
SWEDISH MERGER CONTROL UNDER THE THRESHOLDS

The “particular grounds” rule, its implications and inevitable demise(?)

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1. BACKGROUND

Advisers on merger control are faced with multiple judgement calls on each transaction, such as the hazards of market definition and the peril of designing and negotiating commitments. A particularly complex part is the multi-jurisdictional merger control analysis, where it is decided which competition authorities must be notified of a deal.

In the peculiar case of Sweden, the thresholds for mandatory notification are splendidly straightforward on the face of it: a combined threshold based on the joint turnover of the buyer and the target followed by a lower threshold to be fulfilled for each party. However, the infamous “particular grounds” rule (*Su: särskilda skäl*) also applies. This rule sets out that if the target lacks sufficient turnover, the Swedish Competition Authority (“SCA”) can, if it decides that there are particular grounds, decide to order a notification even after the transaction has been closed. The repercussions of such notification order are grave and can ultimately leave a closed transaction null and void.

Recently there has been debate on the effectiveness of turnover-based thresholds, specifically about a perceived legal enforcement gap for non-notifiable acquisitions of companies that do not yet generate significant turnover, but nonetheless have a significant competitive market potential, which is often reflected in a high transaction value. Examples of such cases could be the acquisition of a business with a pending patent that is bound to achieve high market shares when launched but that is yet to generate any turnover. Another example could be a data-driven business with a broad user base and corresponding high

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market share, but that is still not generating turnover. The acquisition of such a business is likely costly, even though the turnover of the target is low or even zero.

It has been proposed that this perceived legal gap is best filled by introducing thresholds based on the value of the transaction. Such thresholds have recently been introduced into the German and Austrian merger control regimes and are considered to be introduced into the EC Merger Regulation.¹ In this article, we discuss the particular grounds rule in light of recent developments in Europe toward transaction value-based thresholds, and whether under Swedish law the rule should be replaced or supplemented, by such a threshold.

2. THE SWEDISH PARTICULAR GROUNDS RULE

The Swedish Competition Act (2008:579) (*konkurrenslagen*) provides for mandatory notification of transactions to the SCA where both:

1. The target and the buyer group attain, by the transaction, a combined turnover in Sweden of more than SEK 1 billion in the most recent financial year.
2. Each of the target company and the buyer group has a turnover in Sweden exceeding SEK 200 million in the most recent financial year.²

If the parties' combined turnover in Sweden exceeds the first SEK 1 billion threshold but not the second SEK 200 million threshold, the transaction can either be notified voluntarily or the SCA can order a notification if there is a particular ground for it. The advantage of this system is that the turnover thresholds can be set relatively high (thus reducing the SCA's and the concerned parties' administrative burden of assessing non-problematic concentrations), while still being able to catch smaller concentrations that are indeed important to qualify for assessment based on the socio-economic and consumer policy interests that the competition law framework aims to safeguard. The major disadvantage is, however, that the broad and largely undefined scope of the term "particular grounds" creates uncertainty as to when notifications can be ordered – as opposed to quantified thresholds. In many practical cases, the concerned parties are therefore faced with the difficult question of whether to file relatively small mergers voluntarily – which is often associated with significant costs and delays – or to risk the SCA ordering a notification, and, in the worst-case scenario, stopping the concentration and even it being reversed.

The term "particular grounds" is not defined in the Swedish Competition Act, but its meaning is discussed in the preparatory works where the legislator emphasizes its character as an exemption. Furthermore, the legislator states that

¹ COM(2018) 482 final, Report on Competition Policy 2017.

² Chapter 4, Section 6 of the Swedish Competition Act.

there has to be “indications of some strength” of harm to competition for an order to be made and that a particular ground is rarely at hand if the target’s turnover is below SEK 25–30 million. However, the grounds do not have to be “extraordinary” – a term that was also discussed. Ultimately, the concentration has to be considered as being able to prevent, restrict or distort competition in the market to an appreciable extent.

Examples of when a particular ground could be at hand mentioned in the preparatory works include: (i) when a strong company acquires smaller competitors on a concentrated market through successive acquisitions, but where each separate acquisition is of minor importance and (ii) when a strong company in a concentrated market acquires a newly established company that could possibly challenge the position of the acquirer.³ Further, the SCA’s guidelines on notifications and assessment of concentrations states that complaints (e.g., from customers or competitors) may also constitute particular grounds for requiring notification if the SCA 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.⁴ Accordingly, four of the five decisions where the SCA has invoked the particular grounds rule were justified by the finding that it could not be ruled out that the concentration in question could have significantly impeded competition or the development of effective competition.

3. TRANSACTION VALUE THRESHOLDS – AN INTERNATIONAL OUTLOOK

3.1 Introduction of transaction value thresholds into the EU Merger Regulation

In 2017, the European Commission (“Commission”) completed a public consultation on, *inter alia*, the possible existence of an enforcement gap concerning acquisitions of highly valued targets with no or limited turnover, and, in that case, whether it was considered appropriate to introduce complementary transaction value thresholds into the EU Merger Regulation. The majority of the respondents did not see any need to introduce complementary jurisdictional thresholds since, among other things, (i) the perceived enforcement gap was believed to lack sufficient empirical evidence, (ii) the acquisitions of highly valued targets without a community dimension could often be referred to the Commission as they are often subject to review on national level and (iii) the

³ Prop. 1996/97:82 p. 10 f. and prop. 2007/08:135 p. 201 f.

⁴ Guidance from the SCA for the notification and examination of concentrations between undertakings, Dnr 617/2017, p. 27.

negative impact the Commission's resources suffer due to the risk of catching large amounts of false positive cases, thereby increasing the time spent clarifying new jurisdictional queries.⁵ In a 2018 document, the Commission stated that it is “currently reflecting – taking into account among other things the replies to the public consultation – whether potential improvements merit proposing any legislative or non-legislative changes to the EU Merger Regulation.”⁶

3.2 New transaction value thresholds in Germany and Austria

In an effort to adapt its competition laws to the structural changes triggered by technical developments and international competition, German and Austrian legislators imposed new transaction value thresholds in 2017. The intention was to close the gap in the merger control framework, similar to the gap perceived in Sweden, where the acquisition of a business or an asset that would have clear effects on competition in the market would fall below the thresholds because of its turnover being low or non-existent.

German and Austrian legislators therefore introduced the criterion of merger considerations as an additional, subsidiary threshold for the notification requirement. As a result, mergers in which companies or assets that generate little or no turnover are purchased at a high price can now be examined. The aim of the new threshold is to cover cases where current turnover and the purchase price for the company differ to a disproportionate extent, since the high purchase price in such acquisitions is seen as an indication of innovative business ideas with great competitive market potential.

As of today, the new thresholds have not yet played an important role in either Germany or Austria. In Germany, 18 formal “deal value” notifications were triggered in 2017 and 2018 with seven of those being withdrawn and eleven cleared. The same occurred in Austria, where around 20 more mergers than usual were filed for review but none being subject to prohibitions. For this reason, officials of the two national competition authorities have concluded that it is still too early to say whether the new thresholds cover the “right” cases with regards to the intentions of implementing the new thresholds. However, in one case (M.8994 – *Microsoft/Github*) the new German threshold was used as a basis for referral to the European Commission according to Article 4 EUMR, i.e., triggering of the article occurred thanks to the new threshold where notification was deemed mandatory.⁷

⁵ Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control, p. 5 f.

⁶ COM(2018) 482 final, Report on Competition Policy 2017, p. 24.

⁷ See <http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1094979&siteid=190> and <http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1092344&siteid=190>. Obtained on 3 July 2019.

4. SWEDISH CASE LAW

Deal certainty is a crucial matter in any M&A transaction. The performance of the M&A market therefore depends on the predictability of the legal framework in which it operates. This stands against the perhaps equally important interest of preventing (before the fact) transactions that will be adverse to effective competition, for example, by not allowing companies to reach or strengthen dominance by acquiring competitors or integrating up- or downstream with the purpose of foreclosing its competitors.

The most common set-up is to make notification of transactions that reach certain turnover thresholds mandatory. Accordingly, thresholds of this kind are formulated in such a way that allow transactions that are not likely to have detrimental effects on competition to fall below the thresholds and thus not require notification. This is, as already mentioned, the case in Sweden. However, such a system is inevitably deemed to have its flaws, e.g., by overlooking the fact that a turnover-wise small business can still have a high market share on a narrowly defined market or a market with generally low turnover.

A practical example of such a flaw is the leading Swedish real estate franchisor Swedbank Franchise's acquisition of its largest competitor Svensk Fastighetsförmedling. Due to the acquisition being between two franchisors, the franchisees' turnover was not included when calculating the thresholds. For this reason, the acquisition did not reach the Swedish turnover thresholds, whereby there was no need to notify the SCA. Neither was the transaction notified voluntarily to the SCA. However, shortly after closing, the authority reached out to the parties signaling that it looked to use the particular grounds rule after having been contacted by a number of concerned competitors. Faced with the threat of a notification order, the parties decided to notify the transaction even though it had already been closed. In the end, the SCA went on to prohibit the transaction.⁸

Other cases of interest are the voluntary notifications to the SCA in *Visma/ Fortnox*,⁹ which concerned finance and administration systems for SMEs, and in *Blocket/Hemnet*,¹⁰ which concerned digital search services for housing. In both cases, the SCA held that the transaction value in the concentrations concerned – being more than ten times the amount of the respective target's turnover – was a relevant circumstance in its decision to launch phase II investigations.¹¹ More specifically, it seems that it was not the deal value *per se* that triggered concerns, but rather that it was indicative of potential network effects that could be problematic. The parties to both transactions suggested several remedies, but none

⁸ Stockholm District Court's judgement on 16 December 2014 in case no T 3629-14.

⁹ The SCA's decision on 22 April 2016 in case no. 207/2016.

¹⁰ The SCA's decision on 13 March 2015 in case no. 84/2016.

¹¹ This was, however, not mentioned in the decisions directly, but in the SCA's report *Konkurrens och tillväxt på digitala marknader*, 2017:2, p. 143.

were accepted by the SCA. As a result, both voluntary notifications were withdrawn, thereby invalidating the mergers.

The cases of *Visma/Fortnox* and *Blocket/Hemnet* suggest that the SCA is able to use the same line of reasoning in terms of using a high transaction value as an indication of a particular ground being at hand. In turn, this may be argued as indicating that the Swedish merger control regime already includes an adequate tool to catch such concentrations where a target's low turnover does not reflect its actual competitive market potential. In other words, the SCA's reasoning may demonstrate that the perceived enforcement gap is low or even non-existent under the current Swedish merger control regime.

However, since the current system requires a joint turnover of the merging parties of SEK 1 billion, mergers not reaching either of the two turnover-based thresholds will fall outside the SCA's mandate, particular ground or not, thereby eluding the system. In its reports analyzing competition and growth in the new market, the SCA therefore concludes that digitization has made it apparent that a company's role in the market can no longer solely be based on its turnover. Indeed, the SCA indicates that the effects of digitization raises the need to consider alternatives to the turnover criterion when setting thresholds for merger control.¹²

5. AN INEVITABLE DEMISE?

5.1 Conceivable amendments

Few transactions have been subject to the Swedish particular grounds rule. In fact, only five transactions have indicated such strong concerns that the SCA has made use of its mandate to order mandatory notification. Meanwhile, there has been a shift in the ways in which a company's market impact is valued. For this reason, some jurisdictions have amended their merger control regimes by introducing transaction value-based thresholds in addition to the already existing turnover-based ones. In light of these developments, similar amendments should be considered to Swedish law as well.

The originally proposed reason for introducing the particular grounds rule was that some transactions not fulfilling the turnover-based thresholds still gave reasons to anticipate an anti-competitive result. This mainly included concentrations where a strong company acquires smaller competitors on a concentrated market through successive acquisitions or a strong company in a concentrated market acquires a newly established company that could possibly challenge the position of the acquirer. However, the nature of today's market where digitization and new economies rapidly claim an increasing share indicates that there

¹² Ibid., p. 143; the SCA's report *Konkurrensen i Sverige 2018*, 2018:1, p. 310.

are even more ways to structure a transaction that might cause such harm to competition that a notification be required.

It should be discussed whether a revision of the Swedish Competition Act would be useful to catch those cases where the transaction value does not accurately reflect the possibly anti-competitive nature of a transaction. Especially two conceivable amendments comes to mind:

(a) Replace the particular grounds rule

The first option would be to replace the particular grounds rule with a German/Austrian style transaction value threshold formulated as an additional, supplementary threshold for mandatory notifications other than the turnover-based threshold. An apparent advantage of such a change is that the merger control regime would be adapted for the inevitable new ways of appraising a company's competitive market potential, but also that it would be prepared for anticipated changes on the market due to digitization. However, even though this could reduce legal uncertainty, transactions being problematic for reasons other than not fulfilling the existing turnover-based thresholds may still not be caught.

The Swedish legislator must investigate the specific relationship between turnover and transaction value in different industries to decide at what level to set the thresholds. Problems could arise in determination of a transaction price when earn-out mechanisms are used. The introduction of a transaction value threshold would arguably incentivize parties of future mergers close to the threshold to adapt the transaction value to avoid mandatory notification. The SCA has, however, concluded that such issues do not differ significantly from those that may arise as a result of the current rules.¹³ Though a purchase price is adaptable to an extent, turnover is not.

(b) Supplement the current turnover thresholds

Another option is to keep a revised version of the particular grounds rule but add a supplementary transaction value threshold for the reasons stated above. However, expanding the scope for requiring mandatory notification should reasonably come with a narrowing of the scope of the particular grounds rule. Substituting "particular" grounds with "exceptional" grounds would be a suitable clarification to decrease the current uncertainty of the actual meaning of when a transaction under the thresholds should be notified.

In fact, the use of the term "exceptional" was proposed by several consultation bodies in response to the proposal first made to introduce the particular grounds rule, but the legislator deemed it as being too narrow to provide actual protection of the interests underlying the legislation. This concern would, however, be mitigated by the introduction of a supplementary transaction value threshold.

¹³ The SCA's report *Konkurrens och tillväxt på digitala marknader*, 2017:2, p. 144.

