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EFTERSENDELSE AF HØRINGSSVAR

Hvidbog om en mere effektiv fusionskontrol i EU

Til underretning for Folketingets Europaudvalg vedlægges Erhvervs- og Vækstministeriets eftersendelse af høringssvar i Kommissionens offentlige høring vedrørende hvidbog om en mere effektiv fusionskontrol i EU. Grund- og nærhedsnotatet vedrørende Kommissionens hvidbog om en mere effektiv fusionskontrol i EU, KOM(2014) 0449 blev oversendt til Folketingets Europaudvalg den 9. september 2014.

Martin Lidegaard

ERHVERVS- OG VÆKSTMINISTERIET

Draft comments from the Danish government

2 September 2014

European Commission
Directorate-General for Competition, Unit A-2
White Paper "Towards more effective EU merger control"
1049 Brussels
Belgium

Comments on the European Commission's White Paper "Towards more effective EU merger control" (COM(2014) 449 final)

The Danish government welcomes this opportunity to comment on the European Commission's abovementioned white paper and annexed staff working documents.

The Danish government can over-all support the goal of a more effective merger control in the EU. It will, however, await more detailed and specific proposals – if the European Commission decides to prepare such – before it more specifically considers the necessity and appropriateness of amending the EU Merger Regulation.

1. Expansion to include non-controlling minority shareholdings

The white paper proposes an amendment of the EU Merger Regulation to include certain non-controlling minority shareholdings.

The Danish government would welcome a deeper analysis of the consequences of such a proposal.

The Danish government agrees with the European Commission that it is very important that the design of any potential future system ensures that it does not entail unnecessary administrative and financial burdens for the companies. In this respect, it is particularly important that the criteria determining which transactions are reportable are sufficiently clear so as to not give rise to uncertainties for the companies whether or not their transactions are reportable, but that the system is both simple and secure. Furthermore, the design of any such system should ensure that it to the widest possible extent brings within its scope only such transactions which *prima facie* give rise to significant substantive concerns.

The Danish government believes that the targeted transparency system – which the European Commission proposes and recommends – generally is the system among the three proposals which best has the potential of satisfying the

abovementioned objectives. However, it would depend on the precise design of the system. There are aspects of the system as outlined which in the view of the Danish government give rise to some reservations whether it in fact satisfies these objectives to the requisite extent or whether it would be necessary to consider alternative systems. In particular:

- First, there can be some uncertainty in determining the existence of a competitively significant link. If the European Commission will provide a shareholding threshold, it should fix it precisely. The present "*around 20%*" would entail too much legal uncertainty. In the spread between the proposed 5% and around 20% it is necessary to conduct a case-specific assessment. Here it is equally important that the criteria are very clearly set out. It may give rise to uncertainty as to e.g. when an acquirer has a blocking minority or when an acquirer has access to commercially sensitive information. The Danish government believes there is reason to clarify the criteria of such a system.

- Second, there can be some uncertainty as to how indirect a competitively significant link may be. It transpires from the white paper that there will be a duty to report if the acquirer already has a non-controlling minority shareholding in an undertaking active within the same sector as the target undertaking. If such a competitively significant link can also exist in a non-controlling minority shareholding in a company which itself has a non-controlling minority shareholding in a third company, the Danish government can have some reservations as to whether this is something the undertakings will and can have sufficient information about.

- Third, it transpires that a blocking minority can also exist on the basis of low attendance rates at the annual shareholder meetings. Even though the appraisal of such *de facto* control is well-known today under the EU Merger Regulation, the analysis could be inherently more difficult to undertake in case of non-controlling minority shareholdings, in particular if the analysis is also to include indirect shareholdings through undertakings in which the acquirer holds non-controlling minority interests. The Danish government can have some reservations whether this is something the undertakings will and can have sufficient information about.

- Fourth, it transpires that the assessment of whether the undertakings are competitors will not depend on the definition of the relevant market but instead whether the parties are active within the same sector. The Danish government finds that it is not sufficiently clear when this is the case and what the test will be. If the European Commission intends to propose an amendment to the EU Merger Regulation, the Danish government encourages the European Commission to elaborate on this aspect.

- Fifth, it is unclear how the proposed system would apply to joint ventures. It follows from the white paper that the system would apply to FFJVs but that it could be necessary to make some adjustments to the present principles for identifying the undertakings concerned and for calculating turnover. The Danish government can support the latter as it otherwise could fear the number of reportable transactions would increase, e.g. if three or four larger companies form a joint venture over which none of them will exercise control under the present notion of control and if each of the companies will be undertakings concerned for the purposes of a new system. It is unclear whether the explicit reference to FFJVs has as its effect that non-controlling minority shareholdings in non-FFJVs will not result in a reportable transaction. In its recent practice, the European Commission has accepted that certain changes to the ownership structure of an existing non-FFJV can constitute a notifiable change of control even though the original formation did not.

- Sixth, the European Commission proposes that it should have jurisdiction to open an investigation until e.g. four or six months after the parties have reported their transaction. The Danish government appreciates that it can be a time-consuming task to determine whether a concentration gives rise to such substantive concerns that it should be subject to further review. However, in this interim period the parties find themselves in legal uncertainty. Considering the fact that the European Commission estimates the number of reportable transactions will be relatively low, the Danish government finds the European Commission should consider whether there is cause to operate with a shorter deadline – or indeed whether the parties should have certainty that their concentration will not be subject to review (neither by the European Commission nor by a national Member State under a referral request) outside the proposed initial waiting period.

- Seventh, the European Commission proposes that a standstill obligation could apply. Given the nature of non-controlling shareholding acquisitions, the Danish government believes there could be cause to further elaborate on whether a standstill obligation should always apply during the initial waiting period.

- Eighth, the Danish government notes that the European Commission estimates that the number of reportable minority acquisitions would roughly be 20-30 per year. The Danish government attaches great significance to this low number of reportable transactions as it directly ties to e.g. the administrative burdens for the companies. However, the European Commission bases the estimate on information from the German and UK competition authorities and from extracts from the Zephyr-database. Considering 1) that the German rules – as the European Commission also mentions – encompasses acquisitions of 25% whereas the proposed system would encompass acquisitions down to

5% and 2) that the Zephyr-database only contains information for certain acquisitions, the Danish government encourages the European Commission – should it decide to propose an amendment of the EU Merger Regulation – to further analyse and compute the number of expected reportable transactions, also taking into account how the European Commission would identify the undertakings concerned and the calculation of turnover. The Danish government believes it to be very important to have a more precise understanding of the scope of any proposed system.

- Ninth, the Danish government encourages the European Commission to expand more on the relationship between any proposed amendment of the EU Merger Regulation and Articles 101 and 102 TFEU, in particular the extent to which Articles 101 and 102 will continue to apply to, e.g., the exchange of information between the acquirer and the target company and expansion of the rights awarded to the acquirer.

The Danish government also believes there is cause to carefully consider how the present notice on ancillary restraints could or should apply to non-controlling minority acquisitions.

2. Changes to the referral system

The Danish government can over-all support a clarification and streamlining of the present rules on referral of cases to and from the European Commission.

The present rules entail a number of administrative burdens on the undertakings. This, in particular, appears to be the case with Article 4(5). To the extent it is possible to minimise these burdens, this is something the Danish government can support.

Furthermore, the present rules entail a number of uncertainties for the undertakings whether their concentrations require approval from the European Commission and/or one or more national competition authorities/no notification at all. This, in particular, appears to be the case with regard to Article 22 of the EU Merger Regulation. To the extent it is possible to reduce the uncertainties, this is something the Danish government can support.

Finally, the Danish government believes an expansion of the EU Merger Regulation to include non-controlling minority shareholdings could give rise to some complex questions concerning the referral rules. The Danish government encourages the European Commission to consider the referral system in more detail should it propose such an expansion of the EU Merger Regulation.

3. Miscellaneous amendments

The European Commission proposes 11 additional changes to the EU Merger Regulation, in particular to simplify the procedure.

In general, the Danish government can support these proposed changes. However, considering the European Commission has only briefly and broadly described the changes, the government – if the European Commission will propose an amendment of the EU Merger Regulation – will await more worked-through and specific proposals before it considers the necessity and appropriateness of making such changes.

The Danish government will however note that the European Commission contemplates amending Article 5(2)(2) of the EU Merger Regulation so as to include certain concentrations between the same parties within a two year period, namely those that stem from real circumvention. In case of circumvention, however, the European Commission would likely be able to consider the concentrations as one single transaction on the time of the first concentration without having recourse to Article 5(2)(2).

Furthermore, the Danish government notes that the European Commission contemplates amending the EU Merger Regulation so that it can revoke a decision to refer a concentration to a Member State if it has based the decision on incorrect or misleading information for which one of the parties is responsible. While the Danish government appreciates the European Commission wishes to regulate such a situation, it must also take into account that a Member State in the meantime might have approved the concentration under its national merger control rules. The European Commission should consider how to best solve any issues arising from such situations.

4. Potential for further harmonisation

The Danish government notes the statement by the European Commission that there could be cause to consider a harmonisation of parts of the merger control rules. A position, even a preliminary one, would require a more specific proposal. Even though a harmonisation – as emphasised by the European Commission can be to the advantage of the undertakings (at least in some cases) – it would be necessary to further consider the legal basis in the Treaty for such a harmonisation and its compliance with the principle of subsidiarity.