The Swedish Competition Authority's enhanced decision-making powers in merger cases

Director General Rikard Jermsten's speech at Nordic Compliance Summit, 30 January 2018

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Thank you for the opportunity to attend this event today. It is always a pleasure to meet others that are interested in competition law. I am here from the enforcement authority, while your role is to make sure that your employers are not the subject of that enforcement. We sometimes have different roles, but we have the same underlying interest. I hope that we can have a productive dialogue here today.

In October last year the Swedish parliament unanimously decided to grant the Swedish Competition Authority enhanced decision-making powers in merger cases. The changes took effect on the 1st of January this year. The biggest change brought about is that the Swedish Competition Authority will now be able to adopt decisions to prohibit a merger that is damaging to competition. Previously, we were required to raise an action in the courts.

In this speech I want to cast some light on how we will administer this new decision-making power.

I am extremely pleased that the parliament has taken the step to grant the Authority this enhanced power. The time from which a merger is notified to the Authority to the point when the parties concerned receive a decision will be reduced, without jeopardising legal certainty. This benefits us all.

It is positive that companies grow. Flourishing companies grow on the back of their own efforts, or by merging with others. This is an important part of the

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economy. It contributes to growth, creates new job opportunities, and provides a basis for further welfare development. But some mergers can lead to negative effects on competition in a market. It is these kinds of deals that we are tasked with reviewing before they can be implemented. In exceptional cases they should not be permitted. It is the decisions in these cases we are talking about now.

Since Sweden introduced a modern competition law in 1993, the Swedish Competition Authority has handled over 2700 merger cases. The vast majority of these have been decided during phase one. 91 have gone to a phase two review. In 13 of these cases, the Swedish Competition Authority has gone to court to prohibit the merger or obtain commitments. Of these, six have been tried in substance in court. Of those, two actions have been upheld, and four rejected. In one case the action was dismissed. A number of cases have also been withdrawn by the parties during the review, often after we have pointed out that the merger could lead to competition problems.

These figures demonstrate that we have a vast experience in investigating merger cases, and that ultimately our view has often stood. However, reviewing mergers is not simply a box-ticking exercise. Each merger case is unique, and each matter should be assessed in light of its specific circumstances. That is how we work to promote well-functioning competition. At the same time, we uphold legal certainty, make well-founded decisions that are respected, and foster confidence in the authority.

In its bill, the government expressed the view that "to uphold effective competition, it is important that restrictions that arise can quickly be tackled and removed." I agree with that sentiment, and our new decision-making procedure will contribute to this. In the majority of the EU member states the national competition authorities already have decision-making powers, meaning that we now have more similar procedures across the EU. This makes things easier for everyone involved, which is positive.

Our preparation of the design of the new procedures

The government has delegated the question of internal organisation and design of the decision-making role to the Swedish Competition Authority. In October we published a paper setting out various deliberations on the administering of the new powers. We ascertained that the enhanced decision-making powers would in themselves not necessitate any great or radical changes. We can build on our existing organisation and working methods. Nevertheless, we identified reasons to strengthen the functions and processes that existed. Furthermore, we discovered that we were not always quite as clear and transparent about our working methods as we believed, for example with respect to the information on our website. So we have worked to make improvements in this respect.

We offered interested parties the opportunity to provide comments on our proposal. In November we had a breakfast meeting at the Authority, with more than twenty lawyers in attendance who posed questions to us. We also received written comments from the Swedish Forum for Competition Lawyers.

Our impression is that our proposals were generally well received. Those comments that were put forward related, in the main, to specific details about our proposals. There have also been some supplemental comments and examples of how our investigations could be made more efficient.

I am extremely glad that we have been able to work with this question in such an open and transparent manner. If more parties are involved in the design of our working methods, confidence in our work will be enhanced in the longer run. This is something I value greatly.

After having taken into account the very valuable comments that we received, I can now present how we are going to work with mergers from now on. The relevant materials are also available on our website.

Once again, the changes are not radical. The aim is to give an account of routines and working methods to carry out investigations, make well-founded decisions, and ensure legal certainty.

There are two main elements to the changes to our procedures. The first is that we have strengthened the chief legal officer's and chief economist's roles in providing quality assurance and advice to the director general prior to a decision being made. The other aspect is that we have introduced oral hearings in merger cases.

Strengthened role for the chief legal officer and chief economist.

The strengthened role for the chief legal officer and chief economist means that they will no longer take part in the actual investigation. In other words, they will no longer make decisions on investigatory measures, participate in interviews or examinations, or undertake analytical work. Focus will be placed on quality assurance by critically assessing the supporting documentation that the case teams put forward at different points in the decision-making process at the Authority.

Oral hearings in merger cases

In connection to the parties receiving a draft prohibition decision, they will also be offered an oral hearing at the Authority. Oral hearings are already used by the Authority, but in other types of cases. One difference in oral hearings in merger cases is that the director general will be in attendance. This is therefore an opportunity for the parties to supplement and develop certain aspects of their arguments. The oral hearing will be held shortly after the parties have submitted their written observations on the Authority's draft decision. The meeting will be

led by a chairperson, and afterwards minutes will be produced which will form part of the underlying documentation when we make a decision. The chairperson will be appointed by the director general. The chief legal officer and the chief economist will also be in attendance during the oral hearing, but will not have the role of the chairperson. In practice this has also been the case in the past.

Conclusions

In this context I would like to stress that the changes which we have implemented are aimed at the few cases that we deem to be problematic. We will of course work to maintain the positive view that parties have of us when it comes to uncomplicated cases; that we are quick and pragmatic.

With the Swedish Competition Authority as the first decision-making instance in merger cases, this increases the incentives for companies and parties to put all the relevant facts on the table that we need in order to come to a correct decision early in the process. Waiting for a possible court proceeding to produce relevant facts will not be beneficial.

We should make decisions that promote economic growth and ensure that competition is not negatively affected. Companies have to produce facts and documentation to us so that we can make correct decisions in accordance with the law. This has worked well for 25 years, and I expect that it will continue to work well in the future. It can, however, mean that we have to place greater relevant requirements on the documentation we need to receive. I would also like to remind everyone that we always have the possibility to “stop-the-clock” in a merger review if we do not receive the documentation we need.

The Swedish Competition Authority already has decision-making powers for certain issues, for example when we issue orders. For us as an authority to have decision-making powers is not unique. Several authorities both investigate and make decisions. This is, for example, the case with the Swedish Tax Agency and the Financial Services Authority, Finansinspektionen.

I can envisage a development whereby the Swedish Competition Authority could be granted enhanced decision-making powers in other areas in the future. If this can lead to quicker handling times from case initiation to decision, this should be seen as positive. However, any change in the decision-making procedure must take place in such a manner that legal certainty cannot be called into question. I look forward to continued discussions on this.

Thank you for the opportunity to speak today.