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Better possibilities to report cartels and other suggested amendments of the Swedish Competition Act

On 3 March 2014, the Government presented the bill "Enhanced competition supervision" (Sw: "Förbättrad konkurrenstillsyn") (Governmental Bill, prop. 2013/14:135) which contains several suggested changes to the Swedish Competition Act which relate, inter alia, to leniency and the possibility to suspend time limits during merger control assessments. However, after fierce criticism from several stakeholders that submitted comments on the proposal some of the inquiry's proposals have been withdrawn, including a proposal concerning use of mirrored hard drives in the Swedish Competition Authority's premises following dawn raids. Partner Elisabeth Eklund and associate Oscar Jansson below elaborate on the new rules which are proposed to take effect on 1 August 2014 and also on the considerations that the Government did when certain proposals were omitted.

In April 2012, the Government commissioned an inquiry to conduct a review of a number of key aspects of Swedish competition law (directive 2012:37). Among the tasks that the inquiry was given it had to clarify certain aspects of the Swedish Competition Authority's powers during dawn raids, the ability to suspend time limits for investigations of mergers and to analyse the leniency system. The inquiry (SOU 2013:16) submitted a number of proposals to the Government. After considerations, on the basis of the responses received, the Government has now in its bill decided to only proceed with some of the proposals.

Want to avoid paying fines? Get into the queue and get a marker!

Leniency is an instrument which was introduced within the EU in the early 2000's – based on an U.S. model – to make it easier to detect cartels by providing the cartel participant who first informs the competition authorities with a possibility for immunity from fines. It is also possible to obtain a reduction of the fine if the company is not the first to report its participation. In order for a company to be able to benefit from the reduction it is required that the company is cooperating fully with the competition authorities and that all information needed to take action against the cartel is provided. However, it is not possible to obtain leniency for companies that have forced other companies to participate in a cartel.

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The leniency program has had a huge impact on an EU level. Almost all of the major cartels that the Commissioned has revealed in the last years is a consequence of that one of the companies involved has taken advantage of the leniency program.

Under the Swedish system, unlike under the Commission's system, a leniency application is at present required to contain enough detailed information for the Swedish Competition Authority to be able to act against a prohibited cooperation that it has no previous knowledge of, or, if the Swedish Competition Authority has knowledge of it, that the information is so comprehensive that the authority through the information can clarify that an infringement has occurred or that the information submitted by the company provides significant assistance during the course of the investigation. This has meant that companies have been forced to submit extensive information, without being sure that the company qualifies for leniency. Within the European Competition Network ("ECN"), consisting of all national competition authorities within the EU, a model leniency program has been developed. The model program contains a "marker-system" whereby companies can submit an application containing limited information and then supplement it with additional information in order to receive immunity. This system thus rewards the first company that submits its application without requiring the company to provide too much information at an early stage, even if another company shortly thereafter submits a complete and extensive application. These markers are valid for a given period, afterwards the turn goes to the next company that has a marker or submitted an application. This system is presently available in all EU countries except Denmark and Sweden.

The Government now proposes that the marker system should be introduced in Sweden. This means that only basic information must be provided by the company and it is then allowed to submit additional information at a later stage. The information required is the product affected by the cartel, its members and what the cartel's target is (e.g. price fixing or market sharing). It will still be possible to submit a complete notification directly, but by introducing a marker system it will be easier to discuss the information that must be provided to the Swedish Competition Authority, to the advantage of companies that want to "do the right thing." The Government also proposes that it will introduce the possibility to allow deferrals to produce additional evidence that clarifies that a violation has occurred. This situation is not covered by the marker system in the ECN's Model Program but is now proposed to be introduced in Sweden.

New rules to "stop the clock" in merger control assessments

In the EU and in all EU Member States various regulations apply that require companies that meet certain turnover thresholds to notify lasting changes of control either to the European Commission or to the national competition authorities for approval, which in Sweden means that the notification must be submitted to the

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Swedish Competition Authority. In some other countries, high market shares may also trigger a requirement to notify a concentration. Typically notification issues arise in cases of acquisition of either all or part of a business, or when two companies merge but also when parties establish fully-functioning joint ventures as well as in certain other situations. In Sweden, for example, a notification to the Swedish Competition Authority is mandatory if the companies (the acquiring group and the target company) together have a turnover for Swedish customers exceeding SEK 1 billion during the last financial year and at least two of the companies concerned had a turnover exceeding SEK 200 million to Swedish customers during the same period.

The Swedish Competition Authority as well as the Commission have a period of 25 days from notification to assess whether the concentration should be further investigated or if the concentration can be cleared (called Phase 1). In a so-called in-depth investigation (or Phase 2 investigation) the Competition Authority has the possibility to investigate the matter for a further three months. After such an in-depth examination of a merger the authority must either approve the merger or approve the merger after commitments by the parties (such as the sale of a particular business). Unlike the Commission that also has the right to prohibit a merger, the Swedish Competition Authority must bring a case in the Stockholm District Court claiming that the concentration shall be prohibited.

It is not unusual that the competition authorities during these investigations request additional information from the companies. As part of this process the Commission has the ability to suspend the time limit. This can happen if the Commission has issued an order to provide information to the company but the company has not complied with such a request. Such suspension has so far not been possible in Sweden. The reason that the Commission has this possibility is to ensure that the deadline shall be held and in order to provide companies with clear incentives to fully cooperate. The Government now proposes that such a possibility should be introduced in Sweden.

The stakeholders that commented on the proposed legislation expressed some concern that the Swedish Competition Authority could abuse the ability to suspend the time limit. The government considered that it was unlikely that the Swedish Competition Authority would suspend deadlines in order to handle delays in its own process. The Government now proposes that the possibility to "stop the clock" in Phase 1 as well as in Phase 2 should be introduced in Sweden. As the inquiry suggested the period shall resume from the first working day after that the request has been complied with.

Furthermore, the Government has proposed the introduction of a possibility to stop the clock at the request of a party during Phase 1, which is already possible during Phase 2. The Swedish Competition Authority will be deciding whether the clock

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should be stopped and, after consultation with the party, how far the stop should last. There will also be the authority's prerogative to determine if there may be reason to grant such a request several times. As requests for additional information are in the form of an order that can be appealed there is according to the Government no reason to introduce a special appeal possibility as suggested by several stakeholders.

There will be no legislation granting the Competition Authority the right to bring away mirrored hard drives from dawn raids

One of the most debated issues concerning dawn raids over the past few years has been the ability for the Swedish Competition Authority to mirror hard drives. Dawn raids are unannounced on-site inspections of companies suspected of having infringed the competition rules. The aim of the inspections is to secure evidence of such suspected infringements. The Swedish Competition Authority has in recent years tried to bring with it as much digital information as possible. Mirroring means that the Swedish Competition Authority makes forensic copies of hard disks for further examination in its own premises. Forensic copies contain not only the information that is readily available, but also deleted information becomes available to the competition authority. Subsequently, the authority uses servers in its premises in order to index the content of the hard drives so that an advanced keyword search can be conducted.

The legal regulation around dawn raids means that competition authorities may only review and bring copies of the material covered by the suspected infringement and which is not protected by client-attorney privilege.

The criticism that has been directed towards mirroring is that competition authorities may bring superfluous information, which is not covered by the scope of the dawn-raid, from the company's premises as well as information covered by client-attorney privilege. For this reason the inquiry has examined whether the Swedish Competition Authority's rights to take mirrored hard drives from the company's premises is compatible with the Swedish Competition Act.

The inquiry considered that the Swedish Competition Authority was allowed to make mirrored copies, and then bring them to its office without that any changes were required in the Swedish Competition Act. However, a number of stakeholders that provided comments on the inquiry, including Delphi, pointed out that the issue should be investigated further, in order to ensure that the ECHR standards of legal certainty were met. Therefore, the Government took out this suggested part of the proposal at an earlier stage of the legislative process and the Government stated that further legal considerations were required on this point.

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Comments regarding the new rules

The most positive piece of news in the Government's proposal is that a marker-system is introduced within the leniency program. This will mean that it will be easier for companies who want to leave a cartel to do this without the risk of incurring fines. The other very positive piece of news is that the Government listened to the stakeholders that expressed criticism about the right for the Swedish Competition Authority to bring with it mirrored hard drives during dawn raids to its premises. As the Government considers that further consideration and investigation must be made in this area, we believe there are good reasons for companies to oppose the review of mirrored material at the premise of the Swedish Competition Authority.

Regarding the possibility to introduce a temporary suspension of the time period in the process of a merger control review, we think that it is positive that the ability to stop the clock is introduced. However, it is important that the parties review the information requests that the Swedish Competition Authority issues and assess whether the information required is too extensive or simply outside the scope of the investigation. Instead of risking that a process is interrupted a discussion should be taken with the Swedish Competition Authority at an early stage and, in some cases, maybe even an appeal of the information order should be considered.

It is now up to Parliament to consider and adopt the Government bill for it to take effect. The proposed amendments are proposed to enter into force 1 August 2014. Older provisions shall, however, apply for concentration notified before the new regulation enters into force.

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