ROYAL NORWEGIAN MINISTRY OF
TRADE, INDUSTRY AND FISHERIES

Directorate-General for Competition

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Contribution to the European Commission's Public Consultation on the Revision of the EU Merger Guidelines

Introduction

Overall responsibility for competition policy in Norway rests with the Norwegian Government, acting through the Ministry of Trade, Industry and Fisheries. The Norwegian Competition Authority is entrusted with the enforcement of the Competition Act and the EEA competition rules in individual cases, whereas appeals against decisions adopted by the Authority pursuant to the Act are determined by the Competition Appeals Tribunal.

Thank you for the opportunity to submit comments on the draft new Merger Guidelines. We are responding to the consultation by commenting on policy issues related to the Commissions assessment of scale, the innovation shield and Member States' scope of action within regulation 139/2004/EU (EUMR) article 21(4). For further comments on the draft, we refer to the separate submission of the Norwegian Competition Authority.

A Brief Description of Norway's Merger Control Rules

Norwegian legislation on merger control is largely harmonized with the EU merger control regime.[1] Accordingly, the European Commission's decisional practice and the case law of the EU Courts in merger cases have a significant influence on the assessment of mergers in Norway. The guidelines serve as an important legal source for the Norwegian Competition Authority, Competition Appeals Tribunal and the Norwegian Courts. Thus, the revised guidelines will play an essential role in ensuring consistent and effective merger control, as well as to safeguard legal certainty and predictability for the parties involved.

In certain respects, the Norwegian merger control regime grants the Norwegian Competition Authority broader intervention powers than those available to the European Commission. First, the NCA may prohibit or approve, subject to remedies, transactions that do not involve the acquisition of control or decisive influence (minority acquisitions), in the same manner as

[1] Additionally, pursuant to Article 57(2) of the EEA Agreement, the under certain conditions, the Commission has the sole power to review concentrations with an EEA dimension.

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concentrations. Second, the NCA has the power to require notification of concentrations that fall below the national notification thresholds, as well as minority acquisitions, through its call-in powers. To enable the identification of such transactions, the NCA may, pursuant to its general powers to request information, require specific undertakings in any sector of the economy to provide information on all acquisitions they undertake.

The Norwegian Competition Authority cannot independently refer a case to the Commission pursuant to EUMR article 22. However, they may join the reference of EU Member States.[2]

In December last year a government appointed expert committee submitted a report containing proposals for amendments to the Norwegian Competition Act. The amendments recommended by the committee include measures to safeguard national security interests. The Ministry is currently reviewing the committee's proposals and will present any proposed amendments to the Competition Act to the Parliament.

General Remarks on the Ongoing Revision of the Merger Guidelines

We would like to express our support for the European Commission's initiative to modernize EU competition policy in order to strengthen its ability to promote efficient use of resources and the incentives of European businesses to innovate. Since the adoption of the Horizontal Merger Guidelines in 2004 and the Non-Horizontal Merger Guidelines in 2008, the economy has experienced significant structural changes with profound impact on the functioning of the internal market and its underlying competitive dynamics. Accordingly, the ongoing revision of the Merger Guidelines, based on case law and the European Commission's enforcement experience, is timely and warranted.

EU merger control is a key forward-looking instrument of competition policy designed to prevent inefficiencies arising from anti-competitive concentrations. Effective enforcement of the merger control rules, coupled with high-quality case handling, is essential to the protection and promotion of competition in the internal market. It contributes to the efficient allocation of resources, increased innovation and adaptability, reasonable prices and better quality for consumers. Moreover, effective competition also supports the attainment of broader societal objectives, including resilience, security, and sustainability. It is therefore essential that the revised Guidelines do not create scope for concentrations to be seen as contributing to such objectives where they may in fact lead to a reduction of competition within an EEA State or across the internal market.

The draft merger guidelines provide useful and pedagogical guidance, making it easier for companies to conduct proper self-assessments when considering a transaction, and for the Commission and the NCAs to conduct better and coherent assessments in their case handling.

Scaling-up

In recent years, the debate concerning “European champions” has resurfaced. It is argued that EU merger control should facilitate more efficient exploitation of economies of scale and

[2] See for instance Illumina/GRAIL and EEX/Nasdaq Power.

scope in production and innovation. On this view, the European Commission and Member State governments may enable firms to develop into so-called “European champions” capable of competing with global technology giants in markets characterised by “winner-takes-most” dynamics. Our view is that relaxing the effective enforcement of EU merger control in order to facilitate firms' scaling or the creation of “European champions” may lead to a less efficient allocation of resources, consumer harm, and harm to smaller firms, including undertakings from smaller EEA Member States. It may also incentivise rent-seeking behaviour and undermine legal certainty.

We therefore welcome the fact that the draft guidelines appear to exclude considerations relating to undertakings’ need to scale up in order to compete more effectively in European or global markets, where the concentration in question would significantly impede effective competition, for example, in cases involving firms with substantial market power. However, in light of the increased emphasis on scale, we remain concerned that such concentrations may nevertheless be approved in practice.

Effective competition at a local, national, and European level is essential to ensure that consumers have access to a broad range of products at prices reflecting underlying production costs. Firms must be incentivised to produce efficiently and to innovate to succeed in continuous rivalry for customers. Local and national competition function as key drivers of such efficiency by compelling undertakings to develop robust competitive capabilities, thereby enabling them to compete effectively at European and, ultimately, global level as they expand. Over time, market dynamics and the competitive process will identify and discipline market participants, effectively “picking winners” among firms. Taken together, these considerations necessitate the effective and stringent merger control.

We take note of the Commission's emphasis that the customers benefitting from efficiency gains should be substantially the same as those adversely affected by the transaction. This approach serves as a safeguard against, for instance, the approval of mergers yielding efficiencies through geographical expansion while simultaneously harming customers in markets where the parties are close competitors.

Innovation Shield

Norway welcomes the Commission's concrete guidance on when acquisitions of start-ups will generally not be considered to raise competition concerns. We also support that these safe harbours are primarily intended to provide reassurance and legal certainty to start-ups, thereby strengthening incentives to establish and develop innovative undertakings, rather than to benefit established potential acquirers.

However, we would emphasise the importance of ensuring that such safe harbours are not designed or applied in a manner that could facilitate the approval of anti-competitive “killer acquisitions”.

Measures to Protect Legitimate Interests – Guidelines on EUMR Article 21

Pursuant to Article 21(4) of the EUMR, Member States may adopt appropriate measures to protect legitimate interests other than those recognised by the Regulation, provided that such measures are compatible with the general principles and other provisions of Community law. In certain circumstances, Member States may need to rely on this derogation to prohibit or impose additional conditions on the implementation of a concentration with an EU dimension, notwithstanding that the concentration has been cleared by the Commission.

Norway welcomes the Commission's initiative to provide guidance on the substance and application of Article 21(4) in the Merger Guidelines. Provided that the guidance appropriately reflects the scope and purpose of the provision, it could contribute to a common understanding across the EU/EEA, reduce legal uncertainty, and promote greater consistency and predictability in its application.

Public security, media plurality and prudential rules are expressly recognised as legitimate public interests and may be invoked without prior approval from the Commission. Any other public interest relied upon by a Member State must be notified to and approved by the Commission before the measure may be adopted or implemented. A distinction should be drawn between cases in which the Commission assesses whether a Member State's measure complies with Article 21(4), for instance where there are indications that the measure is incompatible with the general principles and other provisions of Community law or the derogation is invoked to circumvent the EUMR, and cases where the Commission risks exceeding its remit by unduly interfering with a Member State's right to protect its legitimate interests. It is important that any guidance on the exercise of Member State prerogatives under Article 21(4) does not go beyond the scope of the provision itself.

We encourage the Commission to closely involve the Governments of the EU Member States and the EEA EFTA States in the process of updating the Guidelines, as this part of the Guidelines primarily concerns matters within their competence.

Yours sincerely,

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