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I. INTRODUCTION

On March 15, 2013, the Norwegian Government submitted its Proposition (Prop. 75 L (2012-2013)) for amendments to the Norwegian Competition Act (2004) to the Norwegian Parliament.

Included were important amendments that concern the control of concentrations, intended to ease the administrative burden of and adjust the Norwegian merger control regime without unduly impairing an effective control of potentially anticompetitive concentrations. Among other issues, the Government proposes a significant raise of the turnover thresholds for mandatory notifications to the Norwegian Competition Authority ("NCA"), a simplified notification system, and procedural changes for a swifter and better decision making process.

Provided the bill passes in Parliament, the amendments related to the control of concentrations are generally welcome improvements of the Norwegian regime for control of concentrations; a regime that arguably inflicts unnecessary costs and bureaucratic delays on (national and international) mergers and acquisitions and ties up an excessive share of the NCA's resources.

The amendments are proposed to take effect from January 1, 2014.

II. A PROPOSED LEGISLATIVE OVERHAUL OF THE NORWEGIAN COMPETITION ACT

The recent Proposition to Parliament is the result of an overall review of the Norwegian Competition Act (2004) by a Government appointed expert committee.[2] The committee's review resulted in a report (*NOU 2012:7—A More Efficient Competition Act*), submitted to the Government on February 14, 2012, which proposed a series of amendments. The report has subsequently been open for public hearing.

The Government's Proposition largely follows the expert committee's recommendations. The Government thus proposes a series of procedural and substantive amendments to the Competition Act, of which some of the most important concern the control of concentrations. Other amendments mainly relate to the rules of enforcement of the antitrust prohibitions, sanctions for infringements, leniency, and the NCA's powers of investigation. The Government does not propose any amendments with regard to the substantive antitrust prohibitions (the

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[2] The committee was chaired by Prof. dr. juris. Erling Hjelmeng, University of Oslo. Beret Sundet (BA-HR) was a member of the committee.

prohibitions on anticompetitive agreements/concerted practices and abuse of dominance)—prohibitions that correspond to, and shall generally be interpreted in accordance with, Article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 and 54 the EEA Agreement.

An overriding objective behind the proposed amendments, in particular those that concern the control of concentrations, is to establish a simpler, better, and more cost-efficient enforcement regime for both businesses and the authorities.

While fundamental changes in Norwegian competition law were introduced by the entry into force of the Competition Act in 2004—a modern competition law harmonizing the substantive prohibitions on anticompetitive conduct with the equivalent prohibitions in the EU/EEA—the Government's recent Proposition for amendments is more modestly set out to adjust and improve the state of Norwegian competition law within the basic framework of the existing Competition Act.

III. AMENDMENTS REGARDING THE CONTROL OF CONCENTRATIONS

A. Introduction

The current Norwegian system for the control of concentrations is, *inter alia*, characterized by:

1. very low turnover thresholds for mandatory notification to the NCA, without an additional (local) effects test, which imply that a large number of concentrations (including foreign-to-foreign transactions) must be notified, putting Norway on the list of "usual suspects" when international mergers are screened for affected jurisdictions;
2. two separate forms of notifications, "Standardized" and "Complete," at different stages of the review process, which may potentially lead to a needlessly burdensome and protracted review process;
3. no incentives for offering commitments at early stages of the procedure; and
4. a standard of appraisal requiring the NCA to intervene against concentrations that will "create or strengthen a significant restriction of competition, contrary to the purpose of the Act"—interpreted and applied as a total welfare standard.

The Government proposes a significant increase of the thresholds for mandatory notification and the abandonment of the two-tiered notification system, as well as procedural changes to incentivize a swifter and better decision-making procedure. Contrary to the advice of the expert committee, the Government does not, however, propose any amendments to the substantive test.

B. Significant Increase in Mandatory Notification Thresholds

Under the current regime, concentrations where the undertakings concerned have a combined annual turnover in Norway exceeding NOK 50 million (appr. EUR 6.7 million), and where at least two of the undertakings concerned each have an annual turnover in Norway exceeding NOK 20 million (appr. EUR 2.7 million), must be notified to the NCA.

Due to the very low notification thresholds, a large number of concentrations with limited potential of resulting in anticompetitive effects are also subject to mandatory notification. Moreover, several international and foreign-to-foreign transactions are also notified in Norway, even in cases where the affiliation to Norway and Norwegian markets is weak. Based on statistics from 2007 to 2010, only 11 (0.7 percent) of a total of 1628 notified concentrations to the NCA resulted in intervention.

The Government proposes to raise the combined threshold to NOK 1 billion (appr. EUR 134 million) and the lower (individual) threshold to NOK 100 million (appr. EUR 13.4 million).

With these proposed thresholds, around 70% of all notified concentrations in the period 2008 to 2010 would not have been subject to mandatory notification. Of the 11 concentrations where the NCA decided to intervene in the period 2007 to 2010, only two concentrations would not have satisfied the proposed new notification thresholds. For the sake of completeness, it should be noted that in 2012 and 2013 (so far), three of six interventions by the NCA have been against concentrations that would not have been subject to mandatory notification pursuant to the proposed thresholds.

The statistics indicate, at least, that the proposed rise in turnover thresholds should lead to a substantial reduction in the number of notifiable concentrations.

The risk that an increase in turnover thresholds may result in a weaker control of potentially anticompetitive concentrations is remedied by a combination of measures. The NCA has the competence to review all transactions that are liable to have effects in Norway independently of the turnover thresholds and may, within a limited time period, order a notification where there are reasonable grounds to assume that a concentration will affect competition, even when the general notification thresholds are not satisfied. Moreover, it is proposed that the Government shall have the competence to issue regulations ordering mandatory notifications of concentrations, even below the general turnover thresholds, in industries with specific competitive concerns.

C. Simplified Notification System

Under the current Norwegian regime for the control of concentrations, different stages of the review process call for two separate forms of notifications ("Standardized" and "Complete").

All concentrations that satisfy the applicable turnover thresholds shall be notified to the NCA by a so-called "Standardized" notification. (The parties may, however, jump to a "Complete" notification, without first having submitted a "Standardized" notification, to save time.)

The general purpose of a "Standardized" notification is to provide the NCA with sufficient information to be able to screen a high number of notifications and determine whether the concentration should be subject to a more thorough investigation. The required information to be provided is therefore limited, especially in cases where there are no horizontal overlaps. Within 15 working days after receipt of a Standardized notification, the NCA may order the submission of a so-called "Complete" notification—otherwise the investigation is closed and the concentration is regarded as "cleared" without further formal notice.

A "Complete" notification shall contain considerably more information to enable a thorough investigation of the concentration's competitive effects on affected markets.

Given the current low thresholds for mandatory notifications, and the resulting large number of notified concentrations, the current system, with two separate types of notifications at different stages of the review process, appropriately enables the NCA to conduct an efficient "screening." A potential drawback, however, is that in cases where the NCA orders a Complete notification, additional information may have to be gathered and processed by the undertaking(s) to be able to submit the more comprehensive Complete notification for subsequent review. This (double) notification procedure may involve considerable extra time and resources spent before the NCA's procedural timetable for a full review is triggered.

Pursuant to the Government's Proposition, the system with two separate forms of notifications at different stages of the review process is abandoned and replaced by a system with one notification that starts the procedural clock, without the interruption caused by the order of a second notification.

The required information will, according to the Proposition, largely correspond to the requirements for the current "Complete" notification. The Government does, however, further propose to introduce a system of Simplified notifications, by means of a new regulation, for specific categories of concentrations with limited potential for resulting in anticompetitive effects, based on similar principles as the Short Form CO under the EUMR. Viewed in light of the NCA's general reluctance to waive the information requirements for the current "Complete" notification in concrete cases, the introduction of a regulation on Simplified notifications that allows the notifying parties to limit the information provided in unproblematic transactions will be a welcome change.

As emphasized by the Government, in relation to the proposed significant increase in the turnover thresholds, the proposed amendments will likely simplify and enable a more effective notification process. The proposal will enable an effective case handling by the NCA from day one of receipt of the notification. For businesses, a single notification that sets off the procedural timetable once and for all may prevent a second round of gathering and processing information for the submission of a (second) notification. The proposal to introduce a "Simplified" notification, inspired by the Short Form CO, will alleviate the need to provide extensive information for clearly unproblematic concentrations.

It may be noted that the Proposition, wisely, does not endorse a proposal by the NCA to introduce a very simple "notification" for all concentrations above the current thresholds for mandatory notification, but below the proposed threshold (NOK 1 billion / 100 million). As emphasized by the Government, the NCA's proposal would counteract the benefits from a rise of the general notification thresholds.

D. Procedural Changes To Incentivize A Swifter And Better Decision Making Process

The Government also proposes several amendments in relation to the procedure for the control of concentrations, some of which are intended to provide a more expedient control procedure and a swifter decision-making process.

1. Reasoned Statement That Intervention May Take Place Within 25 Working Days

The Government proposes that the NCA should provide the parties with a reasoned statement, no later than 25 working days after receipt of a notification of concentration, that intervention against the concentration may take place. Under the current regime, the NCA is not required to substantiate reasons for potential intervention at this stage of the procedure. The proposal is intended to enable the undertaking(s) to propose commitments as early as possible, thereby potentially leading to a more expedient procedure and final decision.

2. Limitation of the NCA's Competence to Design Remedies

Under the current regime, the NCA is responsible for designing and implementing the least restrictive set of remedies to alleviate the competitive concerns of a concentration. In practice, the NCA will leave it to the parties to propose remedies, but will in the end be responsible for the precise scope and wording of any commitments and obligations. The Government's proposition implies that the NCA's competence should be limited to approving or prohibiting the notified concentration and any proposed remedies, i.e. a system more like the process under the EUMR. It is further proposed that the NCA should be able to accept proposed remedies without issuing a formal reasoned notice. The objective is to allow approval of more concentrations during the first phase of the full review (under the current act, this has in practice only occurred once, in 2008).

3. Procedural Deadlines

The Government proposes to retain the main features of the existing procedural timetable, albeit with certain amendments.

Pursuant to the Government's proposal, the NCA must, as mentioned above, provide a reasoned statement that intervention may take place within 25 working days from receipt of a notification of concentration (Phase I). Within 70 working days, the NCA must provide a reasoned preliminary decision on intervention (Phase II). The parties must reply within 15 working days from the preliminary decision, and the NCA must decide whether to intervene within 15 working days of receipt of the reply.

Where the parties offer commitments, the deadlines of the NCA may be extended a maximum of 15 working days. In Phase I, the parties must offer commitments within 20 working days. The NCA may approve the concentration subject to the proposed commitments, without first having to provide a reasoned preliminary decision, within 35 working days after submission of the notification. In Phase II, the offer of commitments will not lead to an extension of the NCA's deadline to provide a reasoned preliminary decision, unless the commitments are offered after 55 working days from submission of the notification, which will extend the NCA's deadline correspondingly.

E. Unchanged Substantive Appraisal of Concentrations

The Government does not propose to amend the substantive standard for appraisal of the competitive effects of a concentration.

The NCA shall intervene against concentrations that will "create or strengthen a significant restriction of competition, contrary to the purpose of the [Competition] Act." The

purpose of the Competition Act is "to further competition and thereby contribute to the efficient utilization of society's resources." Moreover, "special consideration shall be given to the interests of consumers."

The Norwegian standard of appraisal of concentrations, as interpreted and applied under the Competition Act, differs from the SIEC-test under the EUMR in at least two ways. *First*, where competition is already significantly restricted prior to the concentration, any additional increase in the market's concentration level (no *de minimis*) caused by the concentration will satisfy the criterion of "strengthening" a restrictive effect on competition under the Norwegian Competition Act. *Second*, with regard to efficiencies, the Norwegian standard for intervention has been interpreted and applied as a total welfare standard.

The Government-appointed expert committee that reviewed the Competition Act recommended that the Norwegian standard of appraisal should be amended and harmonized with the SIEC-test under the EU Merger Regulation ("EUMR"). The committee pointed out that the extent to which the differences between the Norwegian standard and the SIEC-test, in practice, would lead to diverging results was questionable. The committee nevertheless argued and emphasized that a harmonization would contribute to a more predictable legal situation, at least on the part of multi-national businesses, as well as make the extensive case law, practice, and guidelines under the EUMR more directly relevant to the interpretation and application of the Norwegian standard.

The Government, however, does not follow the committee's recommendations on this issue. The Proposition explains that the interests in simplifying and harmonizing the competition rules should not be given priority at the expense of the possibility to exercise an effective competition policy. The Government does not, however, explain why a transition to the SIEC consumer welfare-standard would jeopardize the exercise of such a policy. The Government further stresses that the Norwegian merger control regime, with the current standard of appraisal, is well-functioning and that the Government does not see any need for change. While few dispute that the current standard is reasonably well-functioning, the Government's ″pro *status quo* position″ is not supported by considerations of whether a SIEC-standard could function just as well or even better.

The Government correctly points out that the interest in harmonizing the standard of appraisal of concentrations with the EUMR is less important than harmonizing the substantive prohibitions of anticompetitive conduct, because the "one-stop-shop" principle prevents simultaneous appraisals of concentrations by the NCA and the European Commission, unless of course the case is partially referred back to Norwegian Authorities under the EUMR (as was the case in *e.g. M.6753 Orkla/Rieber*).

In practice, the differences between the current Norwegian standard and the SIEC-test in the EUMR are relatively minor. A transition and harmonization with the EUMR would, however, at least in "border-line" cases, nevertheless have the benefit of enabling increased guidance and reliance from the practice and guidelines under the EUMR, thereby potentially promoting increased predictability, consistency, and legal certainty. These benefits do not appear to have been considered by the Government.

Where the Government has chosen not to rely on the recommendations from the expert committee, a more elaborate and convincing argument for retaining the current standard of appraisal of concentrations would have been expected.

IV. OTHER AMENDMENTS

In addition to the amendments related to the control of concentrations, the Government also proposes a series of other amendments of the Competition Act. Other proposed amendments include:

- The introduction of commitment decisions, similar to the European Commission's competence pursuant to Article 9 of Reg. 1/2003.
- An obligation of secrecy regarding the identity of undertakings or persons that provide the NCA with information regarding infringements of the antitrust prohibitions.
- Restricted access to information in leniency applications.
- A limitation of the NCA's competence to seize original documents when securing evidence.
- The introduction of a new limitation rule allowing private damages claims within one year after a final infringement decision or judgment even if the claim would otherwise be time barred pursuant to the general statute on limitation periods.
- Increased use of penal sanctions against individuals for infringements of the competition rules and a new rule on conditional prosecution (only where the NCA files an application for prosecution). The rule of conditional prosecution is intended to reduce a concern that the risk of personal prosecution functions as a disincentive for applications for leniency. On the other hand, the Government states that the intention is also to penalize individuals employed by undertakings benefiting from full leniency, thus *increasing* the uncertainty of personal prosecution of management and employees of leniency applicants.
- No proposed amendments in relation to the NCA's competence to impose administrative fines for competition law infringements.

V. GENERALLY SENSIBLE AMENDMENTS OF THE NORWEGIAN MERGER CONTROL SYSTEM

The Government's proposed amendments are generally welcome improvements of the Norwegian regime for control of concentrations. The significant increase in the notification thresholds should lead to a substantial reduction in the number of notifiable concentrations. The abandonment of the system with two types of notifications at different stages of the review process, and the proposed procedural changes to induce a swifter decision making process, should provide for a simpler and more cost-efficient procedural framework for the control of concentrations.

The Government's Proposition for amendments of the Competition Act is subject to the Parliament's ordinary legislative procedures. Due to the fact that the current coalition

Government has a majority of the seats in the Parliament, the bill will likely pass and the amendments are assumed to take effect from January 1, 2014.