Private M&A

Contributing editors
Will Pearce and John Bick

2019

GETTING THE DEAL THROUGH

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Second edition

Getting the Deal Through is delighted to publish the second edition of *Private M&A*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Brazil, Costa Rica, Ecuador, Egypt, Indonesia, Malaysia, Myanmar, Philippines, Singapore and Taiwan.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Will Pearce and John Bick of Davis Polk & Wardwell, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
September 2018

Sweden

Peter Sundgren and Matthias Pannier
Advokatfirman Vinge KB

Structure and process, legal regulation and consents

1 How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

M&A transactions involving privately owned companies, businesses or assets are in general characterised by a significant degree of contractual freedom. Sales of companies structured as share sales are generally more common and give the parties more flexibility than a business or asset transfer where, for example, union consultation and consent from creditors or counterparties may be required. The involved parties typically enter into a written transfer agreement concerning the relevant target company, business or assets: either a share purchase agreement (SPA) or, as applicable, a business or asset transfer agreement, which can vary quite significantly in length, complexity and 'style' depending on the transaction and the parties.

Statutory mergers and demergers under the Swedish Companies Act (CA) are rarely used as instruments in private M&A transactions as they give the parties less flexibility in terms of process, transaction timetable and confidentiality.

A sales process where multiple potential bidders are approached would typically be structured as a controlled auction and include the following steps:

- a teaser with a brief overview of the target company's operations, financials and the contemplated transaction is distributed to a number of potentially interested parties;
- interested parties enter into a written non-disclosure agreement (NDA) before further information is disseminated;
- during 'phase 1' of the process, potential bidders are provided with an information memorandum on the target, its operations and financials and the contemplated transaction, and are requested to submit indicative non-binding bids within a four- to six-week period;
- selected bidders are invited to 'phase 2' and given the opportunity during a four- to six-week period to conduct an extended due diligence, primarily by way of a virtual data room (including a question and answer forum), management presentations, expert sessions and site visits;
- the bidders then submit their final and binding bids, including a mark up of the transaction agreement or agreements and documentation evidencing financing availability, etc; and
- negotiations are conducted with the preferred bidder (or bidders) before a final and binding SPA is executed, which often take place within 24 to 48 hours after final bids or up to two weeks thereafter.

A bilateral process will often be based on a (largely) non-binding letter of intent (or equivalent document) setting out some of the key terms of the contemplated transaction (including indicative valuation) and an outline of the process. Bilateral processes often take longer than controlled auctions.

2 Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

The Swedish Sales of Goods Act (SGA) is applicable to (non-consumer) sales of goods and movables (ie, all assets other than real property), including shares. The SGA is, however, non-mandatory, and can hence be set aside by the parties (wholly or partially), which is customary in private M&A transactions, and particularly in share sales. The CA contains provisions regarding transfers of shares in limited liability companies.

A range of additional acts, regulations and legal principles apply to transfers of employees and certain assets, such as contracts, personal data, real property and certain intellectual property.

The parties may choose foreign law as the governing law of a transfer contract, but would still need to observe mandatory Swedish law to the extent applicable for the transfer of certain assets and liabilities (eg, to perfect a share transfer). In practice, however, Swedish transactions are almost exclusively governed by Swedish law – even where one or several parties are non-Swedish – mainly as a result of the significant contractual freedom, a mature and active M&A market, a favourable litigation regime, internationally recognised enforceability and the absence (by large) of formal requirements.

3 What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

Legal title is generally prescribed by law, that is, the parties cannot freely agree on different levels of title (although the parties can of course agree on contractual assurances concerning title).

Legal title is usually not transferred by operation of law but by taking all steps required under Swedish law to perfect transfer of title to certain assets. Transfer of title to shares is, in short, perfected by way of delivery to the buyer of a share certificate representing the unencumbered shares duly endorsed to the buyer (if such certificate has been issued) and by the buyer being recorded as the owner of such shares in the share register of the company.

Swedish law does not distinguish between legal and beneficial title.

4 Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

A sale of all shares in a company requires that all shareholders agree thereon. A buyer who acquires more than 90 per cent of all shares can, however, initiate a mandatory squeeze-out process under the CA whereby the remaining minority's shares would be acquired. Further, shareholders' agreements often contain drag-along clauses pursuant to which the minority may be required to sell their shares if certain conditions are met.

5 Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

The parties are, in general, free to agree on how to structure the transfer of a business, including which assets and liabilities to include and exclude. However, certain exemptions exist.

For example, in a business transfer, employees of the transferred business are entitled to have their employment agreements transferred to the acquiring entity on unaltered conditions (see question 33). Further, a buyer of a business may by operation of law assume environmental rights and liabilities of the transferred operation, including liabilities for contamination caused by previous operators.

As a general rule, unencumbered (wholly owned) assets can normally be transferred without any consents or information requirements, but a transfer of liabilities and certain assets (such as contracts) normally requires consent from the relevant counterparties (see question 7).

6 Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

In general, there are no restrictions on or governmental registrations or consents required for the transfer of shares, whether to foreign investors or otherwise. Exceptions exists for investments in businesses that are critical from a public perspective (such as the defence, aviation and nuclear sectors) where special consents may be required and restrictions on foreign ownership of the capital or voting rights, or both, may apply. Approval from authorities may further be required in relation to, for example, certain transactions in the financial services sector or if the transaction is subject to the merger control regime (see below). Acquisitions of, inter alia, certain environmental hazardous operations may need to be informed to the supervisory authority.

Concentrations, that is operations that bring about a lasting change in the control of an undertaking, are subject to the merger control regime set out in the Swedish Competition Act (unless notification is required under the EU Merger Regulation), pursuant to which the Swedish Competition Authority investigates transactions that satisfy the following jurisdictional thresholds: the combined aggregate turnover in Sweden of all undertakings concerned in the preceding financial year exceeded 1 billion Swedish kronor; and each of at least two of the undertakings concerned had a turnover in Sweden in the preceding financial year that exceeded 200 million kronor.

There is no general legislation whereby the government could intervene in a transaction in any sector on public or national interest grounds.

7 Are any other third-party consents commonly required?

Business and asset transfers typically require a number of third-party consents, including from counterparties to agreements included in the transfer, landlords, finance providers and holders of security in the relevant assets. Share deals may require consent from external parties, but the number of consents is usually limited to providers of financing to the relevant company and any landlords, customers, suppliers, partners or other parties who may have included a change of control provision in their respective agreements with the target company.

Shareholder approvals would typically not be required for the acquisition or divestment of a private company, business or asset, unless the size and nature of the transaction results in a fundamental change of the nature of the company's business.

8 Must regulatory filings be made or registration fees paid to acquire shares in a company, a business or assets in your jurisdiction?

In general, the acquisition of shares in a company does not require any regulatory filings; nor does the acquisition of a business or assets. Some exceptions exist (see question 6), which may involve application fees. Further, transfers of real property are subject to a stamp duty. A company acquisition may entail corporate changes, such as replacing the board or changing the articles of association, which involves regulatory filings and (minor) registration fees. Further, perfection of a transfer of title to or pledge of certain assets may require registration in public registers or notifications to authorities, or both, and involve fees.

Advisers, negotiation and documentation

9 In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

Parties generally appoint a financial adviser and accountants, while strategy and business consultants may also be engaged to conduct commercial due diligence. For issues of listed securities, public relations advisers are often appointed to coordinate announcements that may have to be made to the capital markets.

Most professional advisers have standard terms of engagement that will be applied. Fees will typically depend on the value and complexity of the deal, its timing and the work product required. A buyer's advisory fees may add up to several percentage points of the deal value.

10 Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

There is no general duty to negotiate in good faith, but if a party engages in or continues negotiations with another party knowing that such negotiations will not lead to the conclusion of any agreement – for example, because it has decided to abort the transaction or to enter into the transaction with another party – such party could under certain circumstances become liable for costs incurred by the other party as a result thereof. The parties can further contractually agree to a duty to negotiate in a certain manner.

The parties and their representatives (including directors) are normally not bound by duties towards the other party. However, directors of a company have a statutory duty to act in the best interest of their company.

11 What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

When acquiring shares, parties to a transaction will customarily enter into:

- a confidentiality undertaking or an NDA governing primarily the exchange of confidential information relating to the transaction;
- an SPA setting out the terms of the transaction;
- private equity buyers often issue an equity commitment letter (ECL) to provide comfort to the seller on the equity funding of its bid (see question 20); and
- a transitional services agreement (TSA) may be required – for example, in carve-out transactions – specifying the basis upon which the seller will ensure the continued provision of certain services to the target following completion of the transaction.

When acquiring a business or assets, the parties will customarily enter into:

- an NDA;
- a business or asset transfer agreement setting out the terms of the transaction, including detailed provisions defining the scope of the assets and liabilities that are to be transferred or not to be transferred to the buyer;
- if applicable, a TSA; and
- additional documents or agreements required to transfer or register title to certain assets, such as real property.

In bilateral transactions the parties often initially enter into a letter of intent to structure the process and agree on certain key terms (see question 1).

12 Are there formalities for executing documents? Are digital signatures enforceable?

In general, there are no formal execution requirements for agreements to be valid and enforceable, meaning that, for example, oral

agreements also are binding. Formal requirements do, however, apply in respect of transfers of certain assets, such as real estate, and in respect of certain other legal acts, such as shareholders' meeting proxies. The parties may further agree that a contemplated future agreement between them only shall be binding if made in writing, which is the customary approach in M&A transactions.

Agreements entered into by way of digital signatures are generally enforceable. Most corporate documents can be validly signed by way of advanced electronic signatures (as further defined in the European Union Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (eIDAS Regulation (910/2014/EC)).

BankID (an electronic identification solution issued by the Swedish banks) constitutes such advanced electronic signature. As of June 2018, around 80 per cent of the Swedish population uses BankID.

Due diligence and disclosure

13 What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

A buyer's due diligence will normally focus on the legal, financial, accounting, tax, operational and commercial position of the relevant target company, business or assets. The legal due diligence will normally comprise title, legal structure, terms of financing arrangements, terms of key business agreements, ownership and use of information technology, intellectual property and real property, employee arrangements, licences and permits, litigation and compliance with law.

A form of vendor due diligence report called a legal guidance report has become increasingly common in controlled auction processes (and as a preparatory step in larger bilateral sales processes), allowing the seller and the target's management team to accelerate the process and proactively assess and address any issues that may surface during such review. The report is normally provided to the bidders, financing banks, transaction insurers and their respective advisers on a non-reliance basis.

14 Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

The transfer agreement would typically limit a seller's liability to only those specific warranties and indemnities set forth therein, thereby excluding liability for any pre-contractual or misleading statements. However, if the seller has caused the buyer loss or damage through wilful misconduct or gross negligence, such limitations of liability could potentially be set aside pursuant to general legal principles, but the transfer agreement often also explicitly states this.

15 What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

Swedish companies are required to make extensive filings with the Swedish Companies Registration Office (SCRO), which are publicly available, including:

- articles of association;
- annual reports;
- details of current and previous company representatives (board of directors, managing directors, auditors, signatory rights, etc);
- details of shares and share capital, and changes thereto;
- corporate mortgages;
- legal status (under liquidation, merged or demerged, in bankruptcy, etc);
- copies of submitted shareholders' meeting minutes, etc;
- certain employer and tax registrations; and
- ultimate beneficial owners.

The Swedish mapping, cadastral and land registration authority's registers contains details of all real property in Sweden, including ownership, boundaries, tax status, mortgages and pledges, purchase price and any cadastral activities. The Swedish Patent and Registration Office (PRV) is the authority for intellectual property; its registers contain details on, inter alia, patents and trademarks. Sweden has a long history of having an extensive principle of access to public documents, meaning that information and documents provided to or generated by public authorities often are publicly available.

A buyer would customarily carry out standard searches in the SCRO's registers, the land register, potentially in PRV's register (as well as in the European Union Intellectual Property Office's registers), in the registers of the district court and administrative court with jurisdiction over the municipality where the target company, business or assets has its seat or is located, as well as in the registers of the relevant appeal courts of said courts.

16 What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

The transfer agreement would normally – in line with non-mandatory Swedish law – stipulate that the buyer cannot make a claim for a breach of warranties (but not specific indemnities) if the buyer had actual knowledge of the facts or circumstances constituting or resulting in the breach, or if such facts or circumstances were fairly disclosed in the data room material. Other types of deemed knowledge of the buyer are less common as grounds for preclusion of warranty claims.

Pricing, consideration and financing

17 How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

Closing accounts and locked-box structures are both commonly used to determine pricing. Locked-boxes have over the past years clearly been more frequently used than closing accounts, particularly with private equity sellers. Locked boxes are typically more appealing to sellers and therefore more common under seller-favourable market conditions.

18 What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

Cash is the most common form of consideration in M&A transactions, and has remained so over the past few years as the availability of relatively low-cost acquisition financing from the banks has continued to increase. Vendor notes are typically seen only in smaller transactions, and then only as a partial consideration form. Shares as consideration are less common, but may be an alternative in certain strategic mergers, especially if the buyer is listed.

19 Are earn-outs, deposits and escrows used?

Based on available statistics, earn-outs have in the past few years been used in about 30 per cent of all private M&A transactions. The average size of earn-outs in 2017 was around 36 per cent of the purchase price and the median earn-out period was 23 months.

Escrow arrangements are still the most common form of security, and were on average used in around 30 per cent of all transactions over the past six years, although less frequently in 2017. Deposits are relatively rare.

20 How are acquisitions financed? How is assurance provided that financing will be available?

Bank-led acquisition financing is common in private M&A transactions. Financing during the past few years has mostly been provided by Nordic banks under Swedish law through bilateral loans or club deals. If an acquisition is of a sufficient size, foreign-law high-yield bond financing or syndicated loans may be employed as a financing component by a buyer.

Financing is often required to be provided on a 'certain funds' basis in a controlled sales process, broadly mirroring the approach taken in public takeovers. However, in contrast to public takeovers, no regulatory regime needs to be complied with; as such, the documentation, conditionality and flexibility can vary significantly from deal to deal.

Where a buyer entity is a newly incorporated SPV and requires capital (eg, from a private equity fund), the seller will typically be provided with a directly enforceable ECL pursuant to which the funding of the SPA with the equity financing amount is secured.

21 Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

A company is prohibited from providing a guarantee or security for a loan that is provided to facilitate the acquisition of shares in the company or the shares in any of its parent companies incorporated in Sweden.

Further, a company may not provide a guarantee for the obligations of a parent or sister company, unless they belong to the same group of companies and the parent company of that group is domiciled within the EEA. There are certain exceptions to this rule.

In addition, if a company provides a guarantee or security interest without receiving sufficient corporate benefit in return, such guarantee or security interest will, in whole or in part, be considered a distribution of assets, which will be lawful only to the extent it meets the mandatory requirements for distribution of assets.

Conditions, pre-closing covenants and termination rights

22 Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

In the absence of legal or regulatory obligations to satisfy before completing the transfer of title to shares or assets, signing and completion of transactions can occur simultaneously. While a seller will often accept conditions relating to such statutory legal or regulatory obligations, the buyer's obligation to satisfy such obligations can be very strict.

Certain buyers may seek to include conditions regarding the absence of material breaches of certain of the warranties at completion and the absence of any material adverse change since entering into the transaction, although in the current market sellers may be less inclined to agree to such condition. Financing conditions are very rare.

23 What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

Sellers often request a 'hell or high water' standard on the merger clearance condition, but this will often be subject to negotiations and result in a compromise as most buyers, for policy and other reasons, are restricted from committing to such undertaking. The standards for other conditions vary, but transaction certainty is a key evaluation criteria for many sellers, which, given the current market, has resulted in relatively stringent requirements for buyers to fulfil conditions.

24 Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

The seller normally undertakes to continue to conduct the business in the ordinary course and to ensure that the target refrains from, for example:

- amending the articles of association;
- issuing shares or similar instruments;
- altering the terms of or terminating the employment of any key employees;
- primarily in locked-boxes: resolving on any dividend distributions or incurring any other leakage;
- acquiring or disposing of assets, incurring certain liabilities or committing to capital expenditure in excess of specified thresholds;
- creating encumbrances (other than minor encumbrances in the ordinary course);
- changing or deviating from accounting principles or practices;
- incurring additional loans in excess of a specified value; and
- commencing litigation or waiving claims.

The buyer would normally undertake, inter alia, not to solicit any employees or customers of the target, approach any representatives of the target outside of the allowed communication channels in the process and maintain the confidentiality of the transaction.

In a bilateral process, the seller may agree to negotiate exclusively with the buyer during a certain period.

The remedy for breaches of pre-closing covenants is often limited to a claim for damages, but the limitations of liability for such claims varies.

25 Can the parties typically terminate the transaction after signing? If so, in what circumstances?

Consistent with the concept that all risks with respect to a company, business or assets passes to the buyer from the date of entering into a transfer agreement, parties usually cannot terminate a transaction in advance of a negotiated long-stop date unless any condition is, or becomes, incapable of satisfaction.

26 Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

Reverse break-up fees are not common. If agreed, such fee would typically amount to a sum that has a sufficiently deterrent effect to prevent the buyer lightly taking on its undertaking to complete the transaction (recent examples have included sums equal to 1 to 3 per cent of the purchase price). Break-up fees are even more uncommon than reverse break-up fees. If employed, they are often limited to a certain portion of the buyer's transaction costs.

Representations, warranties, indemnities and post-closing covenants

27 Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

A seller would normally give fundamental warranties regarding, inter alia, title to shares, absence of encumbrances and free transferability of the shares. Sellers often also give some business, tax and other warranties regarding the target and the information provided. The scope and extent of such warranties varies depending on the competitiveness of the transaction process, the extent and quality of the due diligence, the target's operations and the nature of the parties.

A seller may give special indemnities in respect of certain narrowly defined matters identified in the due diligence as material to the buyer – such as certain tax risks or environmental matters – but usually only to a limited extent and less commonly if the seller is a private equity fund. The distinctions between specific indemnities and warranties do not follow from operation of the law, and are therefore regulated in the transfer agreement. The key differences are that the buyer is able to make a claim despite any knowledge it may have of the underlying circumstances giving rise to the claim, and that most of the limitations of liability applicable to warranties would not apply.

There is no distinction between representations and warranties under Swedish law and Swedish market practice.

28 What are the customary limitations on a seller's liability under a sale and purchase agreement?

The seller's liability for warranty breaches would typically be subject to, inter alia, the following limitations:

- each claim must exceed a certain lowest materiality threshold to be eligible (de minimis, often around 0.1 to 0.2 per cent of the purchase price);
- the seller is not liable unless all claims in aggregate exceed a certain materiality level (typically 1 to 2 per cent of the purchase price), in which case all losses from the first Swedish krona are eligible (a tipping basket);
- the aggregate liability for all losses (the cap) would be limited to 10 to 25 per cent of the purchase price in mid- and large-cap deals, and potentially higher sums in small-cap deals;
- the general and business warranties would normally expire 12 to 24 months post-closing, whereas tax, fundamental and environmental warranties normally would have longer limitation periods;
- claims arising out of facts or circumstances that the buyer had knowledge of or that were otherwise fairly disclosed are normally excluded;
- certain indirect losses are often excluded; and
- in relation to third-party claims, the seller would not be liable unless the buyer has given the seller the opportunity to conduct or direct the defence of the claim.

The seller's total liability for all breaches does normally not exceed the purchase price.

29 Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Insurance in respect of warranties is a common feature of Swedish M&A transactions, in particular in controlled auction processes with private equity sellers. Tailor-made insurances for specific risks – such as tax indemnities – are less common, but have increased over the past few years.

A buyer's warranty insurance policy entitles the buyer to compensation from the insurer (instead of the seller) for unknown breaches of the insured warranties. Seller warranty insurances are less common, since they involve the seller remaining liable towards the buyer but possibly able to seek back-to back recourse against the insurer, but they are sometimes used post-closing.

In structured processes, the seller often puts insurance in place and then allows the buyer to engage in discussions with the insurer when selected as the preferred bidder. In highly competitive processes, the insurance is sometimes put in place after signing (but before closing). The insurance market for warranty insurances placed on the Swedish market has become increasingly competitive over the past few years, and the insurance premium normally range from approximately 1 per cent of the insurance limit up to a few percentage points, depending on, inter alia, the insurance limit, the size and structure of the deductible (typically around 1 per cent of the enterprise value), the scope and quality of the sales process, due diligence, warranties and the target's business. The time to put the insurance in place is typically at least two to three weeks from the first contact with an insurance broker.

A Swedish law-governed policy will typically exclude:

- forward-looking statements;
- fines and penalties that are uninsurable by law;
- pension underfunding obligations;
- transfer pricing liabilities; and
- liabilities arising from the use of asbestos and certain toxic substances.

30 Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Sellers will often undertake not to solicit (key) employees of the target, nor to compete with the target's business for a certain period, typically 12 to 24 months post-closing. The non-compete undertaking may be further limited in geography or by a narrow definition of what constitutes competition, or both.

Tax

31 Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Save for stamp duty, there are no transfer taxes in Sweden.

Stamp duty is levied on the transfer of real property and mortgage loans. As regards real property, standard rates are 1.5 per cent for individuals and 4.25 per cent for legal entities. The rate on mortgages is 0.4, 1 or 2 per cent.

32 Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

A company or individual disposing of shares, a business or other assets may be subject to tax on any chargeable gain arising (currently at a rate of 22 per cent for companies, and at a rate between approximately 20 and 60 per cent for individuals), subject to available exemptions or reliefs.

Shares in Swedish companies can qualify as shares held for business reasons. Gains from a sale of shares that are deemed to be held for business reasons are tax-exempt (participation exemption). Unquoted shares are always deemed to be held for business reasons provided that they constitute fixed business assets. Under certain conditions, the tax exemption also applies to quoted shares and shares in foreign companies.

Value added tax (VAT) is levied (generally at a rate of 25 per cent) on supplies of goods or services for consideration by taxable persons for VAT purposes that are not exempt supplies. Generally, a sale of shares will be an exempt supply for VAT purposes. A sale of a business may fall outside the scope of VAT if it qualifies as a transfer of a going concern for VAT purposes. The person liable to account for VAT will depend on the nature of the supply and of the parties, and on where the supply is treated as taking place for VAT purposes.

Update and trends

The Swedish M&A market remained strong in the second half of 2017 and the first half of 2018, with a continued strong deal flow and a number of high-profile transactions. The competition in some of the controlled auction processes for attractive targets became increasingly fierce with less room for negotiations and sellers' setting the terms. The successful track record of several controlled auctions contributed towards the increasing number of sales processes being structured as controlled auctions. Given the seller-friendly environment, the number of transactions with representation and warranties insurances also saw an uptick, and were in several cases deployed after signing to compress the time period from final bids to signing to sometimes down to a few hours. Capital markets also remained strong but with slightly less initial public offering activity and more focus on strategic mergers and buyouts, especially in the telecom, media and technology and real estate sectors. More sales processes were structured as dual-tracks, where the M&A and trade sale track increasingly was viewed as the more likely track compared to a year ago. Directed share issues, predominantly in biotech companies, continued to increase, as did hybrid and debenture issues.

Employees, pensions and benefits

33 Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

A sale of shares does not, as such, affect the employment relationship between the employee and the employer. Therefore, the employment relationship remains unchanged after the sale of shares and the employees of the company being sold continue to work in accordance with their existing terms.

Sweden has implemented the Transfer of Undertaking Directive, implying that when a transfer of a business or a part thereof occurs, the employment of those employees assigned to work in the business (or part thereof) being transferred automatically (unless they object thereto) transfers on unaltered terms to the transferee. The transferee will under certain circumstances become bound by an applicable collective bargaining agreement (CBA).

34 Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

There is no legal requirement to inform or consult with trade union representatives before a share sale. However, in specific cases when a share sale indirectly affects the employees, the employer may be obliged to consult with the contracting trade unions on the planned consequences of the share sale.

In relation to a business transfer, both the transferor and transferee employers are obliged to consult with the employees' trade union representatives. The general principles are as follows:

- when the company is bound by a CBA, consultations must be conducted with the contracting trade union or unions;
- if the employer is not bound by a CBA, the employer must consult with any trade unions having members among the affected employees. Therefore, the employer must verify whether its employees are members of a trade union. The consultation obligation applies in relation to employees affected by the transfer. If all of the transferor employer's or the transferee employer's employees are affected by the transfer, trade union consultations are conducted

with all trade unions having members among the employees of the transferor employer and the transferee employer; and
- if the employer is not bound by any CBA and its employees are not members of any trade union, there is no consultation obligation.

35 Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

There is no transfer of any benefits in a share deal as the employing entity remains the same.

The rules regarding transfers of business does not apply to old age, invalidity or survivorship benefits. Therefore, the transferee employer will not take on the transferor's obligation to pay for accrued pension benefits. The transferee employer is, however, obliged to continue to apply the transferred contractual terms for pension as well as other benefits (whether individually agreed or as required by an applicable CBA) after the transfer.

Generally, no statutory filings or consents are required in relation to employee benefits. However, pension and benefit providers generally need to be notified of a change of the employing entity in business transfers. Depending on how pension liabilities are safeguarded, other actions may also be needed.

VINGE

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