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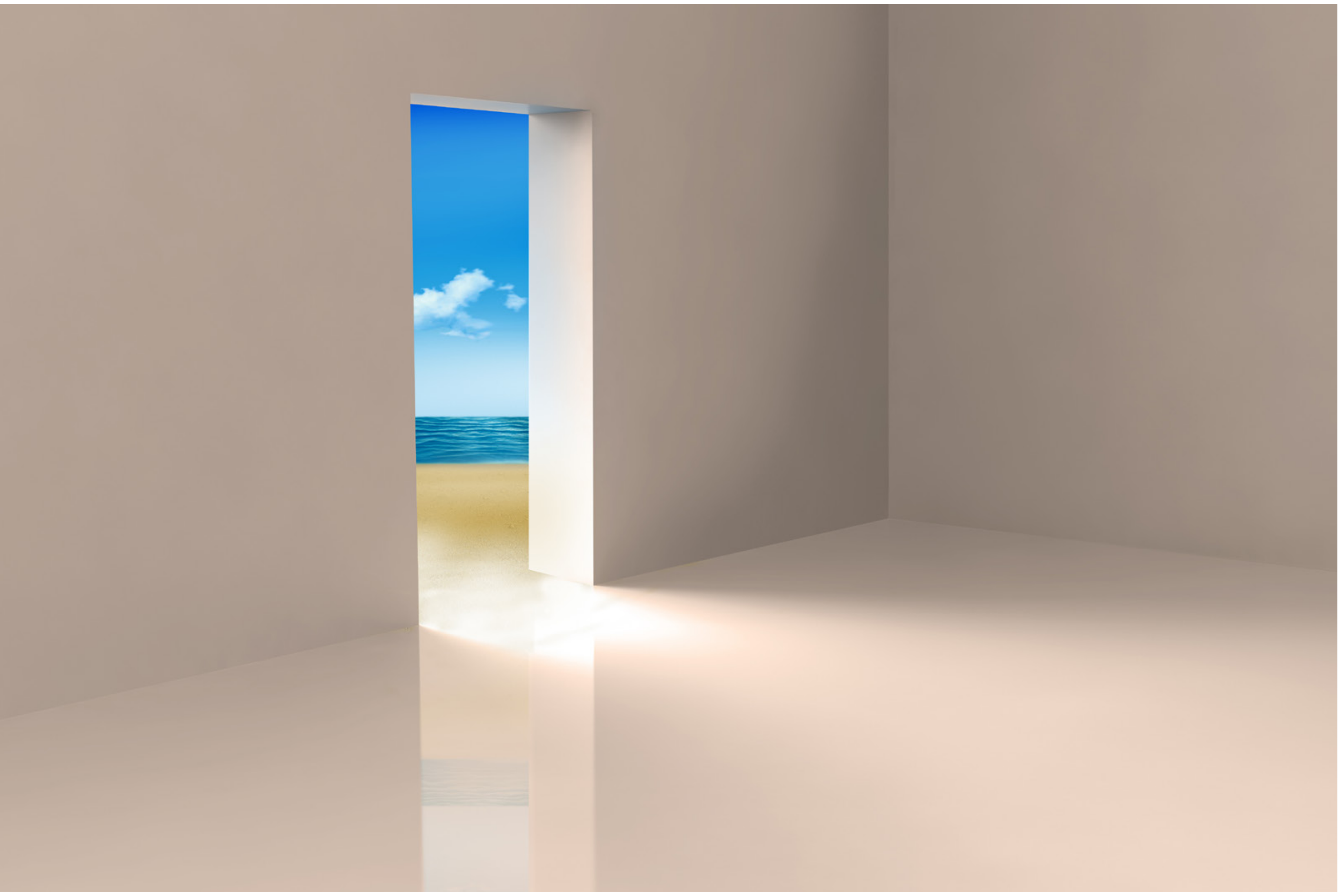

Elections, politics and M&A – a delicate concoction

All the signs are pointing to a brighter M&A future. The economic recovery is continuing and appears less sensitive to geopolitical disturbances (such as Ukraine and Iraq), the stock market remains positive with attractive valuations and the IPO window is wide open. Meanwhile, interest rates are low, there's lots of money looking to be invested and the sentiment in board rooms and among management for M&A transactions has returned. After a somewhat hesitant start to the year for private corporate deals and a very strong public M&A opening, we are looking forward to a busy autumn in both sectors.

It will be interesting to see what impact, if any, this autumn's Swedish general election will have on the appetite of investors targeting Sweden. Current opinion polls indicate we will have a change of government and that the Social Democrats will form a coalition with the Green Party. However, they would probably need the support of the Left Party, Sweden's former Communists, and the question remains whether the Left Party would be offered seats in a new government. The broader the coalition the greater the uncertainty about policies, and uncertainty tends to have a negative effect on markets and investor appetite. According to the latest polls, the fourth-largest party will be the nationalist Sweden Democrats, who have almost doubled their support since the last election in 2010. Growing interest in nationalist parties has also been seen elsewhere in Europe.

The recent EU parliamentary elections saw a surge in support for nationalists across member states. Parallels have been made with political developments in Europe after the great depression of the 1930s, when the global financial slump contributed to the rise of previously marginal figures such as Hitler and Mussolini. This time around, it is clear that the credit crunch and euro zone crisis have fuelled the rise of nationalist parties. While modern nationalist policies are usually less blatantly racist than those of the 1930s, they have many aims in common, such as restricting immigration and protecting the domestic economy and industry. Modern nationalists are usually opposed to the development of free trade between states and regions. The success of the nationalist parties in the EU elections does not appear to have had any immediate impact on the financial markets, but it may hamper the development of the European internal market and the possibility of the EU negotiating free trade agreements with the US, for example.

The rise of the nationalists may also have the indirect effect of influencing the established parties to adopt a more nationalistic approach. After the UK Independence Party's dominance in the European elections, Prime Minister David Cameron may have to bring forward the referendum on the UK's EU membership. Prompted by the success of the nationalists, many established parties across Europe are promising tougher immigration policies.

These may not have an immediate impact on the economy and the development of the M&A market, but a UK withdrawal from the EU certainly would. Another possible consequence of growing nationalism is governments becoming more protectionist of their domestic industries. This was illustrated by the UK and Swedish governments' recent efforts to protect national interests when Pfizer made a bid for AstraZeneca. Another example is the Swedish government's demand for guarantees from Volkswagen that it would safeguard jobs in Sweden in its takeover of Scania.

A new Swedish government may regulate sectors such as schools and healthcare differently from the current coalition, which has introduced profit-making private companies – including private equity firms – as owners of schools and healthcare institutions. There would clearly be a dramatic impact on private companies that have invested in such businesses if these owners were prompted to leave these sectors or were barred from making a profit in them.

Anders Söderlind, partner, member of
Setterwalls' Corporate and M&A practice group.
anders.soderlind@setterwalls.se

Delaware court decision to enjoin merger vote emphasises fiduciary duties that also apply to Swedish boards of directors

In November 2010, Del Monte Foods Company ("Del Monte") announced that it had reached an agreement on a USD 5.3 billion buyout with Blue Merger Sub, Inc., an entity ultimately owned by a consortium of private equity funds affiliated with Kohlberg Kravis Roberts & Co. L.P. ("KKR"), Vestar Capital Partners and Centerview Partners.

However, the shareholders' vote on the proposed buyout, which was required in order to implement it, was postponed by the Delaware chancery court so that Del Monte could seek other potential buyers in an additional "go shop"-period. The reason for the postponement of the decision to approve the buyout and the approval by the court of a new go-shop period, which was in addition to a go-shop period in the merger agreement, was that the court found there was reasonable probability that the Del Monte board had breached its fiduciary duties, which in turn was caused partly by actions by Del Monte's financial advisor.

In short, the background was that the financial advisor had represented both Del Monte and KKR without informing Del Monte. The financial advisor's incentive to do so was that by representing both sides of the transaction it would be able to generate additional fees by providing financing to the buyer side. It was noted by the court that the financial advisor, among other things, had failed to inform Del Monte of its dual loyalties and also that it had directly assisted in breaches of confidentiality agreements entered into. The buyout was subsequently approved and successfully implemented.

This is essentially old news unrelated to the Swedish market, but the underlying principles involved are still of interest. One should bear in mind that, while the US and the Swedish legal systems are very different, the concept of fiduciary duties exists in both systems.

What, then, were the reasons for the court's decision to postpone the merger, i.e. what specific actions and omissions constituted breaches of the board's fiduciary duties?

One of the main omissions by the board was that it made insufficient efforts to follow up on its advisor's actions. The financial advisor was working for both sides of the transaction and this was not questioned by the board even when it became apparent. The board should have done more to protect the company and its shareholders from the negative aspects of conflicts of interest on the part of the financial advisor.

Second, when one of the lead private equity firms wanted permission to "team up" with a private equity firm that had previously shown significant interest in Del Monte, this was approved by the board, thereby limiting the competition. In view of the interests of the company's shareholders, some compensation, such as a higher price, should have been sought by the board in order for such a concession to be made. Alternatively, the board could have asked the private equity firms involved to team up differently in order to preserve or increase competition among them.

Third, the board acted unreasonably when it approved its financial advisor's request to be allowed to provide buyer-side financing. At this time, the board appeared not to have considered at all if this was to the benefit of shareholders, i.e. if it increased the likelihood of a successful transaction or a higher price. As no such considerations appear to have been made, the shareholders were instead left with the key drawback: as Del Monte's financial advisor was also providing financing to the buyer, the financial advisor had an obvious conflict of interest. If the buyer over-paid this could by extension lead to substantial credit losses for the financial advisor.

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Even though the Del Monte case includes many aspects specific to the US, we note that the issues relating to conflicts of interest are also highly relevant in Sweden. Although there is a general absence of case law on the fiduciary duties of Swedish boards of directors, we find that at least some of the shortcomings highlighted by the Delaware court could be viable as grounds for litigation against a Swedish board of directors.

If it finds itself in a situation similar to that of the Del Monte board, a board of directors should ask itself at all times: are we doing our best to protect the interests of the company and its shareholders? If the answer to this question is yes, this would reasonably also mean that the board is taking steps to ensure that its advisors do not have a conflict of the interest from the outset and that the board is taking reasonable measures to ensure that its advisors remain unconflicted by monitoring their conduct. Furthermore, if an advisor makes a specific request to assist another party in addition to the company, e.g. for it to be able to also assist a counter-party in a transaction, such a request should only be approved if there is a significant advantage to the company and its shareholders and if such advantage outweighs the risks involved. In addition, the board should note that while many of the questions relating to conflicts of interest raised could be addressed in an agreement when its advisor is re-tained, the board's responsibility does not end there. Only by making sure that its advisors stay unconflicted can the board of directors be sure that it is observing its fiduciary duties.

Anders Grefberg, senior associate, member of
Setterwalls' Corporate and M&A practice Group.
anders.grefberg@setterwalls.se

The legal framework for equity crowdfunding in Sweden

The past few years have seen the introduction of a new method for the financing of small and medium-sized companies through the sale over the internet of equity securities to many investors for a limited consideration. This method is often referred to as "equity crowdfunding". In addition to the issuers and the investors, equity crowdfunding also involves the provider of an internet funding portal, a "crowdfunding platform". This article examines the legal framework for equity crowdfunding in Sweden from the issuer's perspective.

Sweden has not issued any legislation specifically addressing equity crowdfunding. However, equity crowdfunding involving the sale of securities to Swedish investors is subject to Swedish legislation in general, including Swedish securities law (primarily the Swedish Act on Trading in Financial Instruments) and Swedish marketing and consumer law (primarily the Swedish Marketing Act). The Swedish Companies Act also applies to the extent the issuer is a Swedish company. As crowdfunding normally takes place over the internet, a number of Swedish acts are applicable, such as the Swedish E-commerce Act and the Swedish Distance and Off-premises Sales Act which, for example, carry certain information requirements.

Under the Act on Trading in Financial Instruments, issues of securities by an issuer to the public for a total consideration of less than EUR 2,500,000 from investors within the European Economic Area (the European Union countries plus Iceland, Norway and Liechtenstein) during any 12-month period are exempt from the general obligation to prepare and register a prospectus with the Swedish Financial Supervisory Authority. As an equity crowdfunding typically falls below this threshold, the generally burdensome and costly process of preparing a prospectus can often be avoided in equity crowdfunding. It should be noted that the above provisions apply to Swedish and foreign issuers alike, provided that the relevant issue is directed at Swedish investors. Consequently, a foreign issuer targeting only Swedish investors in the European Economic Area can use the EUR 2,500,000 exemption to avoid having to prepare and register a prospectus.

If the issue is directed at Swedish consumers the Swedish Marketing Act applies, stipulating that marketing must comply with "good marketing practices".

For Swedish issuers, it may be noted that consideration received by the issuer does not constitute taxable income from a Swedish tax perspective. However, Swedish law differentiates between public companies and private companies. Under the Swedish Companies Act, private companies are prohibited from advertising with the aim of placing securities of the company. It should be noted that a number of Swedish private companies are presently involved in equity crowdfunding that could potentially be in breach of such prohibition, and our advice would be not to launch an equity crowdfunding project using a Swedish legal entity without first consulting legal professionals.

Dag Fredlund, partner, member
of Setterwalls' Corporate and M&A practice Group.
dag.fredlund@setterwalls.se

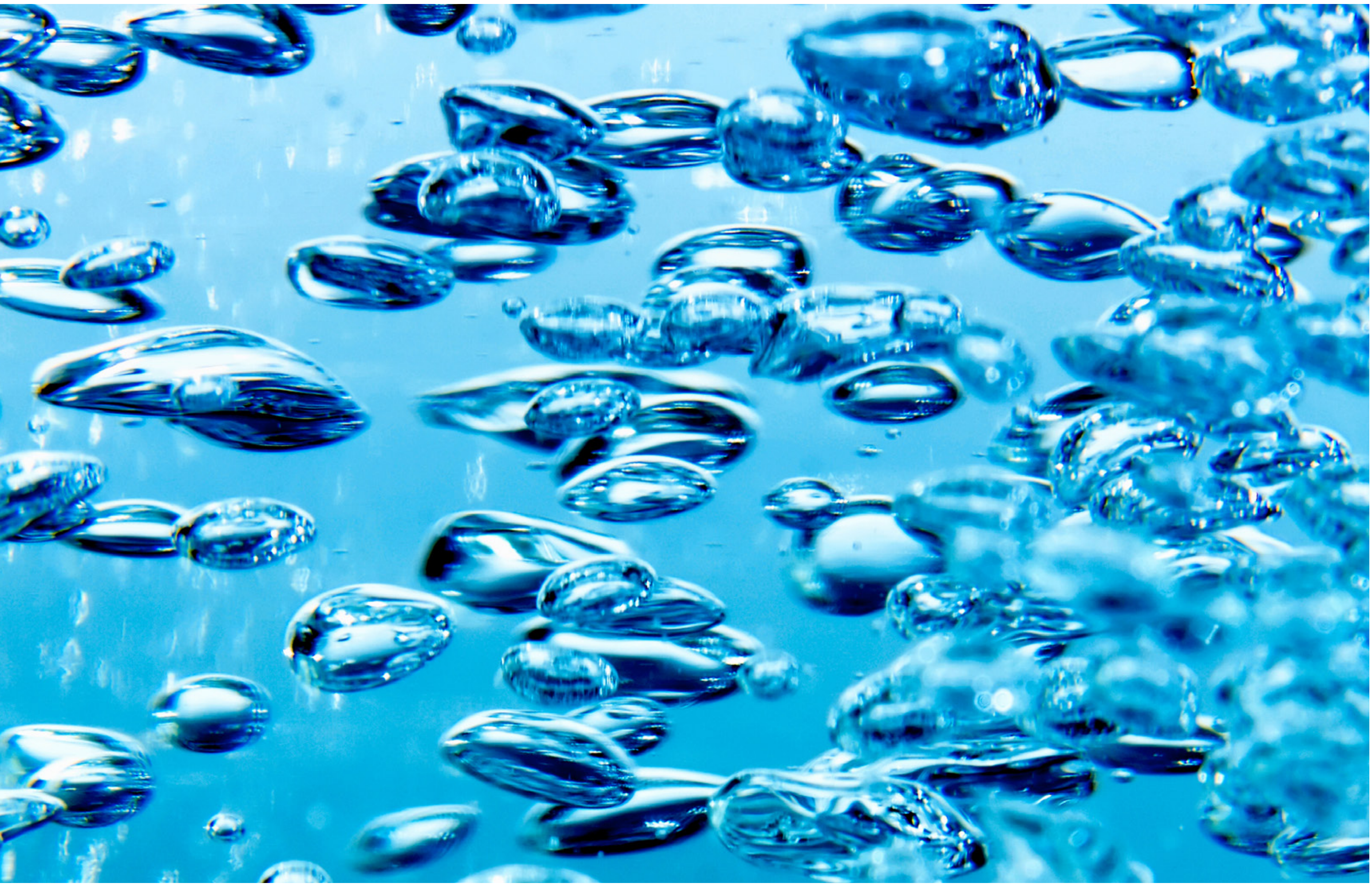
Some issues to consider when implementing provisions regarding liquidated damages in transaction documents

Provisions regarding liquidated damages are commonly used as a remedy in non-disclosure agreements, shareholders' agreements and share purchase agreements. The wording of these clauses is essential for the ability to claim compensation for damages in addition to the agreed liquidated damages. In a recent ruling, the Swedish Supreme Court has limited the ability to claim compensation for damages when liquidated damages have been agreed between parties.

Liquidated damages are commonly used to sanction certain provisions in transaction documents, such as non-disclosure agreements, shareholders' agreements and share purchase agreements. In the two latter types of transaction documents, liquidated damages are typically used to sanction matters such as confidentiality, non-solicitation and non-compete undertakings. The reason for including provisions regarding liquidated damages in relation to these types of undertakings is that it is difficult for the beneficiary of the undertaking to show actual economic loss in the event of breach of the undertakings.

A recent ruling by the Swedish Supreme Court (NJA 2010 s. 629) dealt with a liquidated damages clause in an agreement between two parties concerning the handling of a master key to certain premises. The case is of interest since the court interprets the liquidated damages to be the only remedy and limits the compensation in accordance with the liquidated damages clause. The agreement between the parties in the case in question stipulated that if a certain master key were lost, the party responsible for the key should pay a fixed sum as compensation to the other party. Since the loss far exceeded the agreed liquidated damages, the claimant alleged that the clause did not regulate compensation for damages and that this should be paid in addition to the liquidated damages. The court ruled that the agreement was precise and clear and that the breaching party had been correct in perceiving the clause to be a final regulation between the parties. Therefore, the court ruled that the agreement should be interpreted as a limitation of the ability to claim compensation in addition to the liquidated damages set out in the agreement.

It should, however, be noted that the judgment does not state a general rule but that any agreement must be interpreted with regard to the circumstances of each case. This demonstrates the importance of careful drafting and the need to consider if the liquidated damages should be the minimum or the maximum liability. It should also be noted that a contract term or condition may be modified or set aside by



the court if, for example, such term or condition is unconscionable with regard to the content of the agreement or the circumstances at the time the agreement was entered into.

In practice, the burden of proof for loss is difficult to achieve, especially in respect of losses related to unpermitted use of confidential information. It is a basic principle that the burden of proof lies with the person claiming breach of contract and it is therefore essential to regulate the remedy in the event of unauthorized use when sensitive information is disclosed to the counterparty. A high contractual penalty ("avtalsvite" in Swedish) may sometimes seem aggressive, but it is ultimately the only sure way to simplify the burden of proof for loss suffered from one party's breach of contract, as it is easier to prove a breach of contract than a loss suffered from, for instance, confidential information being inadmissibly disclosed. However, in the context of the recent Supreme Court ruling, the inclusion of a poorly drafted liquidated damages clause could serve as an aggressive limitation of liability clause on behalf of the party in breach. The most important lesson from the Supreme Court case, therefore, is the importance of complementing a liquidated damages clause with a provision stating that the party in breach will also be liable to pay damages in the event that the actual loss suffered by the non-breaching party exceeds the agreed amount of the liquidated damages.

Samuel Skybrand, associate, member of Setterwalls' Corporate and M&A practice Group.
samuel.skybrand@setterwalls.se

Validity and enforcement of minority protection rights in shareholders' agreements

As a general rule under Swedish company law, all provisions of the Swedish Companies Act (the "Companies Act") that protect shareholders (as opposed those protecting third parties/creditors) may be departed from provided that all shareholders give their consent. It is very common for shareholders' agreements to include provisions that depart from the Companies Act on matters such as voting rights, share transfer restrictions and various minority protection rights.

It has been established that only the parties, and not the company, are bound by the provisions of a shareholders' agreement. The relationship between the parties is governed by civil law and the shareholders' agreement, whereas the parties' relationship with the company is governed by the Companies Act and the company's articles of association. The effect of this is primarily that the company's bodies (board of directors and managing director), as a rule, are not bound by provisions in shareholders' agreements. For example, a transfer of shares that violates the provisions of a shareholders' agreement does not prevent the board of directors from registering the new shareholder as owner of the shares in the company's share register, although only to the extent that the transfer complies with Swedish company law and the company's articles of association. The legal effects of such a breach are instead to be found in the shareholders' agreement (i.e. specific sanctions agreed between the shareholders) or in general principles of civil law (normally damages or invalidity).

Minority protection rights in the Companies Act (and in shareholders' agreements)

As stated above, the parties, and not the company, are bound by the provisions of a shareholders' agreement. In principle, this means that a shareholder may still force the company to carry out an action in violation of the provisions of a shareholders' agreement. It is very common in Swedish management (and other minority) shareholders' agreements for the managers to waive all their minority protection rights pursuant to the Companies Act and thus agree not to invoke any minority protection rights pursuant to the Companies Act. For example, a minority shareholder (or a group of minority shareholders) holding more than 10 % of all shares in a company may request the annual general meeting to approve the distribution of 50 % of the remaining profit for the year pursuant to the adopted balance sheet. Another example is that a shareholder that owns more than 50 % of the voting rights in a company may dismiss and appoint board members despite the fact that the shareholders' agreement may state that such action requires approval by other shareholders. Based on this, therefore, a majority shareholder cannot be entirely certain that a minority shareholder will not invoke its legal minority protection rights according to the Companies Act against a majority shareholder, even though the parties have agreed on this in a shareholders' agreement. This also means that a minority shareholder cannot be certain that a majority shareholder will not invoke its legal rights according to the Companies Act against a minority shareholder.

The Supreme Court case

The Swedish Supreme Court recently ruled on a case of fundamental interest in the area of company law in general and the relationship between the shareholders' agreement and the Companies Act in particular. The case concerned the effect of a shareholders' agreement in proceedings for the compulsory buyout of minority shares and comprised several important questions of principle.

Under Chapter 22 of the Companies Act, a shareholder who holds more than nine-tenths of the shares in a company (the majority shareholder) is entitled to buy out the remaining shares of the company's other shareholders. Any shareholder whose shares may be bought out is entitled to compel the majority shareholder to purchase its shares. This is referred to as compulsory buyout.

Two companies each owned 50 % of the shares in a Swedish company. According to a shareholders' agreement each party had the right, under certain circumstances, to acquire all except one of the other party's shares in the company. An arbitration award established that the conditions in question had been met and that one of the parties had the right to acquire all except one of the other party's shares in the company at a certain price level.

Following the award, the new majority owner requested to buy out the remaining share in the company, referring to Chapter 22 of the Companies Act. The minority shareholder disputed the request and argued that the parties had waived their rights to request a compulsory buyout with reference to the Companies Act according to the provisions of said shareholders' agreement. The main question discussed was whether the buyout provisions under Chapter 22 of the Companies Act may be departed from by a provision in a shareholders' agreement.

The Supreme Court concluded that the provisions of the shareholders' agreement did not prevent a party from invoking its right of compulsory buyout under the Companies Act. One of the main reasons for this conclusion is that, according to the preparatory works of the Companies Act, a company's articles of association cannot provide for the right or obligation for a compulsory buyout to be limited or for the provisions of compulsory buyout to be subject to conditions other than those laid down in the Companies Act. The provisions of compulsory buyout are thus not considered to be optional, i.e. the parties cannot deviate from the provisions by agreement.

The Supreme Court did not discuss the issue of whether the losing party could seek recourse by way of damages or other specific agreed recourse for the winning party's breach of the provisions of the shareholders' agreement.

Comments

One conclusion that can be drawn from the case is that the principle that a shareholders' agreement is valid between the parties is to some extent restricted and that the principle's scope is now more uncertain than it was before the case. One can therefore not be sure which provisions of a shareholders' agreement, that restrict a party's minority rights (or other rights as provided by law), that are considered valid or invalid and therefore enforceable or unenforceable in court. The judgment does not discuss or affect the question of whether sanctions in a shareholders' agreement linked to a breach of restrictions of compulsory buyout will be maintained (wholly or partially). However, the judgment could ultimately lead to a more restrictive interpretation and application of provisions of shareholder agreements that deviate from provisions of the Companies Act. In order to assess whether or not a provision is valid, one should be able to gain some guidance by studying the purpose of the rules in question in the preparatory work of the Companies Act.

The case creates problems in general when drafting and negotiating shareholders' agreements, and in particular when drafting and negotiating shareholders' agreements when a majority owner is to allow management of the company or other minority investor to own or acquire less than 10 % of the shares in a company. Depending on which side you represent, this case will lead to the majority owner always having an "option" to acquire the minority's shares and the minority always having an "option" to sell its shares to the majority shareholder, with no possibility for the parties to agree otherwise. This uncertainty also applies to other minority protection rights as described above.

To handle the problems described above, the parties could include provisions in the shareholders' agreements that are designed to prevent the other party from invoking its minority protection rights, or vice versa. Many shareholders' agreements contain provisions entitling a party to purchase the breaching party's shares at a discounted price in the event of a breach of contract. In many cases the shareholders' agreement does not provide for different types of sanctions tailored to different types of breaches of the agreement, such as liquidated damages.

Carl Friberg, senior associate, member of Setterwalls' Corporate and M&A practice Group.
carl.friberg@setterwalls.se

Certain features of Swedish company law to observe when negotiating representations and warranties in connection with fundraising

In the investment climate that has applied during the last years, venture capital investors have the upper hand in funding negotiations and have become more selective in their investment selection processes. As a result, investment processes often take longer and investors are conducting more thorough due diligences. Furthermore, investors are requesting more information about target companies and request solid representations and warranties. In this climate it is important to pay attention to some features of Swedish company law that limit investors' abilities to claim compensation from the target company.

Certain representations and warranties regarding company information (such as accounts, corporate documents and other similar information) provided to a venture capital investor are usually a condition for an investment in a limited liability company. Swedish corporate legislation has, based on legal policy considerations, historically prioritised protection for companies' creditors rather than protection for other stakeholders. Consequently, it is highly uncertain whether a target company could provide representations and warranties in a new share issue or similar situation, despite the subscription agreement demonstrating significant similarity to other types of agreements in which the company is able to provide representation and warranties.

Since both fundraising and the protection of creditors are important for a well-functioning limited liability company, it is not entirely obvious that the limited liability company structure benefits from the company's creditors being protected, in many cases, at the expense of other parties such as the subscribers. There have also occasionally been proposals to implement the principle that a company should be liable for any information provided to its investors in annual reports, prospectuses or other comparable documents. The main rule in Sweden, however, is still that a limited liability company's representatives (i.e. CEO, board members and auditor), but not the company itself, may be liable for incorrect or false information under certain circumstances. The background to this is a ruling from the Swedish Supreme Court back in 1935 in which the Supreme Court ruled that the limited liability company in question could not be held liable in relation to a share subscriber. There is no more recent case that deals with this exact same question, but the matter has been debated in legal doctrine and the general opinion is still that it is not possible for a limited liability company to assume liability in relation to its share subscribers. However, some authors argue that it would be possible provided that the company's liability is capped at its non-restricted equity, while others claim that the company could provide unlimited representations and warranties.

In this climate, it is important to find mechanisms so that venture capital investors feel comfortable about their investment despite a target company not being able to provide any representations and warranties. In order to satisfy an investor, it is possible to insert different types of clauses in a subscription agreement governing an investment. One alternative for subscribers and companies that is commonly used is the insertion of a recalculation mechanism, entitling the investor to subscribe for additional shares at the quota value should the information provided by the company or the other shareholders prove to be false or incorrect.

Another option is for the other shareholders in the target company to provide representations and warranties in the subscription agreement. Depending on the ownership structure of the target company, the various owners might have different incentives to provide such representations and warranties. It is more plausible that shareholders in companies with only a few shareholders, where the shareholders have thorough knowledge about the target company, would be willing to provide representations and warranties given that the incentives are often greater for such shareholders. Conversely, shareholders in companies with a widespread ownership structure, in which the shareholders do not have detailed knowledge about the target company, are unlikely to be willing to provide representations and warranties.

It is highly unlikely that the CEO, board members or management of a target company would be willing to issue any kind of representations and warranties unless they are also major shareholders. This is mainly due to the non-existent incentives and the risks associated with providing these. In cases where the management or board members are majority shareholders, the board members or management would, perhaps, provide representations and warranties. In this case, such individuals would most likely prefer to provide the representations and warranties in their capacity as shareholders rather than in their capacity as directors/members of management.

Based on the above, it is of utmost importance in an investment situation that an investor considers and evaluates both the representations and warranties and the party that has provided the representations and warranties. An investor must be aware that the target company itself can probably not be held liable for breaches of representation or warranties with legally binding effect and the investor should therefore always endeavour to also obtain representations and warranties from other parties.

Ola Grahn, partner, and Marcus Winqvist, senior associate,
members of Setterwalls' Corporate and M&A practice Group.
ola.grahn@setterwalls.se
marcus.winqvist@setterwalls.se

Antitrust – notes on the Swedish Competition Authority's ability to require notification

The late 1990s and beginning of the new millennium saw consolidation in large Swedish industrial businesses through numerous acquisitions. Industry was focussing more than it had previously on specific core businesses, which involved large divestments. This market consolidation continued between 2006 and 2008 via private equity acquisitions and the restructuring of businesses. Since then, the number of transactions targeting companies with large turnovers has decreased. Naturally, this has led to a decline in the number of notifications to the Swedish Competition Authority (SCA). Sweden is currently mostly seeing smaller acquisitions in which the merger control turnover thresholds are not met. However, as shown in recent cases, this does not mean that the merger control rules can be overlooked. This article describes how, according to unique rules in the Swedish Competition Act (the "Competition Act"), the SCA may initiate an investigation by requiring a company to submit a merger control notification regarding acquisitions in which the turnover thresholds are not met.

The Swedish merger control rules apply if the companies concerned meet the merger control thresholds in the Competition Act. This triggers the mandatory obligation to notify the SCA of an acquisition. In Sweden, the SCA must be notified of an acquisition if the companies concerned have a combined annual turnover in Sweden of more than SEK 1,000 million (approximately EUR 110 million) and at least two of those companies individually have an annual turnover in Sweden of more than SEK 200 million (approximately EUR 22 million).

In addition to acquisitions that meet the abovementioned thresholds, the Act contains a unique possibility for the SCA to require a company to provide notification of an acquisition that only meets the combined company turnover threshold of SEK 1,000 million and not the individual SEK 200 million threshold provided particular grounds exist for such requirement. What constitutes *particular grounds* has been discussed to some extent in the preparatory works of the Act and a few indications may be derived from the scarce number of decisions taken by the SCA on this subject.

Pursuant to the preparatory works, particular grounds may exist in the event of successive acquisitions in which an already dominant company acquires smaller competitors. This is regarded as being especially harmful to competition on highly concentrated markets. Each such acquisition increases the risk of harm to competition, particularly if several acquisitions are made over a short time period. It should also

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be noted that the Act states that all transactions between the same companies, where parts of a company or several companies are acquired during a two-year period, are to be regarded as a single acquisition.

Another example of a situation in which a company may be required to provide notification is where a dominant company on a concentrated market acquires a newly established company in order to prevent it from challenging the dominant company in the future. This is deemed to affect the willingness to conduct business on the market and to significantly weaken competition over time.

The abovementioned situations are not exhaustive. According to the SCA, particular grounds may also exist if complaints are raised by competitors or customers if the SCA finds that the negative effects described by the competitor or customer could harm competition. It should also be mentioned that the SCA cannot apply practice from the European Commission ("the Commission") since there is no equivalent possibility in the EU Merger Regulation.

The SCA has required acquiring companies to provide notification of an acquisition in four cases since 2005. In case 597/2005, a company active on the RORO shipping market between Gothenburg, Sweden and Killingholme, England, had acquired its only competitor. The target did not reach the turnover threshold that applied at the time. Since entering the market the target had applied considerably lower prices than the acquiring company, which led the SCA to suspect that the acquisition would lead to higher prices. In light of these circumstances, the SCA required the company to notify it of the acquisition.[1]

In case 660/2009, the SCA required one of Sweden's leading news agencies to provide notification of its acquisition of a company active on markets for digital media monitoring, archives and business intelligence services in Sweden. Before the SCA's decision, the two parent companies that jointly controlled the news agency notified the Commission of their intention to acquire the same target company but withdrew the notification after the Commission initiated an in-depth investigation. Shortly after this, the news agency acquired the target. The joint parent companies were two major Swedish

and Norwegian media groups (Bonnier and Schibsted). After the target had been acquired, a competitor of the target complained to the SCA, claiming it could no longer access digital data from newspapers controlled by the parent media groups.

As the target had an annual turnover of only SEK 40 million at the time and the acquiring company had a turnover of SEK 355 million, neither of the thresholds in the Competition Act were met. However, the parent companies controlling the acquiring company had a combined turnover of SEK 40,000 million in Sweden. In its decision to require the company to provide notification, the SCA referred to the Commission's decision to initiate an in-depth investigation that made it clear that the parent companies controlled the majority of the upstream market in relation to the target. The target and its competitors were dependent upon the deliveries of the parent companies, which after the acquisition allegedly had the opportunity and incentives to discriminate against the target's competitors. In light of this, the SCA found that it could not be ruled out that the acquisition could harm competition and required the companies to notify it of the acquisition. [2]

A recent decision, case 289/2012, concerned the same media group, which this time intended to acquire a target with an annual turnover of only SEK 123 million. In its decision, the SCA found that it could not be ruled out that the vertical and horizontal connections between the media group and the tar-

[1] The SCA eventually did not oppose the acquisition after its in-depth investigation.

[2] The SCA eventually did not oppose the acquisition after its in-depth investigation as it found that the incentives to discriminate against the target's competitors were limited.

get could distort competition. Furthermore, the SCA found that the acquisition would enhance the media group's position on the retail market and there was a risk that the ability of other publishers to reach consumers would be impaired. For these reasons, the SCA found that particular grounds existed and required the company to notify the transaction.[3]

The most recent decision, case 4/2013 of 30 January 2013, concerns a global leader on the locks manufacturing market, which intended to acquire its only competitor on a downstream market. There was no mandatory notification requirement since the target had an annual turnover of SEK 149 million. The SCA, however, found that the acquiring company was integrated in all parts of the distribution chain and that a monopoly would be created on the wholesale market for locksmith products. Furthermore, competitors of the acquiring company and customers of the target stressed that the target provided an alternative, which would disappear as a result of the intended acquisition, thus harming the competition. In light of these observations, the SCA found there were particular grounds to investigate the effects of the acquisition further and therefore required the acquiring company to notify it of the transaction.[4]

Some conclusions may be drawn regarding the possibility of a notification being required. First, it may be concluded that the ability to require a notification is rarely used, but that it is becoming more common. Second, the SCA does not consider itself bound by either the preparatory works or its previous practice. Consequently, it may be difficult to predict when a requirement will be issued by the SCA. Third, in light of the SCA's previous decisions, it may be possible to identify certain situations in which the SCA may require notification.

The first conclusions above is also highlighted in the preparatory works and affects the situation whereby an already strong or dominant company successively acquires smaller competitors. Such successive acquisitions do not have to have been made within a specific time period; each acquisition on the same market which further concentrates the market structure increases the risk that the SCA will require notification. Based on the most recent SCA practice, other factors to be taken into account are acquisitions in which dominant companies acquire competitors on markets where competition is limited or acquire companies on vertically connected markets. Furthermore, a dominant company acquiring a new competitor also increases the risk of a requirement being issued. It should also be presumed that the risk of requirement increases if the target company has valuable intellectual property rights, unique know-how or similar that could enhance an already dominant position.

In addition to the above, the SCA has also found that other situations constitute particular grounds to require a notification. Complaints from customers and competitors may lead to a requirement if the SCA finds that the concerns raised are reasonable and that competition would be harmed as a result of the acquisition.

In light of the above, a dominant company on highly concentrated markets should not place too much emphasis on the notification thresholds but should instead analyse further whether an intended acquisition could face a notification requirement from the SCA. To avoid the uncertainty regarding a possible notification requirement, it is possible for an acquiring company to voluntarily notify the SCA of an acquisition, provided that the SEK 1,000 million threshold is met. Such course of action enables the company to decide when the time limit starts for the initial phase of the SCA investigation. Voluntary notification may be useful if, for example, the acquiring company has a very strong market position on a highly concentrated market and if a clear decision on the acquisition is considered to be of value.

Ulf Djurberg, partner, and Mikael Rydkvist, associate,
members of Setterwalls' Corporate and M&A practice Group.
ulf.djurberg@setterwalls.se
mikael.rydkvist@setterwalls.se

[3] The SCA eventually did not oppose the acquisition after its in-depth investigation as it found that sufficient competitive pressure would remain on the relevant market after the acquisition.

[4] The transaction was subsequently withdrawn after the SCA filed a summons to prevent the transaction.

Facts and figures

Established in 1878, Setterwalls is the oldest law firm in Sweden. Today it is also one of the largest law firms in Sweden, employing more than 170 lawyers at offices in Stockholm, Göteborg and Malmö. Setterwalls has undergone substantial expansion over the past 10 years, both in terms of the number of lawyers and practice areas. Setterwalls' dynamic growth and the firm's participation in several high-profile cases and transactions have pushed the firm to its prominent position in the Swedish legal services market.

Setterwalls is organized into practice groups and trade and industry oriented teams. At Setterwalls, we have considerable experience of handling mergers and acquisitions in the Swedish market. These range from small-scale M&A to major transactions.

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Clients rely on us to coordinate deals, bringing together teams of specialists with expertise in areas like competition law, tax, intellectual property, bank & finance, labour & employment or acquisition finance. We have built up particular experience of M&A in the areas of IT, the media and financial services. The group currently consists of 13 partners and 35 associates.

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Setterwalls Advokatbyrå AB

STOCKHOLM

Arsenalsgatan 6
P.O. Box 1050, SE-101 39 Stockholm
T: +46 8 598 890 00
F: +46 8 598 890 90
E: jorgen.axelsson@setterwalls.se

GÖTEBORG

Sankt Eriksgatan 5
P.O. Box 11235, SE-404 25 Göteborg
T: +46 31 701 17 00
F: +46 31 701 17 01
E: fredrik.roos@setterwalls.se

MALMÖ

Stortorget 23
P.O. Box 4501, SE-203 20 Malmö
T: +46 10 690 04 00
F: +46 10 690 04 70
E: lennart.arvidson@setterwalls.se

www.setterwalls.se