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Vinge

Sweden Launches an Amended Competition Act: Providing further alignment with Community law, new merger thresholds, and introducing a disqualification order regime for cartel infringements

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On November 1, 2008, Sweden's amended Competition Act (SFS 2008:579) ("2008 Competition Act") will come into force.[1] The country's current Competition Act (SFS 1993:20) ("1993 Competition Act") entered into force on July 1, 1993 and since has been continuously amended in order to take into account changes in the EC rules.[2] Most notably, the 2008 Competition Act amends the merger thresholds and introduces the possibility to issue disqualification orders on individuals responsible for cartel infringements. It is also clear that a number of the amendments will further align the Swedish rules with the current EC legislation.

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[1] The government launched an inquiry on September 20, 2004 which terms of reference included to analyze how to increase the efficiency of the competition legislation. A report (SOU 2006:99) was issued on November 29, 2006 and formed, together with a Ministry publication (Dnr N2006/10823/MK), the basis for a government bill (prop. 2007/08:135) published on March 27, 2008. The Parliament approved the proposals on June 12, 2008.

[2] For example, the amendments implemented through SFS 2004:409 where the possibility to apply for negative clearance was removed and instead general exemptions to the prohibitions laid down in the competition rules was put in place (this in line with the then newly adopted Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p.1).

Without any claims to provide an exhaustive discussion of all aspects of the amendments of the Swedish competition legislation, this article outlines and discusses the 2008 Competition Act's major amendments to be implemented in the area of merger control (Section I) and in the area of leniency and sanctions for breaches of the substantive competition rules (Section II). The article ends with a few concluding remarks (Section III).

I. MERGER CONTROL

In the area of merger control, three main amendments are implemented with the 2008 Competition Act. The rules triggering a mandatory notification are amended, the standstill obligation is expanded, and the substantive test under which notifiable concentrations are to be assessed is changed. It follows from these changes that practical questions may arise during an intermediate period whether the 1993 or the 2008 Competition Act applies to a particular transaction.

Apart from this, a number of minor amendments and clarifications are provided by the 2008 Competition Act. For example, the Competition Authority's initial review period (i.e., Phase I) is extended from 25 working days to 35 working days if commitments are offered by the parties to the concentration. This brings the initial review period in this regard in line with the EC Merger Regulation.[3] It is also explicitly provided in the Act that the parties to a concentration may submit a notification as soon as they can show that they intend to undertake a contemplated transaction. The 1993 Competition Act was silent on this particular issue and the Competition Authority initially took the

[3] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1.

position that in order to file, the parties had to submit a signed and finalized transaction agreement. The Authority changed its position though in January 2008 and then, in line with the EC Merger Regulation, began to allow filings based on a good faith intention to conclude an agreement (e.g., by submitting a signed letter of intent).

A. Amendments to the Rules Triggering a Mandatory Notification

The amendments to the merger control thresholds triggering a mandatory notification and other relevant provisions are showed in Figure 1 below.

Figure 1. Merger Thresholds in Sweden

Thresholds / Other Provisions	1993 Competition Act	2008 Competition Act
Combined turnover	> SEK 4 billion worldwide (approx. EUR 432.4 million)[4]	> SEK 1 billion in Sweden (approx. EUR 108.1 million)
Each of at least two of the parties' turnover	> SEK 100 million in Sweden (approx. EUR 10.8 million)	> SEK 200 million in Sweden (approx. EUR 21.6 million)
Other provisions	Not possible to review where the combined worldwide turnover is less than SEK 4 billion. When particular grounds exist: Possible to review where the SEK 100 million prerequisite is not fulfilled.	Not possible to review where the combined Swedish turnover is less than SEK 1 billion. When particular grounds exist: Possible to review where the SEK 200 million prerequisite is not fulfilled. Two or more transactions which take place within a two-year period between the same persons or undertakings should be treated as one and the same concentration arising on the date of the last transaction.

[4] Based on the European Central Bank's yearly average conversion rate (2007) of EUR 1 = SEK 9.2501.

The amendments to the two threshold prerequisites implemented by the 2008 Competition Act was originally proposed by the Competition Authority. A review of the period 2003 to 2005 had showed that 97 percent of the notifications made during that time were unconditionally cleared during the Authority's initial (Phase I) review. Had the thresholds now being implemented been applied, the number of notifications would have dropped 40 percent without any, allegedly, potentially harmful concentrations being withdrawn from the Authority's review. In other words, the amendments here are undertaken for efficiency reasons.

An alignment to the EC Merger Regulation is implemented through a new provision providing that for two or more transactions which take place within a two-year period between the same persons or undertakings, those transactions should be treated as one and the same concentration arising on the date of the last transaction. The purpose of this alignment is obvious: it should not be possible to remove a concentration from review under the 2008 Competition Act by implementing it in stages.

Otherwise, the basic system of mandatory notification duty based on statutory set turnover thresholds remains unchanged. Under the 1993 Competition Act, concentrations where the first turnover prerequisite is not met (i.e., where the combined worldwide turnover of the parties is less than SEK 4 billion) cannot be reviewed by the Competition Authority. However, in cases where the second turnover prerequisite is not met (i.e., where two or more of the parties do not have a Swedish turnover exceeding SEK 100 million), an exemption rule allows the Authority to require a party to a concentration to

submit a notification if particular grounds exist. In the preparatory works of the Act, it was stated that such particular grounds may exist (e.g., where an incumbent undertaking on a concentrated market makes successive acquisitions of smaller competitors or such incumbent undertaking seeks to acquire a newly established competitor in order to prevent future competition). Under the 2008 Competition Act, this exemption remains (but with the amended prerequisite) and no changes can reasonably be expected with respect to the application of the rule. However, one should note that this exemption rule has been extremely rarely used by the Competition Authority.

B. Extension of the Standstill Obligation

Under the 1993 Competition Act, the standstill obligation (i.e., the period during which the parties to a concentration may not take any action to put the concentration into effect), only covers the Competition Authority's initial investigation (i.e., Phase I). Consequently, there has been no formal obligation to notify a concentration before its implementation and it has technically been possible (even though rarely advisable) to submit a post-merger notification.

The 2008 Competition Act introduces a provision making pre-merger notification mandatory as it is expressly provided that a notification should be made before a concentration is implemented as well as that no action may be taken to put the concentration into effect during the Competition Authority's initial investigation. However, this general standstill obligation ceases at the expiration of the Phase I period. For standstill to continue to apply, the Authority must request that the Stockholm City

Court issue an order prohibiting implementation awaiting final examination.

Even though these amendments brings the Swedish standstill obligation closer in line with the corresponding obligation applicable under the EC Merger Regulation, it gives the acquiring party some possibilities to assert control of the target company or even close a notified transaction before a final approval has been obtained. In practice, this may not happen particularly often (presumably, when faced with a Phase II inquiry the undertakings concerned will tend to tread carefully), but from a regulatory perspective this is not ideal as the underlying purpose of the standstill rule is to ensure the efficiency of the merger control system. Arguably, when future revisions of the merger control rules is undertaken it would be reasonable to extend the standstill obligation to apply automatically up until final clearance is granted.

One may note that even though the 2008 Competition Act makes pre-merger notification mandatory, this requirement is not backed up by any direct sanctions for a failure to notify or for a breach of the standstill obligation. Instead, the Competition Authority is limited to being able to issue a decision obliging an undertaking to submit a notification (when the parties have failed to notify) and a decision expressly prohibiting the parties from taking steps to implement an already-notified transaction (when deemed necessary to ensure the compliance of standstill). Both these types of decisions can be issued under the threat of periodic penalty payments. The lack of automatic sanctions in these respects is arguably an unfortunate gap in the sanction system laid down in the 2008 Competition Act. If maintaining a system of mandatory merger control based on

turnover thresholds it seems reasonable to, in line the EC Merger Regulation, provide for direct sanctions for a failure to notify or for a breach of the standstill obligation.

C. Amendments to the Substantive Test

Under the 1993 Competition Act, the general substantive test under which a concentration is to be assessed has been whether it created or strengthened a dominant position (which significantly impeded, or was liable to significantly impede, the existence or development of effective competition in the country as a whole, or a substantial part thereof). In other words, a similar dominance test which was laid down in the old EC Merger Regulation has been applicable.[5]

The 2008 Competition Act also introduces the SIEC test. The wording of the legal prerequisite ("significantly impede effective competition or the development thereof") is nearly identical to the wording of the Swedish language version of the EC Merger Regulation. However, as the purpose of introducing the SIEC test is, as noted in the preparatory works, that concentrations should be assessed in the same manner under the 2008 Competition Act as under Community law; one can assume that the Swedish SIEC test will (at least ideally) be applied in the same manner as the Community one.

It remains to be seen to what extent the introduction of the SIEC test in practice will come to influence the Swedish merger control regime. Under the 1993 Competition Act few notified concentrations have been taken into a Phase II review (so-called special

[5] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p. 1.

investigations) and no formal prohibitions have ever been issued. Figures 2 and 3 below illustrate this.[6]

Figure 2. Notifications Made and Initiated Phase II Reviews

Total number of concentrations having been notified to the Competition Authority:	**2,121***
Number of concentrations brought into Phase II (special investigation):	**64**

*As some notifications have been withdrawn, the number of reviewed concentrations is somewhat lower. No statistics regarding the exact figures here have been published though.

Figure 3. Status of the Concentrations Brought into Phase II

Number of concentrations against which the Competition Authority has decided not to take any action:	**34**
Number of concentrations against which the Competition Authority has decided not to take any action after the parties has offered remedies:	**15**
Number of concentrations abandoned by the parties:	**8**
Number of concentrations which the Competition Authority has sought to prohibit by taking legal actions before the Stockholm City Court:	**5***

* Of these five cases, three actions were dismissed by the courts (Stockholm City Court or the Market Court on appeal) and two concentrations were abandoned by the parties after an action had been brought.

As can be seen, the 1993 Competition Act has prevented few mergers from taking place as originally intended by the parties. In light of this, some commentators have contemplated that the system of mandatory concentration control should be abandoned and instead a system providing for voluntarily notification in combination with giving the Competition Authority the power to initiate reviews on a case-by-case basis to be put in place. The argument here would be that from the low number of notified concentrations that are prevented (or amended) one may conclude that the mandatory merger control system lead to costs which is not proportional to the gains in preserving an efficient

[6] Statistics per April 17, 2008 compiled by the Swedish Competition Authority, *available at:* http://www.konkurrensverket.se/t/Page____372.aspx.

competition. The present authors are not prepared to accept this line of reasoning though as an important underlying purpose of a system of a threshold-based mandatory notification duty is the preventive effects the system is expected to have on contemplated transactions (i.e., transactions with potential harmful effects to competition may be called off during the planning stage). These preventive effects are not measurable and an abandonment of the current system should not be undertaken lightly.

With that said, it remains to be seen to what extent the introduction of the SIEC test in the 2008 Competition Act may prompt the Competition Authority to bring an increased number of notified concentrations into Phase II as well as how it may influence the parties to notifiable concentrations to offer remedies in order to clear their planned transactions. The future statistics here may bring about further debate regarding the usefulness of the current system of mandatory notifications.

D. Transitional Regulation

With respect to the merger control regime, the transitional regulations implemented with the 2008 Competition Act simply provide that the rules of the 1993 Competition Act should apply to concentrations which have "arisen" prior to the implementation date (i.e., November 1, 2008). The Competition Authority has issued a reasoned draft version of the new notification form[7] to be used for concentrations falling under the 2008 Competition Act. In its reasoning, the Authority stated that a signed letter of intent, where the circumstances are concrete enough to allow for a notification to be filed, should be sufficient for a concentration to arise in the meaning of the transitional

[7] Swedish Competition Authority, Dnr 147/2008 (June 5, 2008).

regulations. The date at which the concrete nature of the intent is determined should answer the question of whether the 1993 or the 2008 Competition Act should apply to the concentration (no matter at which point in time and on what basis the actual notification is made).

If this will indeed be the Authority's final position on the matter, this would be seemingly at odds with the Commission's practice for determining the relevant date for determining jurisdiction. As follows from the Commission's Jurisdictional Notice, the relevant date for establishing Community jurisdiction over a concentration is the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of the first notification, whichever date is earlier.[8]

Admittedly, there is no equivalence of the Article 4(1) of the EC Merger Regulation (which explicitly lays down the triggering events for when the notification duty arises) in the 2008 Competition Act. Nonetheless, should this become a practical issue in a specific matter (e.g., if the parties to a concentration would trigger a notification duty under the 1993 Competition Act, but not under the 2008 Act) it could be argued fairly that the relevant date for determining the Competition Authority's jurisdiction (and, thus, which Act applies to the concentration) should be identical to what applies under Community law. Thus, in border-line cases, one should be able to delay the signing of a transaction agreement until after November 1, 2008, thereby causing the transaction to fall under the 2008 Competition Act.

[8] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (at 155-56), OJ C 95, 16.4.2008, p. 1.

II. LENIENCY AND SANCTIONS

In the area of leniency and sanctions, four main amendments are implemented with the 2008 Competition Act. First, the provisions on determining the level of administrative fines for infringements of the substantive competition rules is amended in line with how such fines are calculated under Community law. Second, the Competition Authority's power is extended as it will become authorized to issue administrative fines in uncontested cases for such infringements. Third, the leniency rules are slightly amended further aligning the Swedish rules with the Commission's Immunity Notice[9] and the European Competition Network's (ECN's) Model Leniency Program. Fourth, the courts will be authorized to impose disqualification orders on persons exercising legal or actual management of undertakings found to have committed cartel infringements of the competition rules.

A. Amendments to the Provisions on Calculating Administrative Fines

Under the 1993 Competition Act, the statutory provision determining how administrative fines sanctioning infringements of the substantive competition rules (i.e., Article 81 or 82 of the EC Treaty or the equivalent Swedish prohibitions) should be calculated is rather brief and generally worded. Consequently, how to calculate these fines has been an issue mainly to be developed through case law.

In the 2008 Competition Act, four provisions are laid down with a more precise language dealing with how to calculate administrative fines. These were drafted taking

[9] Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17.

the Commission's Guidelines on the method of setting fines into account.[10] Without going into a more detailed review, one can briefly note that the rules in the Act stipulates that administrative fines should be set by determining a so-called "sanction value" for each undertaking's infringement. When doing this, one should in particular take into account the gravity of the infringement (e.g., looking at the nature of the infringement, the importance and size of the market affected, and the infringement's effect or potential effect on competition) and its duration. Adjustments can be made upwards or downwards depending on a number of stated aggravating and mitigating circumstances.

It is explicitly noted in the preparatory works that the purpose of these amendments is to adjust the calculation method for setting administrative fines to the current Community law. With that said, the provisions in the 2008 Competition Act are neither as detailed as those provided in the Commission's Guidelines, nor is the method prescribed as mechanic and structured as the one provided in the Guidelines. Nonetheless, this amendment can, especially considering the small amount of existing (and expected) Swedish case law on this subject, be expected to increase the foreseeability for undertakings facing charges of breaches of the competition rules as numerous concepts are being aligned.

B. Possibility for the Competition Authority to Issue Administrative Fines

Under the 1993 Competition Act, the Competition Authority (unlike the Commission) has not been able to issue any administrative fines at all for infringements of the substantive competition rules. In order to sanction such infringements, the

[10] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006, p. 2.

Authority is forced to bring a case before the Stockholm City Court (or the Market Court on appeal).

Under the 2008 Competition Act, the Competition Authority's powers in this respect are extended as it will be authorized to issue administrative fines in uncontested cases. In these cases, the Authority will draw up a draft decision which will be legally binding if accepted by the undertaking concerned (an injunction to pay the fine). This will allow for quick closures of processes where the private parties have no interest to litigate and instead wish to quickly settle the case (if, for nothing else, to avoid the negative publicity a drawn-out process may cause). For contested cases, the judicial order will remain intact. Thus, an undertaking faced with a charge of having breached the competition rules will have the choice of either defending itself in a trial (claiming that no breach has occurred or simply contest the level of fine sought by the Competition Authority) or accepting the injunction put forward.

For this newly introduced procedure to become efficient though, it will require a certain amount of restraint and fairness on the part of the Competition Authority. Under the 1993 Competition Act, the Authority has seemingly showed a willingness to push and, arguably, exaggerate its claims in cartel cases. For example, in the recent *Asphalt* cartel case,[11] the Authority requested that administrative fines of a total of more than SEK 1.2 billion to be handed out to nine construction companies—a request that the Stockholm City Court cut down to a total of around SEK 460 million (i.e., around 40 percent) despite having found the infringements claimed by the Authority to have been

[11] Case T 5467-03, *Swedish Competition Authority v. Kvalitetsasfalt i Mellansverige AB et al.* (Stockholm City Court, July 10, 2007). The judgment has been appealed to the Market Court.

proven to a large extent. If it is suspected that an inflated administrative fine will be proposed, then the private parties concerned may very well decide to have their day in court in order to dispute the level of fines sought by the Competition Authority.

C. Amendments to the Leniency Rules

The current Swedish leniency rules were introduced (and incorporated into the 1993 Competition Act) in 2002. Under these rules, full immunity, as a principle rule, cannot be granted to the undertaking which has had the leading role in a cartel infringement. Under the leniency rules entering into force with the 2008 Competition Act, no differentiation is made between a leading undertaking and its followers. The only bar against receiving full immunity is put up against undertakings having coerced other undertakings to participate in a cartel infringement. In this respect, this will align the Swedish leniency rules with the Commission's Immunity Notice and the ECN Model Program.

However, the leniency rules will not be fully aligned with the European ones. Most notably, no marker system is provided for in the 2008 Competition Act. The issue of such a system is briefly discussed in the preparatory works but without any convincing arguments presented why deemed unnecessary to be put in place. The lack of a marker system is unfortunate as such a system is a vital part of the ECN's Model Program (as well as the Commission's Immunity Notice) and not having such a system in place may cause practical problems for applicants undertaking multiple leniency filings in several jurisdictions. This is not in line with the underlying purpose of the cooperation that led up

to the ECN Model Program. As is pointed out in the latter program, a benefit of harmonization in this field is that it serves to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between existing leniency programs. Once future revisions of the Swedish statutory leniency rules are undertaken, it would, in light of this, be reasonable to implement a marker system.

D. Possibility to Impose Disqualification Orders

Under the 2008 Competition Act, the courts (specifically, the Stockholm City Court or the Market Court on appeal) will be authorized to impose disqualification orders on persons exercising legal or actual management of undertakings found to have initiated or participated in a cartel. The underlying purpose of this is obvious: the threat of being subjected to a disqualification order is intended to be an incentive for individuals not to engage in cartel infringements. This is a novelty in the Swedish competition regime as a general principle has been that the sole sanction of infringements of the competition rules should be financial penalties imposed only on the undertakings concerned.

Even though the possibility to impose disqualification orders is novel, the notion to impose sanctions on the individuals responsible for an undertaking's competition law infringements is not new. The issue of criminalization has been extensively discussed in various inquiries and reports issued in connection with legislative processes concerning the competition regime.[12] In the preparatory works of the 2008 Competition Act, for

[12] For example, the government launched an inquiry on January 9, 2003 which terms of references included to review the Swedish competition law in light of the so-called modernization work undertaken by the Community institutions. As part of this inquiry, a report (SOU 2004:131) was issued on December 30, 2004 which covered the issue of making it a criminal offence to infringe the prohibitions on anticompetitive behavior in articles 81 and 82 of the EC Treaty and their Swedish equivalents. The issue of criminalization was also discussed in the preparatory works underlying the 2008 Competition Act (*see supra* note 1).

example, it was claimed though that a criminalization would have a negative effect on the current leniency system as individuals would presumably be less inclined to come forward with information if they, by doing this, personally risked criminal sanctions. Arguably though, the threat of being issued a disqualification order is weak compared to an outright criminalization and is not likely to have the same effect on business as criminal sanctions would have. However, years of discussions have now ended. It remains to be seen whether the Swedish leniency system will ever be a success. The potential failure of this system, in combination with the publicity foreign criminalization regimes receives, may lead to new discussions. At the end of the day, criminalization may be unavoidable.

III. CONCLUDING REMARKS

From a practitioner's perspective, two of the most important changes to the Swedish competition regime implemented by the 2008 Competition Act are the amended merger thresholds and the possibility to issue disqualification orders on individuals responsible for cartel infringements.

The change to the merger thresholds can be expected to decrease the number of transactions falling under the mandatory Swedish concentration control regime. Although a new provision is implemented covering successive transactions, the provision is unlikely to be triggered particularly often as its effect should mainly be of a preventive nature. The new sanction in the form of disqualification orders will bring an additional dimension to issues concerning horizontal cooperation as individuals may risk personal

sanctions if having exercised legal or actual management of undertakings found to have engaged in cartel behavior. To what extent the threat of this sanction will affect business behavior remains to be seen though.

Besides these two highlighted changes to the competition regime, a number of the amendments, as discussed in this article, will be implemented by the 2008 Competition Act which serves to further align the Swedish rules with the current EC legislation.

However, as amendments to the Swedish competition regime continue to be implemented almost exclusively by statutory legislation (the 2008 Competition Act, as its predecessor, leaves little scope for development through administrative guidelines), the rules provided are in most areas not nearly as detailed as the provisions laid down by legislation and guidelines issued by the Commission. Consequently, the Competition Authority and the Swedish courts are expected to develop the various procedural and substantive rules through case law. Despite the explicitly stated purposes to align a number of Swedish rules with their respective Community counterparts, one cannot overlook the fact that various interpretative divergences may arise between similar rules as the (Swedish and EC) case law develops.