



NOTE

13. december 2016

European Commission
Directorate-General for Competition
Ref.: HT.3053
1049 Bruxelles / Brussel
Belgique /België

Comments of the Danish Government on procedural and jurisdictional aspects of EU merger control

General remarks

The Danish Government welcomes this opportunity to comment on the European Commission's Consultation on evaluation of aspects of EU Merger control.

The Danish Government is generally in favour of creating more lenient procedures for investment, while also maintaining the purpose in the Merger legislation designed to ensure, that undertakings merging will not be at the expense of competitors or consumers.

Simplification

The Danish Government supports the idea of excluding certain non-problematic transactions from the scope of the European Commission's merger review. This could for example simplify the procedure for undertakings in the EEA that establish businesses outside the EEA. Before a simplification is introduced, especially if a number of mergers notified today will be exempted from the merger notification procedure, the Danish Government would welcome a deeper analysis on the scope and the consequences of the exclusion.

Jurisdictional thresholds

The Danish Government would welcome a thorough analysis of the possible effects of and sector specific need for an introduction of other and lower thresholds for specific industries, such as the digital industry and the pharmaceutical industry.

The Danish Government finds that the current merger legislation to a large extent ensures that a merger will not significantly impede effective competition. According to the Danish Competition Act, a merger must be notified when the participating undertakings have a combined turnover of at least DKK 900 Million (approx. EUR 120 Million) in Denmark and at

least two of the undertakings each have an annual turnover of DKK 100 Million (approx. EUR 13,4 Million) in Denmark. Transactions involving small and medium sized enterprises must therefore be notified under the Danish Competition Act, and are referred to the European Commission under article 22 (139/2004), if the merger affects the trade between Member States and threatens to significantly affect competition.

In 2015, sector specific merger control on telecommunications was introduced in Denmark. This merger control entails that a merger between two or more commercial providers of electronic communications networks, which involves public electronic communications networks and in which the merging undertakings have a combined aggregate annual turnover in Denmark of at least DKK 900 Million (approx. EUR 120 Million) must be reported to the Danish Business Authority, which refers the case to the Danish Competition and Consumer Authority. The reason for the introduction of sector specific merger control in this area was to ensure effective merger legislation in relation to the specific competitive conditions existing in the telecommunications market.

Simplification and functioning of the case referral system

The Danish Government is generally in favour of making case referrals between Member States and the European Commission more business-friendly and effective. An abolishment of the two step procedure under article 4 (5) will create more efficiency for the merging undertakings when a case is referred to the European Commission.

An expansion of the European Commission's jurisdiction to the entire EEA if it accepts a referral request under article 22 (139/2004) will create a simpler procedure as the European Commission will assess the case instead of a number of National Competition Authorities. The second part which entails the requirement to renounce jurisdiction over the entire EEA, if one or several Member States oppose the referral request, will establish a certainty for the undertakings in a situation in which one or more National Competition Authorities have found that there is no community effect and that the merger can therefore be examined in the relevant Member States.

The Danish Government supports the removal of the requirement under Article 4(4) of the Merger Regulation pursuant to which the parties have to assert that the transaction may significantly affect competition in a market.

Technical aspects

The Danish Government is in favour of clarifying the Merger Regulation with the aim of creating more simplicity in the merger notification process.

The Danish Government finds, that the following proposals are relevant amendments;

- Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures
- Clarification that “parking transactions” should be assessed as part of the acquisition of control by the ultimate acquirer

The European Commission contemplates amending article 5(2)(2) of the EU Merger Regulation (139/2004) so as to include certain concentrations between the same parties within a two year period with the aim to capture real circumvention, including situations where the first concentration was notified and cleared by a national competition authority. The Danish Government would like to note that the scope of the concentrations, which will be included, preferably should be limited to a very few transactions. Those transactions are to have the ambition to circumvent the Merger Control, as it will lead to the same concentration being assessed twice - first in the Member States, and a year or two later at the European Commission in relation to another concentration which include the same undertakings.

The Danish Government also notes that the European Commission contemplates amending the EU Merger Regulation (139/2004) 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 Member States 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.