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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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## Global Forum on Competition

### ECONOMIC ANALYSIS IN MERGER INVESTIGATIONS – Contribution from Sweden

- Session III -

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This contribution is submitted by Sweden under Session III of the Global Forum on Competition to be held on 7-10 December 2020.

More documentation related to this discussion can be found at: [oe.cd/mergerinv](https://oe.cd/mergerinv).

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## *Economic Analysis in Merger Investigations*

### **- Contribution from Sweden –**

#### **1. Introduction to merger procedure under the Swedish Competition Act**

1. According to the Swedish Competition Act (2008:579), the Swedish Competition Authority (SCA) has 25 working days from a complete notification to decide whether to clear a merger or initiate an in-depth investigation. These 25 working days are referred to as phase 1. Phase 2 is opened when the case cannot be resolved in phase 1, after which SCA has a further three months to decide if the concentration shall be prohibited.

#### **2. Structure of economic expertise**

2. The Chief Economist leads the Chief Economist Unit (CEU), which has around 10 senior economists with PhDs in economics. Several of them excel in quantitative analysis, while others specialise in theoretical models. Many of them have long experience of merger issues, having performed numerous phase 2 merger investigations.

3. Apart from the CEU, there are also economists with extensive experience working as case handlers in other units within SCA, e.g. the Cartels and Mergers Unit and the Market Abuse Unit. Depending on the type of case, economic analysis may be conducted by economists from these units alone, or jointly with economists from the CEU.

#### **3. Stages of economists' involvement in merger review**

##### **3.1. Merger investigations**

4. In very broad terms mergers notified to the SCA can be grouped into three categories, although it should be noted that there is no formal classification of different types of mergers in the Swedish merger regime.

5. The first group consists of the mergers which, given the circumstances apparent from the outset, have a very low risk of anti-competitive effects and which do not require any in-depth investigation. These mergers usually do not require the specific involvement of economists and are cleared by case handlers and the SCA's director for merger control.

6. The second group consists of mergers that display characteristics which imply a certain risk of anti-competitive effects, and which require more investigation to make sure that the merger does not raise concerns of a significant impediment to effective competition (SIEC). A couple of economists can be engaged as early as the pre-notification contacts with the parties. Some of these mergers may require extensive economic analysis during the phase 1 investigation, even if they can be cleared at this stage. It is also common, though not the rule, that economists are involved in the investigation if the parties offer remedies in phase 1 with a view to the SCA clearing the merger.

7. The third group consists of mergers that display characteristics that imply a high risk for a SIEC, and which from the outset suggest that an in-depth investigation may subsequently be required. For this type of mergers, a robust group of economists and

lawyers will be involved from the very beginning of phase 1 (or during the pre-notification phase) with the possibility of further strengthening the group in phase 2.

8. For mergers that proceed to phase 2, a project group consisting of several economists and lawyers is typically formed. A group of economists is normally assigned to carry out more sophisticated economic analyses. Economists conduct parallel analyses to investigate market definition and the estimation of anticompetitive effects such as likelihood of price increases, which often requires quantitative analysis techniques. Economists also carry out qualitative investigations into market entry and existence of buyer power along with lawyers in the project group. Economists in the project are usually led by a senior economist. Depending on the case, the group can be composed of economists with quantitative and/or theoretical skills. The SCA does not use external economic experts.

9. It can be noted in this context that the SCA has received around 3000 merger notifications since the introduction of the merger control regime in Sweden. Fewer than 100 of the notified mergers have proceeded to a phase 2 investigation.

### 3.2. Quality control prior to decision-making

10. The Chief Economist has the ultimate responsibility for all economic analysis, regardless of which unit has performed the analysis. Prior to any decision being presented to the Director General in a phase 2 investigation, the CEU is responsible for controlling the quality of the economic analysis undertaken during the merger review. The critical assessment of economic evidence is conducted by members of the CEU that have not been involved in the investigation. The Chief Economist also participates in this critical assessment, and does not participate in the case team's prior investigation.

11. In those cases where the Director General himself/herself adopts a decision, the Chief Economist participates along with the Chief Legal Officer and other officials in a formalized case briefing for the Director General. The Chief Economist provides advice to the Director General prior to any decision being taken.<sup>1</sup> In cases involving a potential prohibition decision, the Chief Economist also participates in any oral hearing with the parties, as well as case briefings for the Director General prior to a final decision.

## 4. Quantitative analysis

### 4.1. Types of quantitative analysis and criteria applied

12. An extensive quantitative analysis requires data of good quality. However, not all markets offer such data suitable for a sophisticated econometric exercise.<sup>2</sup> The selection of techniques used in merger review is largely determined by the suitability of available data.

13. Time is also an important factor. If data is available at a late stage of the investigation (e.g. in the middle of phase 2), the use of sophisticated econometric analysis may not be prioritized due to the lack of time available for proper quality assurance.

14. The vast majority of phase 2 mergers require an analysis of demand-side substitution to define a relevant market and to estimate unilateral effects, i.e. price increases

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<sup>1</sup> Merger decisions taken by the Director General include all decisions in phase 2 along with more complex phase 1 decisions, when the decision is conditional on remedies by the parties or involves initiating a phase 2 investigation.

<sup>2</sup> Blocket/Hemnet (Dnr 84/2016)

after the merger. The use of the hypothetical monopolist test has almost become a standard procedure in this exercise. Quantitative analysis to evaluate the effect of a merger on prices, such as the upward pricing pressure (UPP) test, are also often used in merger review when they are suitable.

15. When the project group identifies external supply shocks, the economist team conducts a difference-in-difference analysis or a panel data analysis, which can give price elasticity of demand or cross price elasticity (diversion ratios). These results are, in turn, used in the UPP analysis or the critical loss analysis.

16. Other than in a few old cases,<sup>3</sup> the SCA has not conducted a fully-fledged merger simulation during a merger review. This is typically due to lack of available data and time constraints.

## 4.2. Employment of new or complex techniques in quantitative analysis

17. To apply new or complex techniques can pose challenges, since techniques or methods that have been applied in previous cases and been established in case law and decisional practice are often favoured during investigations. A relatively new approach to implementing a test, albeit well-established in economic theories, may ultimately not be opted for by the case team due to its absence in decisional practice or case law.

18. In one of the SCA's latest phase 2 mergers, a ready-made market survey was used to estimate "aggregated diversion ratios" as an alternative to the conventional "critical loss analysis". The test was challenged by the undertakings during the legal proceedings, which questioned whether the test could be applied in accordance with the European Commission notice on the definition of relevant market, and since the method has never been tested in the Court of the European Union. The Patent and Market Court, to which the SCA's prohibition decision was appealed, did not ultimately examine the substance of the case, so the court did not provide an opinion on the SCA's use of the test.<sup>4</sup>

## 5. Qualitative analysis

19. Most economists are involved in the analysis of qualitative evidence. In data-intensive mergers, it can be the case that economists with strong quantitative skills focus only on quantitative analyses, while other economists and case officers focus on gathering qualitative evidence such as contacting competitors and other stakeholders as well as searching internal documents.

## 6. Use of surveys

20. Surveys are often used in phase 2 investigations and are also utilised in a limited number of phase 1 investigations, especially for mergers involving consumer products. The SCA has conducted over ten consumer surveys over the last ten years. We have used

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<sup>3</sup> See for example GSK/AZT (Dnr 706/2008)

<sup>4</sup> This was due to separate arbitration proceedings concerning the sellers' right to sell which were held before the court could arrive at a decision of the merger case. The arbitration proceedings led the court to conclude that an examination of the case in substance would have related to a hypothetical situation.

different survey methods, such as telephone interviews<sup>5</sup> and face-to-face surveys<sup>6</sup> in older cases and online surveys in recent years.

21. Within the CEU there is an economist responsible for documenting best practice on surveys, which is an important part of the SCA's knowledge management to ensure institutional memory of merger procedures. The documentation includes a wide range of materials, which allows staff to make use of the SCA's past experience, ranging from practical issues such as how to formulate a certain question or response alternatives, to how to communicate with potential respondents on issues related to the EU's General Data Protection Regulation.

22. The SCA's surveys have been conducted both by external survey providers through publicly procured channels, and in-house using an online survey tool. Surveys have to be formulated according to the needs of a specific investigation. Both these methods are time-consuming, and for that reason the use of third-party surveys must be decided soon after the case goes to phase 2.

23. A challenge when using surveys is ensuring that there is no room for misunderstanding or interpretation on the part of the surveyed party. A poorly formulated question can have undesirable repercussions for the investigation. Planning a survey in good time is therefore important.

24. In some cases, it is possible to get flat files from undertakings' market surveys containing questions about substitution patterns and consumer preferences. This data can be used in the analysis of UPP, SSNIP ("small but significant and non-transitory increase in price") and other economic analysis. The SCA often contacts the merging parties and other undertakings active in the market very early on in the investigation about available materials that they have produced or acquired.

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<sup>5</sup> Åhléns/NK Kosmetik (Dnr 254/2009), ComHem/Canal Digital Kabel (Dnr 513/2011),

<sup>6</sup> OfficeDepot/Svanströms (Dnr 42/2011), Bonnier/Pocket Shop (Dnr 370/2012), Akademibokhandeln/Bokia (Dnr 452/2012)