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Director General

Mr Josep M. Carpi Badia
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Policy
European Commission, DG COMP

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Dear Mr Carpi Badia,

RE: Evaluation of procedural and jurisdictional aspects of EU merger control

The Swedish Competition Authority (SCA) welcomes the evaluation of procedural and jurisdictional aspects of EU merger control and supports the roadmap as proposed by the European Commission (Commission). The SCA would like to take the opportunity to comment on some of these aspects.

Treatment of certain categories of cases of which generally do not raise competition concerns

The SCA supports the White Paper proposal¹ on amending the EUMR so that the creation of a full function joint venture located and operating totally outside the EEA would fall outside its scope. It could be further discussed if other categories of transactions which normally do not raise competition concerns could be exempted from mandatory notification. However, it is important that such exemptions would meet the companies' requirement of legal certainty, since those transactions would not receive a clearance decision from the Commission. Another way to proceed could be to further simplify and speed up the notification and clearance procedure for certain types of transactions.

Application of turnover-based jurisdictional thresholds set out in the EUMR

The SCA is positive to the evaluation of how the turnover-based thresholds are applied and how they can be improved to ensure an effective merger control. Digital markets have changed the landscape, and the value of a company and the role it may play in the market is today not necessarily reflected in its turnover. Therefore, the SCA considers it highly relevant to reflect on alternative ways to calculate thresholds or other means of determining when a merger has to be

¹ White Paper Towards more effective EU merger control, Brussels, 9.7.2014, COM(2014) 449 final, p. 18

notified. Transaction value may be one aspect to consider. The SCA has first-hand experience from cases where the target's turnover was low but the transaction value was significant, as was the role the target had or was about to develop in the market.

At the same time, it is crucial to maintain the principle that thresholds should be calculated or defined in an objective way, to ensure that undertakings will know when there is an obligation to notify and when a merger does not have to be notified.

According to the Swedish Competition Act, in cases where the merging parties fulfil only the total but not the individual turnover thresholds for mandatory notification, the SCA may request a merger notification *ex post* on particular grounds. This could, for example, be the case when a strong undertaking acquires a newly established undertaking that could challenge the position of the buyer in the future. The right for the SCA to request a notification is accompanied by a right for the merging parties to voluntarily notify a concentration where only the total turnover threshold is met. By doing so, the merging parties can themselves initiate the legal time periods for the SCA's investigation in cases where they believe that the transaction could be of interest for the SCA to review. The risk that the SCA will request a merger notification *ex post* is not unlimited in time, since the Swedish Competition Act stipulates that a concentration may not be prohibited more than two years after it occurred. This time period includes the time for the SCA's investigation as well as for the judicial review.

Functioning of case referral mechanisms set out in the EUMR

Article 4(5) of the Merger Regulation: pre-notification referral from Member States to the Commission

The SCA supports the White Paper proposal² on abolishing the current two-step procedure whereby the parties would notify a transaction directly to the Commission instead of submitting a reasoned submission followed by a notification. The SCA has so far never opposed an Article 4(5) request. The possibility for a competent Member State to oppose a referral request within 15 working days from a notification to the Commission should be sufficient for those exceptional cases where Member States wish to review the cases under national law.

Article 22 of the Merger Regulation: post-notification referrals from Member States to the Commission

The SCA welcomes the proposed improvements³ aimed at making the procedure under Article 22 more effective. It is important that a Member State has the

² White Paper Towards more effective EU merger control, Brussels, 9.7.2014, COM(2014) 449 final, p. 16

³ White Paper Towards more effective EU merger control, Brussels, 9.7.2014, COM(2014) 449 final, p. 17-



possibility to refer a case where competition concerns arise outside its jurisdiction. It is reasonable that only a Member State competent to review a transaction under national law would be able to make a referral request to the Commission. It should also be clarified that a Member State cannot veto a referral request if that Member State has already cleared the transaction in its own jurisdiction.

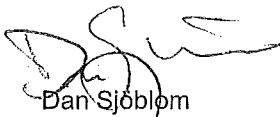
Article 4(4) of the Merger Regulation: pre-notification referrals from the Commission to a Member State

The SCA supports the White Paper⁴ proposal on adapting the substantive test in Article 4(4) so that parties are no longer required to claim that the transaction may significantly affect competition in a market in order for a case to qualify for a referral. The current stipulation of the Article may refrain companies from making a referral request in cases where it actually would be more efficient and in line with the principle of subsidiarity to try the case in a Member State. Thus, whether a concentration may lead to competition concerns or not in that Member State has no real significance for the referral.

Certain technical aspects of the procedural and investigative framework for assessment of mergers

The SCA is positive to changes and clarifications in the regulatory framework that make the assessment of mergers more effective and efficient for the business community as well as for the authorities. In this regard, the areas identified in the 2014 Commission Staff Working Document⁵ appear to be relevant aspects to consider.

Yours sincerely,



Dan Sjöblom

⁴ White Paper Towards more effective EU merger control, Brussels, 9.7.2014, COM(2014) 449 final, p. 18

⁵ Commission Staff Working Document accompanying the document White Paper Towards more effective EU merger control, Brussels 9.7. 2014, SWD(2014) 221 final, Section 5.2