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Practical cross-border insights into merger control issues

Merger Control 2022

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Contributing Editors:
Nigel Parr & Steven Vaz
Ashurst LLP

ICLG.com

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Sweden


Peter Forsberg


David Olander


Johan Holmquist

Hannes Snellman Attorneys Ltd

1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The Swedish Competition Authority ("SCA") is responsible for merger control in Sweden. It has the power to review mergers and acquisitions of control (collectively defined as "concentrations" between undertakings, *cf.* question 2.1), and, as of 1 January 2018, the power to prohibit notified concentrations as first instance. The SCA's decisions may be appealed to court, *cf.* question 5.9 below.

1.2 What is the merger legislation?

The central legislative act regulating merger control in Sweden is the Competition Act (2008:579), which stipulates mandatory notification of all concentrations exceeding certain turnover-based thresholds (see question 2.4 below). The Competition Act contains a stand-still obligation which prohibits implementation of concentrations prior to the SCA's clearance decision. The Competition Act is, to a large extent, modelled on, and interpreted in accordance with, EU competition rules. In addition to the Competition Act, the SCA has issued an Implementing Regulation (2008:579) and Guidelines.

1.3 Is there any other relevant legislation for foreign mergers?

On 1 January 2021, Sweden amended the Security Protection Act (2018:585) and introduced a new foreign investment control regime which requires sellers of security-sensitive businesses or assets "that are vital to Sweden's national security" to obtain approval from the Swedish Security Service before the transaction is carried out. It is up to the seller to assess whether the condition "vital to national security" is fulfilled and whether a notification is required in each case. If no notification is made and the Security Service later considers that the condition is fulfilled, the authority have the powers to order a notification as well as to block an already finalised transaction without limitation in time. The investment control regime is separate from the merger control regime enforced by the SCA.

1.4 Is there any other relevant legislation for mergers in particular sectors?

While the Competition Act's merger control regime aims to maintain effective competition in all economic sectors, there are a few sector-specific regulations in place, e.g., within the financial sector and education, which aim to maintain an appropriate ownership of undertakings active in those sectors. Where such sector-specific regulations apply, a change of control over a company may, in addition to clearance by the SCA, require approval from sector-specific authorities.

1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

The Competition Act's merger control regime is applicable to all economic sectors.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

Mergers, acquisitions, and the creation of full-function joint ventures are referred to as "concentrations" between undertakings.

A "concentration" is deemed to arise when a change of control over an undertaking on a lasting basis results from:

1. the merger of two or more previously independent undertakings or parts of undertakings; or
2. the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

Furthermore, the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity constitutes a concentration within the meaning of point 2 above.

The Competition Act does not contain a definition of "control". However, the concept of control is interpreted in line with the EU Merger Regulation's definition of control. Accordingly, control is constituted by rights, contracts or any other means which, either separately or in combination, confer the possibility of exercising decisive influence on an undertaking, in particular by:

1. ownership or the right to use all or part of the assets of an undertaking; or
2. rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

Once it has been determined that a transaction constitutes a "concentration" within the meaning of the Competition Act, the transaction will trigger an obligation to notify the SCA if the relevant turnover thresholds outlined under question 2.4 below are met.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Yes, an acquisition of a minority shareholding may constitute a "concentration" insofar as the transaction confers "control" over the target as set out in question 2.1 above.

2.3 Are joint ventures subject to merger control?

The creation of a joint venture which, on a lasting basis, performs all the functions of an autonomous economic entity constitutes a concentration (see question 2.1 above). The Competition Act does not contain an explicit definition of a full-function joint venture; however, the SCA's Guidelines refer to the definition provided in the European Commission's consolidated jurisdictional notice.

2.4 What are the jurisdictional thresholds for application of merger control?

A concentration between undertakings (as defined in question 2.1 above) must be notified to the SCA if:

1. the combined turnover in Sweden of all the undertakings concerned is more than SEK 1 billion; and
2. the aggregate turnover in Sweden of each of at least two of the undertakings concerned is more than SEK 200 million.

If the SEK 1 billion combined turnover threshold in point 1 is fulfilled, but not the SEK 200 million individual threshold, the SCA may order the parties to submit a notification, even post-closing; please see question 2.7 below.

Furthermore, a concentration which exceeds the thresholds in the EU Merger Regulation will be subject to review by the European Commission; please see question 2.7 below.

2.5 Does merger control apply in the absence of a substantive overlap?

Yes, the Competition Act applies to all concentrations which fulfil the thresholds, regardless of the relation between the parties' business activities.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

"Foreign-to-foreign" transactions are not exempt from the SCA's scrutiny under the Competition Act. Thus, concentrations between non-Swedish undertakings must be notified to the SCA if the transaction constitutes a "concentration" and the parties' turnover attributable to customers located in Sweden meets the turnover thresholds. To illustrate, the creation of a joint venture without business activities in Sweden may be notifiable in Sweden if the joint venture's ultimate parent companies fulfil the thresholds in Sweden.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

If the SEK 1 billion combined turnover threshold is fulfilled, but not the SEK 200 million individual threshold (*cf.* question 2.4 above), the SCA may order the parties to notify a concentration, provided that there are "special reasons" for such an order. Although there is no exhaustive definition of "special reasons", the SCA Guidelines provide that special reasons may be at hand in situations where the parties have large combined market shares or where the target company supplies important input goods, is an important customer, or is a gatekeeper to an important sales channel. Moreover, special reasons may be at hand where the parties' competitive importance is not reflected in their turnover; for instance, in the digital economy.

If the SEK 1 billion threshold is fulfilled, the parties may voluntarily notify a concentration to the SCA. Thus, a voluntary notification could be considered in situations where the parties believe that the SCA may have "special reasons" to order a notification.

The SCA's power to prohibit a concentration cease two years from when the concentration arose, which means that an order to notify may, in theory, constitute a risk relatively long after the closing of the transaction, which may lead to uncertainties in borderline cases.

Albeit uncommon, the SCA has recently made use of its power to order a notification (Easypark's acquisition of Inteleon in 2019). On average, two voluntary notifications are submitted to the SCA each year.

Furthermore, as Sweden is a Member State of the EU, a concentration which fulfils the Swedish thresholds could be transferred to the European Commission in two situations:

- First, a concentration which exceeds the thresholds laid down in the EU Merger Regulation will be subject to exclusive review by the European Commission. Thus, the EU Merger Regulation provides for a "one-stop-shop" regime where the European Commission's jurisdiction will supersede the national competition authorities' jurisdiction.
- Second, the EU Merger Regulation contains a referral mechanism which can transfer jurisdiction, both pre-filing and post-filing, from the European Commission to a Member State or *vice versa* to ensure that the concentration is reviewed by the most suitable authority. A concentration which does not meet the EU thresholds could be transferred to the European Commission if the concentration is notifiable simultaneously in several Member States. Conversely, a concentration which fulfils the EU thresholds may be transferred to a national competition authority if the anticipated effects on competition are primarily national in scope. Moreover, one or more Member States may request the Commission to examine any concentration which does not fulfil national thresholds or EU thresholds but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request. The specific conditions for these referrals are laid down in Articles 4, 9 and 22 of the EU Merger Regulation and in the European Commission's notice on case referral.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The calculation of turnover relevant for the turnover thresholds shall include all transactions made between the same parties within the last two years.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

It is mandatory to notify concentrations which meet the turnover thresholds. There is no obligation to notify within a specific time period. However, as the Competition Act contains a stand-still obligation, the parties may not complete the transaction, e.g., by transferring control (as defined under question 2.1 above) over the target from the seller to the purchaser or by the purchaser otherwise exercising a decisive influence over the target, prior to the SCA's clearance decision.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

There is no exception to the obligation to notify when the turnover thresholds are met.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

The Competition Act does not contain any direct sanctions in case the parties fail to notify a notifiable concentration. However, if the SCA learns about such a concentration, it may order the parties to submit a notification under a penalty of a fine. The SCA's power to prohibit a concentration ceases two years from when the concentration arose. Moreover, if the SCA ultimately prohibits a concentration, the agreements between the parties which led to the concentration will be invalidated.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

Generally, it is not possible to complete a cross-border concentration which is notifiable in Sweden before the SCA's clearance of the complete concentration. However, on a case-by-case basis, the SCA may release the parties from the stand-still obligation which could facilitate completion in other jurisdictions prior to the SCA's clearance.

3.5 At what stage in the transaction timetable can the notification be filed?

A notification may be filed as soon as the parties can demonstrate their intention to go through with the concentration. Such intentions could, for example, be demonstrated by a letter of intent or an announcement to make a public bid.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The statutory period for the SCA's initial review is 25 working days ("Phase I") starting on the working day after the notification was filed, provided that the SCA deems the notification complete. The SCA will not issue a formal declaration of completeness, and in complex matters it is advisable to engage in pre-notification discussions with the SCA to ensure that the notification is deemed complete once filed. Before the end of Phase I, the SCA will either clear the concentration or open an in-depth review ("Phase II") which may last up to three calendar months.

Phase I will be extended to 35 working days if the parties propose remedies within the initial 25 working days. The SCA may extend Phase II by one month at a time if the parties consent to such an extension or, in the absence of the parties' consent, if the SCA has extraordinary reasons for such an extension.

The SCA may temporarily "stop the clock" in either phase if a party to the concentration has failed to comply with an information request. The SCA recently took this opportunity during the review of Noka's acquisition of Avarn in 2018. The SCA may also stop the clock on request by the notifying party as recently illustrated during the SCA's review of Gasum's acquisition of Lidingö Clean Gas in 2020, where the parties asked for a one-month respite, as well as the SCA's review of the recent merger between Altia and Arcus, where the parties consented to extending Phase II. In case the SCA has stopped the clock, the process will recommence on the working day after compliance with the request. Furthermore, on request by the parties, the SCA may stop the clock temporarily for as long as the SCA deems appropriate.

In order to facilitate the SCA's review, particularly of complex concentrations, the SCA encourages the parties to engage in informal pre-notification discussions with the authority.

The SCA's aim is to conclude unproblematic concentrations (without horizontal overlaps or vertical relationships) within 15 working days. In 2020, the SCA's average handling time for concentrations concluded in Phase I was 16 working days, compared with 88 working days in Phase II.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

The Competition Act contains a stand-still obligation which stipulates that notifiable concentrations must not be completed, e.g., by transferring control (as defined in question 2.1 above) over the target from the seller to the purchaser or by the purchaser otherwise exercising a decisive influence over the target, prior to the SCA's clearance decision. If the SCA apprehends an infringement of the stand-still obligation, the authority may order the parties to respect the stand-still obligation under a penalty of a fine in case of non-compliance.

3.8 Where notification is required, is there a prescribed format?

The SCA requires that notifications follow a standardised format provided by the SCA's Implementing Regulation. In relation to complex concentrations, the parties will typically engage in informal pre-notification discussions with the SCA to ensure

that the authority deems the notification complete upon filing as Phase I will not recommence until the notification is deemed complete; *cf.* question 3.6 above.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

There is no separate short-form notification for unproblematic concentrations. However, if there is no horizontal overlap or vertical relationship between the parties or, in case of a horizontal overlap where the combined market share is less than 20% or in case of a vertical relationship where the market share is less than 30% on the upstream or downstream market, the notification requires less information from the parties. The SCA's aim is to clear unproblematic concentrations (without horizontal overlaps or vertical relationships) within 15 working days.

3.10 Who is responsible for making the notification?

In concentrations resulting from the acquisition of control, the acquirer has the obligation to notify the concentration to the SCA. If the concentration consists of a merger between two previously independent undertakings, those parties are jointly responsible to notify the concentration to the SCA.

3.11 Are there any fees in relation to merger control?

There are no filing fees payable in relation to a merger control procedure.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

The stand-still obligation provides that concentrations must not be completed, e.g., by transferring control (as defined in question 2.1 above) over the target from the seller to the purchaser, or by the purchaser otherwise exercising a decisive influence over the target prior to the SCA's clearance decision. The Competition Act does not contain an explicit exception from the stand-still obligation in situations where control is acquired over a listed undertaking through purchase of shares over a stock exchange. However, in such situations, where the purchaser, for practical reasons, is unable to notify the concentration prior to the acquisition, the SCA Guidelines provide that that the stand-still obligation prohibits the acquirer from exercising the rights associated with the shares prior to the SCA's clearance. Thus, an acquisition over a listed target remains notifiable to the SCA if the relevant turnover thresholds are met, and the stand-still obligation applies in the sense that the acquirer may not exercise the rights related to the purchased shares, including voting rights, prior to the SCA's clearance. Lastly, the Competition Act provides that the parties may ask the SCA for an exception from the stand-still obligation.

3.13 Will the notification be published?

All notified concentrations will be listed in the SCA's registry which is accessible on the SCA's website (including a summary of the concentration and the parties involved). Furthermore, practically all records of a Swedish authority, including the SCA, are generally available to the public under the public's constitutional right to access authority records. However, business secrets submitted to the SCA in relation to a merger review and pre-notification communication are exempt from public access and will be kept confidential upon the parties' request.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The SCA shall prohibit a concentration which would significantly impede effective competition within Sweden or in a substantial part of the country ("substantive test"). In particular, account shall be taken of whether the concentration creates or strengthens a dominant position. The substantive test focuses on competition concerns, and the theories of harm associated with the substantive test generally concern whether the concentration could give rise to non-coordinated or coordinated effects on competition.

As the Competition Act's substantive test is modelled on the substantive test of the EU Merger Regulation, the European Commission's decisional practice may provide useful guidance on the application of the substantive test.

4.2 To what extent are efficiency considerations taken into account?

The SCA will take efficiency claims into account and assess whether such claims could outweigh potential negative effects on competition.

4.3 Are non-competition issues taken into account in assessing the merger?

The main objective of the substantive test is to maintain effective competition. Thus, the SCA will not take other public interests into account, except for situations relating to national security for which there is an explicit rule stipulating that a concentration may not be prohibited if a prohibition would conflict with important national security interests or national supply interests.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

All notified concentrations will be listed in the SCA's registry, which is accessible via the SCA's website. In unproblematic cases, the SCA typically will not consult third parties. However, in more complex cases, the SCA will often send information requests to the parties' customers, suppliers and competitors to the extent that the SCA deems necessary. The SCA may also contact other market participants and will also hear other third parties' opinions sent to the SCA during the review. There is no formal procedure to file such an opinion.

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

The SCA has far-reaching powers to order both the parties and third parties to provide any information that the SCA deems

necessary for the assessment of a notified concentration. An order to provide information may be issued under a penalty of a fine. Orders to provide information and decisions to impose penalties are available to the public.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The case file of a Swedish authority, including the SCA, is generally available to the public under the public's constitutional right to access authority records. Thus, it must be assumed that any document sent to the SCA, including a merger notification, will be available to the public. However, commercially sensitive information submitted to the SCA and all pre-notification communication are exempt from public access on request by the parties.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The SCA's review ends by either a clearance decision or a prohibition decision. Clearance decisions in unproblematic cases will typically not contain any reasons for the decision. Decisions in more challenging cases will generally contain the SCA's reasons, and prohibition decisions will always contain the SCA's reasoning. Generally, the SCA only issues press releases on its website in relation to the two latter types of cases. Nevertheless, as noted above, all decisions are available to the public upon request.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

If the SCA identifies competition concerns, the parties may propose commitments to remedy such concerns. Commitments can be structural (e.g. a divestiture) or behavioural (e.g. non-discrimination of third parties or granting third parties access to restricted resources such as intellectual property).

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

As noted in question 2.5 above, "foreign-to-foreign" mergers are not exempt from the SCA's scrutiny if the transaction constitutes a "concentration" and the parties' turnover attributable to customers located in Sweden meets the turnover thresholds. Thus, the SCA's approach to remedies is based on the concentration's effect in Sweden rather than the parties' domicile.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

The scope of commitments and the exact deadlines in which to implement them are issues that the SCA and the parties will discuss on a case-by-case basis. However, commitments proposed during Phase I can only be considered by the SCA if the competition concerns are clear and easy to remedy. Commitments proposed during Phase I will extend the review from 25 working days to 35 working days. There is no exact deadline for submitting commitments in Phase I; however, parties should bear in mind that the SCA may decide to open a Phase II investigation prior to the 25 working days' deadline of Phase I.

Commitments proposed during Phase II should be filed to the SCA no later than three weeks before the end of the phase. If commitments are proposed later in Phase II, e.g. in connection with an oral procedure, the parties should at the same time be prepared to give consent to an extension of the phase to enable the SCA to conduct a market test and assess whether the proposed commitment is sufficient to remedy the competition concerns. If the SCA has decided to extend the phase, commitments should be sent to the SCA no later than three weeks before the new deadline expires.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The SCA has not published detailed guidelines on remedies; instead, the SCA's Guidelines explicitly refer to the European Commission's notice on remedies for guidance.

5.6 Can the parties complete the merger before the remedies have been complied with?

The exact scope of commitments will be negotiated on a case-by-case basis and could entail both pre-completion and post-completion commitments. The SCA's practice has generally been to accept post-completion commitments.

5.7 How are any negotiated remedies enforced?

A commitment negotiated with the SCA will typically be made a condition of the clearance decision and subject to a penalty of a fine in case the parties breach their commitment. The size of the fine is decided on a case-by-case basis to ensure a deterrent effect.

5.8 Will a clearance decision cover ancillary restrictions?

A clearance decision covers ancillary restrictions which are directly related and necessary to the implementation of the concentration.

5.9 Can a decision on merger clearance be appealed?

It is not possible to appeal a clearance decision. Therefore, a clearance is effective immediately.

A prohibition decision may be appealed by the parties to the concentration within three weeks from the date of the decision. Third parties have no right to appeal a prohibition. An appeal will be heard by the Patent and Market Court in Stockholm ("PMC") which will conduct a full review of the merits of the case. The PMC must deliver its judgment within six months from the appeal. The PMC may extend the period by one month at a time if the parties consent to such extension or, in the absence of consent, if the PMC has extraordinary reasons for such extension. The PMC's judgment may be appealed within three weeks to the Patent and Market Court of Appeal ("PMCA") which should deliver its judgment within three

months from the deadline to appeal the PMC judgment. The PMCA may extend the period on the same grounds as the PMC.

5.10 What is the time limit for any appeal?

A prohibition may be appealed by the parties to the concentration within three weeks from the date of the decision.

5.11 Is there a time limit for enforcement of merger control legislation?

The SCA's prohibition decision must be delivered within two years from when the concentration arose.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The SCA cooperates with the European Commission and the national competition authorities in all EU Member States within the European Competition Network. Moreover, a Nordic cooperation agreement enables the SCA to cooperate closely with the competition authorities in Denmark, Finland, Iceland and Norway.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

The SCA publishes statistics on concentration cases on a yearly basis. Approximately 80 concentrations are notified to the SCA each year. During the last three years, approximately two to three cases per year have been subject to a Phase II investigation. Outright prohibition decisions are relatively unusual, which implies that parties typically abandon problematic concentrations which could not be remedied on terms acceptable to the parties and/or the SCA. Indeed, in the last three years, only one concentration has been prohibited by the SCA.

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

The Swedish Government is currently conducting an inquiry contemplating whether the investment control regime (mentioned in question 1.3 above) should be amended further. The outcome of the inquiry is expected in November 2021.

6.4 Please identify the date as at which your answers are up to date.

The answers are up to date as at 15 October 2021.

7 Is Merger Control Fit for Digital Services and Products?

7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

The SCA is actively monitoring competition in digital markets and has conducted several investigations on the basis of the current Competition Act. The SCA has stated that the current Competition Act, which includes a possibility to review certain non-notifiable concentrations, is well suited to review concentrations in digital markets, which was illustrated by the SCA's recent review of a non-notifiable concentration within the market for mobile payment services (Easypark's acquisition of Inteleon in 2019).

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

There have not been any changes to law, process or guidance in relation to digital mergers recently.

7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

In a recent merger control case concerning an acquisition in the market for mobile payment services (Easypark's acquisition of Inteleon in 2019) which did not meet the turnover thresholds, the SCA found special reasons to order the acquisition to be notified and conducted in an in-depth review before ultimately clearing the concentration. The case highlights that the SCA must take an active role in apprehending non-notifiable concentrations which involve small but important competitors in digital markets.

Peter Forsberg specialises in competition law and has solid experience of domestic and international merger control, competition law disputes and compliance work. He regularly represents clients in proceedings before national competition authorities as well as before the European Commission. In addition, Peter has substantial experience from advising companies and contracting entities in both advisory and contentious public procurement law matters. Peter has recently been involved in matters, e.g., in the following sectors: energy; financial services; food and consumer products; forest products; pharmaceuticals; and telecommunications.

Hannes Snellman Attorneys Ltd
Kungsträdgårdsgatan 20
111 47 Stockholm
Sweden

Tel: +46 760 000 080
Email: peter.forsberg@hannessnellman.com
URL: www.hannessnellman.com

David Olander specialises in EU and competition law. He regularly represents clients in matters concerning merger control, cooperation agreements, cartels, abuse of dominance and other aspects of competition law before competition authorities, sector agencies and courts. His recent experience includes a wide range of industries and markets, such as the pharmaceutical, media, tech, food, transportation, construction, forest and mining industries. Prior to joining the firm in 2017, he was a case officer with the Swedish Competition Authority.

Hannes Snellman Attorneys Ltd
Kungsträdgårdsgatan 20
111 47 Stockholm
Sweden

Tel: +46 760 000 057
Email: david.olander@hannessnellman.com
URL: www.hannessnellman.com

Johan Holmquist's practice focuses on competition law matters, including conduct investigations, merger reviews, litigation and counselling. He has represented clients before the European Commission and the Swedish Competition Authority in Phase I and Phase II merger reviews. Prior to joining the firm in 2018, Johan served as an associate judge at the Patent and Market Court of Appeal in Stockholm.

Hannes Snellman Attorneys Ltd
Kungsträdgårdsgatan 20
111 47 Stockholm
Sweden

Tel: +46 760 000 047
Email: johan.holmquist@hannessnellman.com
URL: www.hannessnellman.com

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