitments.

⁵ It can be noted that parties, by voluntarily notifying a merger, activate the deadlines for the examination and can be informed if the merger can be carried out.

summons application to prohibit the transaction. Of the four ordered notifications that went to phase two, three were cleared and the fourth notification was withdrawn. 55 per cent (five out of nine) of the mergers not subject to mandatory notification that went to phase two were stopped, which can be compared to mergers subject to mandatory notification where 17 out of 22 cases that went to phase 2 during the same period were cleared and the other five cases were not implemented.

30. With regard to the scope of investigative efforts, the SCA has not found any systematic or statistically significant correlation that distinguishes the handling of mergers not subject to mandatory notification from other cases. Nor has the SCA found any difference in the handling of voluntarily and ordered notifications, with the exception of the difference in resource demands that follows from the fact that a larger proportion of mergers not subject to mandatory notification went to phase two.

7.4. Turnover of target companies in mergers not subject to mandatory notification

31. As part of its evaluation, the SCA found a clear difference when comparing the turnover of target companies in voluntary and ordered notifications. In the majority of the cases involving voluntary notifications (12), the target companies' turnover were between SEK 150 to 200 million (i.e. close to the limit for mandatory notifications), while there were no ordered notifications in that interval. For voluntary notifications, the average turnover of the target companies was SEK 142 million, which can be compared with SEK 88 million for ordered notifications.

7.5. Guidance on mergers not subject to mandatory notification

32. As part of its evaluation, the SCA conducted a survey with companies' external counsel. The interviews aimed to gather information about how communication regarding the SCA's methods for handling these types of cases can be improved. The survey was based on the seven law firms that featured most frequently in the cases at the Swedish Competition Authority.

33. The survey results suggest that further guidance would provide more clarity to companies and counsel regarding the use of voluntary and ordered notifications. The SCA intends to take account of this information and other comments from respondents in the context of a forthcoming update of its merger guidance.⁶

⁶ Swedish Competition Authority, Guidance from the Swedish Competition Authority for the notification and examination of concentrations between undertakings, points 23-27.