

Competition Authority receives greater decision-making powers

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Introduction

After years of intense debate, Parliament has passed a government bill, giving the Competition Authority greater decision-making powers in relation to notified mergers in Sweden.

The Swedish Competition Authority is one of the few competition authorities in the European Union that lacks its own decision-making powers and adheres to a judicial model. Following the legislative amendments, the authority will be able to block notified mergers and its decision-making powers will therefore be similar to those of the European Commission.

The legislative amendments to the Competition Act will enter into force on January 1 2018. That means that concentrations notified after January 1 2018 will fall under the new regime.

Changes

According to the existing regime, the authority lacks decision-making powers in relation to mergers, as well as penalties for infringements of the Competition Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The authority must bring an action before court in order to prohibit a merger or impose penalties against an abuse of a dominant position or anti-competitive agreements.

In June 2016 an official government report was published proposing greater decision-making powers for the authority in relation to mergers and penalties due to violations of the act and Articles 101 and 102 of the TFEU. However, the bill published in September 2017 proposed amendments to the authority's decision-making powers in relation to mergers only.

There are several underlying reasons for the legislative amendments. The amendments will, in some ways, harmonise the procedure in competition law matters and create greater conformity with the penalising powers available to the European Commission and other competition authorities in the European Union. According to the official government report, reasons of efficiency also support a reform.

The report states that the authority's decision-making powers should lead to an increased incentive for fast, high-quality decision making and eliminate time losses that might arise as a result of the authority preparing a lawsuit instead of a decision.

The amendments mean a shift in the decision-making power from the courts to the authority. This gives rise to certain consequential changes:

- The amendment will allow the authority to independently decide whether the requirement of 'exceptional reasons' is fulfilled to extend Phase II of the investigation without the consent of

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the parties.

- Although the timeframe for investigation and issuing a decision are the same, it has been clarified that the two-year limit within which a merger can be prohibited applies to the authority's decision rather than the courts' decisions. Court proceedings can take an additional nine months.
- A prohibition will have immediate effect, unless otherwise decided by the authority. The authority's decision can be appealed to the Patent and Market Court.
- The authority will no longer be obliged to send a draft decision to the parties before issuing a prohibition decision. This has been subject to criticism, and it has been stated that an obligation for the authority to communicate a draft decision will be included in provisions to be issued by the government.

It will still be possible for the authority to order a merger to be notified due to the existence of 'particular reasons'. In theory, this means that such an order may be issued up to two years after the transaction.

Criticism

According to the bill, the majority of the consultation bodies were positive about the proposal. However, several important consultation bodies rejected it, including the relevant courts deciding on competition law matters – the Patent and Market Court and the Patent and Market Court of Appeal – and the Bar Association.

The Patent and Market Court of Appeal considers it necessary to have a judicial proceeding in the first instance, declaring that a prohibition of a merger is an extensive measure that may affect both the individual parties and the market. Further, mergers usually require an assessment of extensive written and oral evidence and it could be questioned whether a regime where the authority both investigates and decides on mergers is in line with the rule of law.

As part of the government inquiry, attorneys and legal counsel active in the field of competition law were interviewed. In principle, the attorneys and legal counsel were opposed to greater decision-making powers for the authority regarding both mergers and penalties. The main argument was that such a system would have a negative effect on legal certainty.

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