RESPONSE OF ADVOKATFIRMAN VINGE TO THE EUROPEAN COMMISSION’S PROPOSALS TO AMEND THE MERGER REGULATION IN RELATION TO MINORITY SHAREHOLDINGS AND CASE REFERRALS

Advokatfirman Vinge welcomes the opportunity to respond to the European Commission’s public consultation concerning its White Paper Towards More Effective EU Merger Control (the White Paper), and the accompanied Commission Staff Working Paper (the Staff Working Paper), both dated 9 July 2014. Vinge has previously replied to the public consultation of 2013 on the same topic, as well as contributed to the comments on the White Paper provided by the European Competition Lawyers Forum (ECLF). Nonetheless, there are certain additional points regarding minority shareholdings that Vinge would like to particularly emphasise.

Vinge considers a system of mandatory notification of non-controlling minority shareholdings to be unnecessary and disproportionate to the perceived enforcement gap. The Commission has identified a limited problem and has not yet provided convincing arguments why Articles 101 and 102 TFEU are insufficient tools for dealing with that problem.

The proposed system also goes against the aim of making the EU more business friendly, evidenced by the 2004 modernisation of EU antitrust enforcement (abandoning the notification system in non-merger situations) as well as the merger simplification procedure (limiting the number of mergers requiring full notification).

Vinge fails to see any valid justification for a waiting period for acquisitions of non-controlling stakes. There is no merger and hence no eggs to unscramble in case competition concerns are identified. Moreover, despite proposing a notification requirement, the Commission further proposes a 4-6-month prescription period in which the Commission is to decide whether or not a full notification is necessary. Such a long period is clearly excessive. Any reference to the UK system is unmerited since the UK system is one of voluntary filing, where a longer prescription period is warranted due to the risk of transactions otherwise not being detected. Any period beyond a month appears excessive in a notification system.

Some ambiguous terminology in the White Paper should be addressed. First, the “additional factors” that may establish a “competitively significant link” for the acquisition of a stake between 5% and around 20% are too vague for a threshold test. Secondly, the information notice would among other things require “some limited market share information”. This could be more burdensome than it sounds. Clear criteria need to be defined, and must be limited to what can reasonably be expected to be available (bearing in mind that an acquirer of a minority shareholding is unlikely to gain access to business secrets often required to correctly calculate market shares). Finally, we are concerned that there is no test identified in the White Paper or in the Staff Working Paper for when the Commission may require a full filing. This gives the Commission full discretion, which in turn risks resulting in inconsistent practice between case teams and parties potentially being asked to provide information in the information notice procedure that goes beyond what was originally intended.

For the remaining aspects of the White Paper and Staff Working Paper, Vinge subscribes to the position of ECLF.

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