Global Legal Insights

Mergers & Acquisitions

2019

Eighth Edition

Editors:
Scott V. Simpson & Scott C. Hopkins

global legal group

CONTENTS

Sweden

Jonas Bergquist, Alban Dautaj & Katerina Madzarova
Magnusson Advokatbyrå

Overview

The global M&A market

Globally, the M&A market had an ambivalent year 2018.

> "With so many market-moving factors fluctuating throughout the year, mergers and acquisitions have understandably had a somewhat ambivalent 2018. Intensifying trade tensions, political instability, and increased regulatory scrutiny took their toll on the number of transactions struck over the year, though transaction values remained relatively high."[1]

The number of transactions decreased, for the first time since 2010, to 19,232. However, the total transactions value was USD 3.53tn; an increase of USD 0.38tn or 11.5% compared to 2017. 2018 became the fifth straight year in which the value of global M&A transactions surpassed USD 3tn.

Considering the socio-political climate and the decreasing number of transactions, it may be surprising that the value of transactions maintained a positive rate. An 81.7% increase in Chinese bids for European companies was recorded.[2]

The cross-border contribution to the market value continued to be important. The number of cross-border transactions amounted to 6,405 with a total transaction value of USD 1.35tn, an increase from USD 1.27tn in 2017.[3]

The Energy, Mining and Utilities sector continued to be the largest target sector by value, with a total value of USD 673bn. At the same time, the construction sector reached a decade high at USD 116.5bn.[4]

The Nordic M&A market

The Nordic M&A market continued to be strong in 2018, although it did not quite reach as high as the levels in 2017. In 2017, the value of the transactions was EUR 104,268m and 1,155 transactions took place. In 2018, the value of the transactions amounted to EUR 85,331m, corresponding to a decrease of 18.2% and the number of transactions virtually stayed the same.[5] In Sweden, however, the number of transactions and the transaction value exceeded the numbers of the record year in 2017.[6] In 2018, 390 M&A transactions with a value of EUR 39,562m took place in Sweden, a record compared to the last five years.[7]

Private equity and the continued driving force of innovations accounted for a large part of Nordic business, which reached a buyout record with 224 transactions worth a total of EUR 21.2bn.[8] The tech sector noted the highest number of transactions in 2018, an increase for the seventh consecutive year. The tech sector accounted for 17.9% of the Nordic M&A value in 2018.[9] Some call Stockholm the "start-up capital of Europe", and according to data from investment firm Atomico, Stockholm is the second-most prolific tech hub in the world on a per capita basis behind Silicon Valley.[10] The tech sector accounted for 13.8% of all transactions in the Nordics, while the communications sector topped the list for transaction value.[11]

Biggest sectors in the Nordics – by number of transactions[12]

Sector	Transactions
Technology Services	232 (13.8%)
Commercial Services	223 (13.2%)
Producer Manufacturing	159 (9.4%)
Industrial Services	157 (9.3%)
Finance	127 (7.5%)
Distribution Services	121 (7.2%)
Consumer Services	104 (6.2%)

Biggest sectors in the Nordics – by transaction value[13]

Sector	Transaction value (mil. USD)	No. of transactions with published value
Communications	15,835 (15.69%)	14
Finance	13,545 (13.42%)	46
Industrial Services	13,299 (13.18%)	37
Technological Services	9,770 (9.68%)	64
Process Industries	6,938 (6.87%)	19
Transportation	6,233 (6.18%)	23
Utilities	4,713 (4.67%)	14

Industrials & Chemicals was, and remained, the biggest sector in 2018, with 22.9% market share in terms of the transaction value.[14] Transaction value in the Industrials & Chemicals sector increased to EUR 19.7bn in 2018 compared to EUR 10.5bn in 2017 despite a slight drop[15] in the number of transactions made. Mergermarket points out that energy assets have begun to attract private equity players. Several high-profile businesses took place in 2018, such as the acquisition of Shell Oil at a value of EUR 1.6bn.

The transaction value in the telecommunications sector significantly increased to EUR 15.3bn in 2018 from only EUR 655m in 2017. This extreme increase is primarily because of the acquisitions of TDC A/S[16] and Com Hem AB.[17]

2018 was generally a good year for Nordic M&A, partly because of high private equity activity, good transaction valuations, banks' willingness to support transactions, and companies generally having solid balance sheets. Last year, there were many small and medium-sized transactions.[18] 2019 has, however, had the slowest start since 2013 with Q1 having only EUR 6.8bn in transaction value.[19]

The U.S. is the number one single-country acquirer of Nordic companies with 78 transactions over the last 18 months.[20]

Relevant legislation and regulations

Swedish M&A transaction are usually made through an acquisition of all or part of the shares of the target company (so-called "public tender offers" or "takeovers" with regard to acquisitions of public companies) as they give the parties more flexibility compared to business or asset transfers which may require, *inter alia*, consent from various counterparties and union consultations.

Acquisitions by way of mergers of public and private companies are unusual within Swedish M&A since the rules regarding mergers under the **Swedish Companies Act (2005:551)** give the parties less flexibility in respect of, *inter alia*, the confidentiality and timetable of the transaction.

In general, there are no restrictions on foreign investments under Swedish Law. However, it should be noted that some business sectors are subject to a permit for foreign buyers, e.g. production of military equipment, which can impose restrictions on foreign ownership.

Swedish M&A is characterised by a significant degree of contractual freedom. The **Swedish Sales of Goods Act (1990:931)**, which provides certain protection for the buyer, is applicable on (non-consumer) sales of goods and moveable assets (i.e. all assets other than real property), including shares. The Swedish Sales of Goods Act is, however, non-mandatory, and it is common for the parties to agree to deviate from the Act.

In a cross-border asset transfer, the **United Nations Convention on Contracts for the International Sale of Goods (CISG)** may be applicable. CISG applies automatically to (non-consumer) sales of goods (*excluding shares*) between parties whose places of business are in different states and where both states are contracting parties to CISG. However, it is common that the parties agree to deviate from CISG.

The Swedish Companies Act contains, e.g., provisions relating to the board of directors' responsibilities towards different stakeholders (such as the company and the shareholders), compulsory acquisitions of minority shareholdings, etc.

Swedish tax laws are highly relevant in Swedish M&A transactions, especially in respect of the financing and structuring of the transaction.

In addition to the above, the two main sources in Sweden regarding public tender offers (takeovers) are the **Swedish Takeover Act (2006:451)**, which contains provisions regarding public tender offers and is an implementation of the Takeover Directive (2004/25/EC), and the **Takeover Rules**. The Takeover Rules have been adopted by the Swedish stock exchanges (Nasdaq Stockholm and Nordic Growth Market), in compliance with the **Swedish Securities Market Act (2007:528)** and the Takeover Directive. Thereto, the marketplaces have issued their own rules (e.g. Nasdaq Stockholm Rule Book for Issuers), containing disclosure requirements and certain other provisions applicable on takeovers while the **Swedish Market Abuse Penalties Act (2016:1307)** provides rules for improper disclosure of insider information.

Apart from relevant case law and above-mentioned rules, the private **Swedish Securities Council** promotes good practice in the Swedish securities market.

Regulatory authorities

Private and public acquisitions and mergers are regulated by the **Swedish Competition Authority (SCA)** and the **European Commission**.

The SCA is a state authority responsible for the enforcement of the **Swedish Competition Act (2008:579)**. The SCA must be notified of a concentration if the combined aggregate turnover in Sweden of the parties in the preceding financial year exceeded SEK 1bn and each of the entities concerned had a turnover in Sweden in the preceding financial year which exceeded SEK 200m.

The European Commission shall, according to the **EC Merger Regulation (2004/139/EC)**, be notified when a concentration has an EU dimension and the aggregate worldwide turnover of the parties the preceding financial year exceeded: (i) EUR 5bn and the EU-wide turnover of each of at least two parties the preceding financial year exceeded EUR 250m (*big concentrations*); or (ii) EUR 2.5bn and the EU-wide turnover of the parties in the preceding financial year exceeded EUR 100m in at least three Member States in the EU, and the turnover of each party the preceding financial year exceeded EUR 25m in at least three Member States in the EU (*smaller concentrations*).

In addition to the above, public tender offers (takeovers) and mergers are supervised by the **Swedish Financial Supervisory Authority (SFSA)** and the **Swedish Corporate Governance Board**. The SFSA is a state authority which, *inter alia*, supervises public tender offers and enforces compliance with the Swedish Takeover Act. The Swedish Corporate Governance Board is a self-regulated body that promotes good corporate governance of listed companies in Sweden and proposes amendments to the Takeover Rules.

Significant transactions and highlights

Largest Nordic M&A transactions of 2018[21]

Transaction value (mil EUR)[22]	Announcement date	Acquirer	Target	Transaction type
5,481	12/02/2018	DK Telekommunikation ApS, Denmark	TDC A/S, Denmark	IBO 100%
4,600	07/12/2018	ANTA Sports Products Ltd; Fountainvest Advisors Ltd; Anamered Investments Inc; and Tencent Holdings Ltd, via acquisition vehicle Mascot Bidco Oy, Finland	Amer Sports Oyj, Finland	IBO 100%
2,749	10/01/2018	Tele2 AB, Sweden	Com Hem Holding AB, Sweden	Acquisition 100%
2,213	17/07/2018	Telia Company AB, Sweden	Get AS, Norway	Acquisition 100%

Transaction value (mil EUR)[22]	Announcement date	Acquirer	Target	Transaction type
2,064	24/09/2018	Newco, Norway	SpareBank 1 Skadeforsikring AS; DNB Forsikring AS	Acquisition 100%

Largest Swedish transaction – Com Hem Holding AB

In October 2018, the acquisition of Com Hem was announced. The transaction was the largest on the Swedish market. Com Hem's shareholders received SEK 37.02 in cash and 1.0374 B shares in Tele2 for each share in Com Hem. The acquisition raised competition issues as both companies were active in the provision of retail mobile telecommunications services, retail fixed internet access services, and multiple play services.[23] The transaction was notified to the European Commission on 3 September 2018.[24] The Commission approved the acquisition and concluded that the transaction "would raise no competition concerns as the companies' activities and assets are largely complementary" and the two companies would not be perceived as direct competitors.[25] Both companies provide telecommunications services in Sweden. However, Com Hem's main activities are related to fixed telecommunications and TV, while Tele2 is mainly active in mobile telecommunications.[26] Thus, the impact on fixed telecommunications and the mobile telecommunications markets would not be impacted to a high enough degree.

Key developments

Proposed changes to Swedish company law

The Swedish Government has presented its proposals on changes to Swedish company law in order to implement Directive 2017/828/EU. The following changes are proposed.

Changes to the "Lex Leo" rules in Chapter 16 of the Swedish Companies Act

The Lex Leo rules deal with issues and transfers of financial instruments, and loans to board members, employees, and their related persons. The rules apply to public limited liability companies and have been criticised for giving listed investment companies competitive disadvantages and for complicating making management buy-outs.[27]

It has been proposed that some smaller transactions are to be exempted from the rules and that the majority rule at the shareholders' meeting should be reduced from 9/10 to 2/3 of the votes. Transactions within the same group of companies are also covered by the proposal. The timeline for the implementation of these rules is uncertain.

Limitation of shareholders' right of initiative in public limited liability companies

Shareholders' right to include matters in the agenda at shareholders' meetings is to be restricted.[28] It is proposed that such right to include matters in the agenda should be given only to shareholders who own at least 1/10,000 of the shares in the company or to 25, or more, shareholders jointly. The implementation of this change is uncertain.

Remuneration to senior executives and material transactions with related parties

It has been proposed that the guidelines for remuneration to senior executives must include more information and more requirements for the decision-making process. It has also been proposed that a detailed report on the compensation paid to senior executives should be required. This report shall be submitted at the annual general meeting.[29] These rules will, according to the Directive, be implemented by 10 June 2019.[30]

A new chapter 8a of the Swedish Companies Act

This new chapter is proposed to deal with transactions between publicly listed companies, their subsidiaries, and more. Chapter 8a will supersede AMN 2012:05 but not for transactions that fall under special regulation.[31]

Reduced corporate income tax and interest deduction limitations

New tax legislation was introduced on 1 January 2019, which, *inter alia*, includes an interest deduction in the corporate sector, a reduction of the corporate tax rate and tax rules on financial leases.

The changes introduced a new general EBITDA-based interest deduction limitation for negative net interest, i.e. the difference between interest income and interest expenses. The cap is calculated as 30% of EBITDA. Negative net interest which is not deductible can be carried forward for a maximum of six years. Furthermore, there is a new interest deduction prohibition for when a related company in another state obtains a tax deduction for the same interest expense, or when the corresponding interest income is not subject to tax due to the classification of the income for tax purposes (anti-hybrid rules).

The new tax-rules regarding financial leases implies that the interest element in certain leases should be determined and included in the EBITDA calculation, as a lease can correspond to the lending of funds. Accordingly, cooperation cannot circumvent the interest deduction limitation by leasing instead of debt-financing a purchase.

The tax legislation follows from the EU Anti-Tax Avoidance Directive and has clarified the tax rules regarding interest deductions. Compared to the minimum requirements in the EU Anti-Tax Avoidance Directive, the new rules are generous. How the new tax legislation will affect M&A is hard to say, but generally, if a cooperation does not receive a deduction for interest expenses, debt finance may not be an alternative, which will lower the leverage. Furthermore, it may also affect the group's overall debt.

In June 2018, the Parliament approved a reduction in corporate tax from 22% to 20.6%. The reduction will take place in two steps: 21.4% for the financial year commencing 1 January 2019; and 20.6% for the financial year commencing 1 January 2021.

The year ahead

After a strong 2018, M&A activity has decreased significantly in 2019 due to greater market volatility, trade tensions between the US and China, and the threat of Brexit.[32] In fact, 2019 has been the slowest start to Nordic M&A since 2013.[33]

The rest of Europe has experienced the same slow start to the year 2019. Because of improved M&A regulations in Europe, it is, however, likely that the situation will improve, and it would help if, during the year of 2019, Brexit reaches a conclusion and if the tensions between America and China subside.[34]

This decline in transaction value is impacted by "growing levels of economic and geopolitical uncertainty across the continent".[35] Jonathan Klonowski[36] stated that "[d]ealmakers will be hoping that the abundance of innovative assets in the region results in an uptick in the coming months".

Inbound has outpaced outbound transaction values in 2019: EUR 5.4bn compared to EUR 1.6bn.[37] Inbound M&A transaction value is expected to increase, and early numbers show that the value as of 1 April 2019 has already significantly increased compared to the EUR 2.1bn at the same time in 2018.[38] Chinese investment into the Nordics is as active as ever, with four transactions so far, as of April 2019, compared to seven transactions in the whole of 2018.[39]

Artificial intelligence

The use of artificial intelligence ("AI"), specifically machine-learning technology pre-trained to recognise legal concepts, has increased significantly in the M&A process during 2018 and the number of M&A transactions where AI is used is likely to increase in the next few years.

Within the Swedish M&A market, the top business law firms in Sweden have started to experiment with and evaluate AI solutions in their M&A processes; some have already adopted AI solutions such as Luminance, Kira Systems, etc. AI solutions used in due diligence processes are intended to increase the review speed, as well as reduce costs, which has been predicted to change business models and pricing within the M&A sector.

Warranty & Indemnity insurance in Swedish M&A

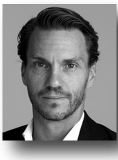
We have seen a significant increase in the use of Warranty & Indemnity ("W&I") insurance in Swedish M&A, especially with regard to PE sellers, which are very reluctant to assume any post-closing liabilities. The costs of these insurances are often borne by the seller and amount to large sums (the premiums are often between 1% and 1.5% of the insured value). We expect the use of W&I insurance in Swedish M&A to continue to increase during 2019.

* * *

Endnotes

1. Comment by Elizabeth Lim, Research Editor at Mergermarket (see https://www.mergermarket.com/info/mergermarket-releases-2018-global-ma-report).
2. Mergermarket Global & Regional M&A Report FY 2018 (https://www.mergermarket.com/info/mergermarket-releases-2018-global-ma-report).
3. *Ibid*.
4. *Ibid*.
5. Realtid – Rekord i fusioner och förvärv (https://www.realtid.se/rekord-i-fusioner-och-forvarv).
6. *Ibid*.
7. Realtid – Rekord i fusioner och förvärv.
8. Mergermarket Global & Regional M&A Report FY 2018.
9. *Ibid*.
10. FactSet – Global deals drive Nordic M&A (https://insight.factset.com/global-deals-drive-nordic-ma).
11. *Ibid.*
12. *Ibid*.
13. *Ibid*.

14. Mergermarket – Q1 2019 has been the slowest start to Nordic M&A activity since 2013 (https://events.mergermarket.com/nordic-region/q1-2019-has-been-the-slowest-start-to-nordic-ma-activity-since-2013).
15. 230 *vs.* 246 in 2017.
16. Worth EUR 8.5bn according to Mergermarket.
17. Worth EUR 3.7bn according to Mergermarket.
18. Realtid – Rekord i fusioner och förvärv.
19. Mergermarket – Q1 2019 has been the slowest start to Nordic M&A activity since 2013.
20. FactSet – Global deals drive Nordic M&A.
21. Bureau van Dijk – Nordic M&A Review Q 1-4 2018 and Q1 2019.
22. The numbers and stats differ depending on the source. Compare Bureau van Dijk – Nordic M&A Review Q 1-4 2018 and Q1 2019 to FactSet – Global deals drive Nordic M&A.
23. European Commission – Press release (http://europa.eu/rapid/press-release_IP-18-6065_en.htm).
24. *Ibid*.
25. *Ibid*.
26. *Ibid*.
27. *Ibid.*
28. *Ibid*.
29. *Ibid*.
30. *Ibid*.
31. *Ibid.*
32. Imprima – Is M&A Getting Better or Worse? Q1, 2019 Review (https://www.imprima.com/2019/04/08/is-ma-getting-better-or-worse-q1-2019-review/).
33. Just over EUR 6.8bn in transaction value (https://events.mergermarket.com/nordic-region/q1-2019-has-been-the-slowest-start-to-nordic-ma-activity-since-2013).
34. Imprima – Is M&A Getting Better or Worse? Q1, 2019 Review.
35. Mergermarket – Q1 2019 has been the slowest start to Nordic M&A activity since 2013.
36. Research Editor EMEA at Mergermarket.
37. Mergermarket – Q1 2019 has been the slowest start to Nordic M&A activity since 2013.
38. *Ibid*.
39. *Ibid*.



Jonas Bergquist
Tel: +46 76 822 75 01 / Email: jonas.bergquist@magnussonlaw.com
Jonas Bergquist is a Swedish attorney-at-law (advokat) and a Stockholm-based partner at Magnusson. He has over 15 years of experience advising clients in the areas of M&A, including real estate, corporate and commercial and international joint ventures. According to a recent *Chambers* report: "Jonas Bergquist attracts enthusiastic plaudits from clients. They describe him as 'extremely quick, alert and responsive, as well as proactive'."

Alban Dautaj
Tel: +46 72 722 09 49 / Email: alban.dautaj@magnussonlaw.com
Alban Dautaj is a Stockholm-based associate at Magnusson and specialises in International Commercial Arbitration. He is expected to be admitted to the New York State Bar Association in 2021 and the Swedish Bar in 2022.

Katerina Madzarova
Tel: +46 76 046 46 29 / Email: katerina.madzarova@magnussonlaw.com
Katerina Madzarova is an associate based at Magnusson's office in Stockholm and her main areas of practice include mergers and acquisitions, corporate and commercial law.

Magnusson Advokatbyrå

Hamngatan 15, Box 7413, 103 91 Stockholm, Sweden
Tel: +46 76 822 75 01 / URL: www.magnussonlaw.com