

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Suspensory Effects of Merger Notifications and Gun Jumping - Note by Denmark**

**27 November 2018**

This document reproduces a written contribution from Denmark submitted for Item 5 of the 130<sup>th</sup> OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

[www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm](http://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm)

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## Denmark

1. This contribution will focus on the Danish Competition Council's ruling on the breach of the stand-still obligation in the merger between KPMG DK and EY as well as the ECJ preliminary ruling on the matter. As also noted in the background note, the rationale behind the stand-still obligation is to ensure that the merging parties act independently on the market in question until the national competition authorities review and approve the merger. This will ensure that there are no negative effects on markets structures.

### 1. The Danish Competition Council decision on the breach of the stand-still obligation in the merger between KPMG Denmark and Ernst & Young Europe LLP's.

2. On 18 November 2013, KPMG Denmark ("KPMG DK") and Ernst & Young Europe LLP's ("EY") agreed to enter into a merger agreement ("the Merger Agreement"). KPMG DK was - prior to the merger - member of the international audit KPMG International Cooperative ("KPMG International"). The Merger Agreement stipulated that KPMG DK should, as part of the merger, terminate its membership agreement with KPMG International.

3. In accordance herewith, on the day of the signing of the Merger Agreement, KPMG DK terminated the membership agreement with KPMG International. The termination was not subject to the approval of the merger between KPMG DK and EY.

4. During the assessment of the merger, the Danish Competition and Consumer Authority ("DCCA") became aware of the termination of the membership agreement. The DCCA approved the merger with commitments on 28 May 2014. Following the merger decision, the DCCA decided to take up the case of a potential breach of the stand-still obligation cf. the Danish Competition Act article 12 c (5).

5. The termination of the membership agreement meant that KPMG DK would no longer be able to service the largest international companies if the merger was to be prohibited. As a result hereof, the DCCA assessed that the merging parties had (partly) implemented the merger before its approval and it was with this in mind that the DCCA decided to go forward with this case regarding the breach of the stand-still obligation.

6. EU and Danish case law concerning the scope of the stand-still obligation is sparse (aside from clear cases of non-notification) and, accordingly, the DCCA based its decision on a combination of the (limited) case law, in particular T-332/09 Electrabel and case IV/M.993 Bertelsmann/Kirch/Premier, and an interpretation of the Danish Competition Act article 12 c (5), based on its wording, its objective and preparatory works. The DCCA also looked at applications for exemptions given by the Commission and DCCA. Based on this, the DCCA analysed the case based on the following three criteria:

1. whether the termination in question was merger-specific,
2. whether the termination was irreversible, and
3. whether the termination had an inherent potential for market effects.

7. The DCCA noted that these criteria were neither exhaustive nor necessary in all cases.

8. In regards to whether the termination was merger-specific, the DCCA considered that the termination was a condition within the Merger Agreement and would not have happened absent the merger.

9. As to whether the termination was irreversible, the DCCA found that the termination was final and absolute. KPMG DK could not unilaterally rescind the termination.

10. With respect to whether the termination had an inherent potential for market effects, the DCCA assessed that the termination implied that the future of KPMG DK would be uncertain, until the DCCA merger approval, due to the fact that they were outside KPMG International's network. The termination could therefore have had great implications for KPMG DK if the merger had not materialized. The DCCA therefore concluded that the termination was a commercially strategic disposition with inherent potential market effects.

11. Based on the above, the Danish Competition Council (DCC) found that KPMG DK and EY had breached the stand-still obligation stipulated in section 12 c (5) of the Danish Competition Act.

12. EY decided to appeal the ruling to the Danish Maritime and Commercial High Court. Section 12 c (5) of the Danish Competition Act is modelled after the EUMR stand-still obligation in article 7 (1). The preparatory works to the Danish Competition Act states that the stand-still obligation should be interpreted in accordance with the Commission's decisions, the General Court's and the Court of Justice's case law. It was therefore decided to postpone and present the case to the ECJ as a preliminary reference.

## 2. European Court of Justice Preliminary ruling in *Ernst & Young P/S v Konkurrencerådet* (C-633/16)

13. In the reference, the Danish Maritime and Commercial High Court asked the European Court of Justice ("ECJ") to clarify the scope of the stand-still obligation.

14. The ECJ found that Article 7 of the EUMR must be interpreted as "*prohibiting the implementation by the parties to the concentration of any transaction which contributes to lasting change of control over one of the undertakings concerned by that concentration.*"<sup>1</sup>

15. In regards to the case-specific assessment as to whether the termination was indeed prohibited under the EUMR, the ECJ found that the termination of the membership agreement between KPMG DK and KPMG International did not lead to a change in control since EY did not acquire "*the possibility of exercising any influence on the KPMG DK companies [...]*"<sup>2</sup>. The ECJ acknowledged the fact that the termination of the membership agreement was "*subject to a conditional link with the concentration in question and likely to be of ancillary and preparatory nature [...] despite the effects it is likely to have on the market, it does not contribute, as such, to the change of control of the target undertaking.*"<sup>3</sup>

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<sup>1</sup> Cf C-366-16 para 52

<sup>2</sup> Cf 366/16 para 61

<sup>3</sup> Cf 366/16 para 60

16. The ECJ did not find reasonable ground to conclude that the termination contributed to a change of control (irrespective of whether the termination had produced market effects).

17. The ECJ also stated that actions or provisions that do not constitute a full change of control could be assessed after the antitrust rules in articles 101 and 102 TFEU.

18. After the ECJ's preliminary ruling, the DCC decided to acknowledge and admit the claim in respect of the national proceedings.

19. In summary, the ECJ preliminary ruling gives clarity as to when a provision or action can be seen as having breached the stand-still obligation, however, there are still areas which are not fully clarified by the ruling. It will remain to be seen if further guidance will be given when the Altice case<sup>4</sup>, upon its appeal, reaches a ruling.

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<sup>4</sup> Cf. M.7993 Altice / PT Portugal