The new amendment to the Competition Act enters into force

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The amendment to the Danish Competition Act enters into force today, 1 July 2024. The amendment enables the Danish Competition and Consumer Authority ("DCCA") to call-in mergers for assessment even though the mergers are not subject to notification requirements. The amendments also enable the DCCA to issue behavioural orders to companies without finding an infringement of the Competition Act. Finally, the amendments result in a new method for calculating fines.

Call-in option

The amendment enables the DCCA to call in mergers for assessment below the notification thresholds, if:

- The merging parties have a combined turnover in Denmark of DKK 50 million (EUR 6.7 million), and
- The DCCA assess there is a risk that the merger significantly will impede effective competition, in particular due to the creation or strengthening of a dominant position.

The DCCA must render a decision to call in a merger for assessment within 15 working days from the moment the DCCA was made aware of the merger. In order to start the time limit, the DCCA must actively be made aware of the merger and the DCCA must be provided with relevant and sufficient information in order assess whether the condition to request a merger notification is present.

Whether a merger significantly will impede effective competition is not specified, but it is suggested to focus on the merging parties' competitive potential. This should capture acquisitions of startups, acquisitions of companies with unique inputs to the market, and acquisitions in oligopolistic markets.

The call-in option is used in several jurisdictions such as Norway and Sweden. In Norway, the call-in option was used to call in and prohibit Schibsted's acquisition of Nettbil.

While it will be a burden to face a call in it will also be a significant burden to assess the risk of call in and to document to the DCCA why call in is not relevant. The DCCA has announced that it will use the call-in option only once or twice a year, but for merging parties the consequence is a lot more burdensome as the parties must assess potential notification requirements prior to merging and also to document to the DCCA why a merger is not notifiable.

Market investigation with behavioural orders

The amendment enables the DCCA to initiate a market investigation in one or several sectors if the DCCA suspects that the market structure or behaviour of the market players weaken competition. If the DCCA assess that the market structure or behaviour of market players clearly weaken competition, the DCCA may issue behavioural orders or negotiate remedies with the market players in order to solve the weakening of competition.

Behavioural orders may include orders to terminate agreements, set prices and margins, provide improved access to information or limit the public available information, ease the consumers access to switch suppliers, or reduce entry barriers to the market. The behavioural orders must be reasonable, necessary, and proportionate to the ensure effective competition.

The DCCA may as part of the market investigation request information from the market players or conduct dawn raids. The decision to initiate a market investigation requires approval from the Competition Council and the behavioural orders are appealable to the Competition Appeals Tribunal or directly to the courts.

Market investigations followed by orders are a known tool in jurisdictions such as the United Kingdom, Iceland, and Greece. In the United Kingdom, orders have been rendered forcing retail banks to create a joint platform with standardised information to consumers and prohibiting wide MFN clauses within private car insurance. For companies in Denmark the amendment means that companies now must assess not only the regulatory requirements but to some extent also effects in the market. The same must be expected from the authorities. They too must show a deeper insight and understanding in the market they consider to regulate. Legal and economic analysis is no longer sufficient.

Calculation of fines

The amendment aligns the method used to calculate fines with the one used by the EU Commission. While the previous calculation method used fixed values based on the severity of the infringement, the new method is based on the turnover associated with the infringement, the severity of the infringement and the length of the infringement. The amendment is expected to increase the fines for companies with high turnover – including global turnover – and for infringements over a long period of time.

The calculation method will apply to companies infringing the prohibition against anti-competitive agreements and abuse of dominance. The calculation method will not apply to fines for procedural infringements, infringements of merger control, nor fines for natural persons. Further, the calculation method will apply for violations from 1 July 2024 and forward.

The new calculation method seems to aim at higher fines for bigger corporations. This means it is getting more expensive to infringe the Danish competition act. This underlines the important of compliance programs and training.

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