



Emerging trends in Nordic competition law: Expanded powers and tools for competition authorities may reshape the M&A landscape



Erik Brändt Öfverholm
Partner



Line Voldstad
Partner, Head of EU Regulatory
and IPT



Josefine Høy Bendtsen
Legal Advisor



Hanna Medelius
Senior Associate



Oda Linneberg Uggen
Associate, (On leave)



Michael Klöcker
Partner, MBA, Head of Litigation &
Regulatory, Denmark

In the ever-evolving sphere of Nordic competition law, policymakers are considering granting national competition authorities expanded investigative powers. And this could have far-reaching consequences for businesses across the region. There's a similar trend in some European countries, including the introduction of a tool in Iceland inspired by the tool the Competition and Markets Authority uses in the UK. This article delves into these emerging trends, examining how they might

influence the M&A landscape. Join us as we explore the driving forces behind the proposed Nordic reforms and their potential implications for industry stakeholders.

In the field of Nordic competition law, discussions are taking place regarding potential reforms. These discussions focus on proposals that grant competition authorities increased powers and new tools that would affect the M&A landscape in the region.

Finland

In contrast to other Nordic countries, the Finnish government has not yet initiated a governmental inquiry on the necessity of supplementary competition law tools. But there are initial discussions on whether there's a need for legislative changes to tackle certain antitrust conduct not caught by the current rules, as it does not constitute an abuse of dominance, an anti-competitive agreement, or a transaction. It remains to be seen whether Finland will follow the lead of other Nordic countries in this regard, or whether it will consider other necessary changes, such as granting the Finnish Competition and Consumer Authority (FCCA) the power to investigate transactions that fall under the notification thresholds.

Sweden

In Sweden, the government has recently initiated a governmental inquiry on the necessity of supplementary competition law tools. As set out below, the government wants to assess the necessity for a more adaptable and flexible competition instrument and explore the potential introduction of an instrument to investigate mergers that fall below the thresholds:

- **Analyzing and assessing the need for a broader competition tool:** The investigator will consider whether a new, broader competition tool is required in addition to the existing ones. This tool will complement the current set of competition instruments. The exact tools are yet to be defined, but the indicated amendments are in line with existing market investigation tools in other jurisdictions.
- **Considering mandatory reporting by companies:** The investigator will examine whether companies should be obligated to inform the Swedish Competition Authority (SCA) of transactions in cases where the transactions do not mandate reporting under the current rules.
- **Drafting regulatory proposals:** Based on the findings and considerations, the investigator will draft regulatory proposals that are warranted by the assessments made during this review process.

The inquiry is expected to reach its conclusion in February 2025.

Norway

In Norway, the government issued a public consultation of proposals for amendments to the Norwegian Competition Act on 31 March 2023:

- **New competition tool:** The proposal provides the Norwegian Competition Authority (NCA) with a market investigation tool, the purpose of which is for the NCA to be able to intervene in markets with poor competition even if there is no breach of competition law.

- **The suggested amendments include** powers for the authority to impose both behavioral and structural remedies and infringement fees and management suspensions against natural persons.

The deadline for submissions passed on June 30, 2023, and the proposal has met considerable criticism, including that the suggested amendments are too invasive, lack sufficient checks and balances and shift the power to regulate the market from the Parliament to the NCA. The proposal has also been criticized for creating deviating regulatory frameworks in the EEA and increasing legal uncertainty in Norway. It remains to be decided if a market investigation tool will be implemented and how it will be shaped. Most stakeholders are of the opinion that the amendments require a more comprehensive legislative process.

Denmark

In Denmark, the Danish Competition and Consumer Authority (“DCCA”) launched a public consultation for a bill to revise the Danish Competition Act on 10 November 2023. The main purpose of the proposed bill is to strengthen the authority of the DCCA by expanding its mandate and investigative powers. The central topics of the proposed bill are:

- **Extended market powers:** The DCCA will be given the authority to initiate a market investigation of behaviors or structures in a market if there are indications of weakened effective competition. The DCCA can intervene by issuing behavioral injunctions or making commitments binding without a breach of the competition rules having been established.
- **Call-in option:** The DCCA can order parties to notify M&A transactions that fall below the standard filing thresholds. The DCCA may require a M&A transaction to be notified if the undertakings concerned have a combined annual turnover in Denmark of at least DKK 50 million, and the DCCA assesses that the transaction risks significantly impeding effective competition.
- **Fines:** The principles for calculating fines will be amended.

The deadline for submission of consultation letters is 22 December 2023. Subject to the introduction and adoption of the bill adhering to schedule, the revised legislative act is likely to enter into force in the summer of 2024.

Emerging Trends

Creating new competition tools and empowering national competition authorities to address modern competition challenges that can’t be adequately tackled with existing methods is being discussed across the Nordic region. Notably, in November 2021, Executive Vice-President Vestager emphasized the urgency to review and potentially enhance competition instruments. At EU level, new competition tools have already emerged. The Digital Markets Act (DMA) has equipped the Commission with new measures to address competition concerns in unconventional ways, such as examining 'killer acquisitions' (transactions falling below traditional merger control thresholds but still capable of significantly impeding effective competition) in digital markets. Despite indications, the European Commission hasn’t presented any other specific proposals. This may have prompted national competition authorities to take independent action. In some EU Member States outside the Nordics, market investigation tools have been implemented, signaling recognition of the need for enhanced tools. Other EU Member States have chosen to discontinue or temporarily halt similar initiatives, potentially due to differing regulatory priorities or considerations.

Another prominent trend in the discussions in the Nordic countries is the adoption of new call-in options to address competition concerns related to M&A transactions that otherwise fall below thresholds and are not covered by a merger filing requirement. Notably, in the Danish legislative revision, the DCCA might be empowered to require parties to notify M&A transactions, even if they fall below the filing thresholds, provided there's a risk of significant competition impairment. Sweden is considering implementing mandatory reporting for companies engaged in M&A transactions, irrespective of the transactions meeting current filing thresholds, similar to the existing information obligation imposed on some companies in Norway and on gatekeepers under DMA. In Finland similar legislative changes have been discussed without resulting in concrete legislative proposals.

Impact on M&A transactions

The discussed policy options will have a significant impact on M&A transactions and market structures across the Nordics. While the specific nature of the new competition tools is yet to be decided, it's expected that the national competition authorities are seeking to implement ex-ante tools that can be used to handle competition issues arising from the very structure of the market (and not necessarily the conduct of a given company). These tools will require very clear procedures and proportional jurisdictional protection to ensure legal certainty. Without this certainty, the new competition tools could stifle innovation and discourage M&A. Increasing the investigate powers of the Nordic regulators may lead to increasing discrepancies between the regulatory frameworks in the EEA and even the Nordics, resulting in a more complex legal framework for dealmakers to navigate.

First of all, granting the national competition authorities expanded investigative powers to call in transactions below the thresholds will significantly decrease deal certainty. Transactions may be subject to unforeseen delays and increased costs. Companies that haven't been subject to merger reviews in the past should be aware that their transactions may draw the attention of the Nordic regulators with discretionary review powers. To mitigate this uncertainty, it's key that the risks of an unforeseen merger review are allocated in the agreement between the parties.

Secondly, to reduce unpredictability, it will be essential at an early stage of the deal to analyze potential competition issues to identify jurisdictions where the national competition authorities might review the transaction even if it falls below thresholds. Understanding what markets are of particular concern to the Nordic regulators will be essential to mitigate the risk of call-ins and ensure a smooth closing. Startups and companies in emerging (tech) markets are more likely to be of interest to the Nordic regulators. Markets for energy and food may also come under increased scrutiny. Companies conducting transactions in these markets should be mindful of the increased risk.

The exact tools to be proposed by the Nordic governments are yet to be seen, but the indicated amendments are in line with a tendency towards a continuous expansion and reinforcement of the competition authorities' investigation powers going on across many jurisdictions. With potential significant impact across the M&A landscape, dealmakers in the Nordics should follow the developments closely.

