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EFTA SURVEILLANCE AUTHORITY

The Ministry of Government Administration and Reform
Attn.: Director Steinar Undrum

Subject: The EFTA Surveillance Authority's inspection powers in Norway

Dear Steinar,

Reference is made to the recent discussions by telephone between the Ministry of Government Administration and Reform and the Competition and State Aid Directorate regarding the EFTA Surveillance Authority's inspections powers in Norway in the field of competition.

The rules governing the inspection powers of the EFTA Surveillance Authority (hereinafter "the Authority") in antitrust cases are found in Articles 20 and 21 in Chapter II of Protocol 4 to the Surveillance and Court Agreement (SCA). These powers are described in detail in the attached annex to this letter.

Protocol 4 SCA is implemented in Norwegian law by the EEA Competition Act of 5 March 2004 No. 11 and underlying regulations. The inspection powers of the Authority are therefore given effect in Norwegian law by way of national legislation. Thus, it can be assumed that Regulation 966 of 4 December 1992 ("the procedural regulation") which contains a Norwegian translation of Protocol 4 SCA gives the rules contained in Protocol 4 SCA full effect in Norwegian law, including the rules regarding the Authority's inspection powers.

However, according to Section 3 first paragraph of the EEA Competition Act (entitled "*Inspections by the EFTA Surveillance Authority*") Sections 24 and 25 of the Norwegian Competition Act shall apply to inspections conducted by the EFTA Surveillance Authority, or by the Norwegian Competition Authority at the request of the EFTA Surveillance Authority. The question therefore arises as to whether the reference to Sections 24 and 25 in the Norwegian Competition Act is meant to alter (limit or broaden) the powers conferred upon the Authority in Protocol 4 SCA and Regulation 966.

With regard to inspections by the EFTA Surveillance Authority, it is stated by the Ministry in the preparatory work to Section 3 of the EEA Competition Act that the reference in Section 3 first paragraph to Section 25 of the Norwegian Competition Act implies that:

"to secure evidence an order must be obtained from a national court"

It is further stated in the preparatory work that such requests can be submitted by the EFTA Surveillance Authority or by the Norwegian Competition Authority on behalf of the EFTA Surveillance Authority. The preparatory work goes on to say that for the rest ("forøvrig") Protocol 4 SCA, as implemented in Norwegian law [by Regulation 966], will regulate the competence of the EFTA Surveillance Authority as regards the securing of evidence.[1]

The preparatory work seems to use the term "secure evidence" ("*bevissikring*") both about the inspections of the Authority pursuant to Article 20 of Protocol 4 SCA and about the powers of the Norwegian Competition Authority under Section 25 of the Norwegian Competition Act although the former uses the term inspection ("*kontroll*") and only the latter uses the term secure evidence ("*bevissikring*"). No distinction is made between the situation where undertakings submit to an inspection ordered by an Authority decision and the situation where undertakings oppose an inspection ordered by an Authority decision. The use of coercive measures would only be necessary in the latter case.

In the Authority's experience, undertakings in the market and their legal advisers have been confused when it comes to the interpretation of Section 3 of the EEA Competition Act and its relation to the Authority's inspection powers as laid down in Protocol 4 SCA and Regulation 966. Such confusion occurred in particular when the Authority carried out its inspection at the premises of Color Line in April 2006. The confusion on the part of Color Line's lawyers in this respect created a very unpleasant situation for the Authority which negatively affected the effectiveness of the inspection.

Also in recent contacts between the Authority and Norwegian competition lawyers it has emerged that statements in the preparatory work to the EEA Competition Act are liable to create legal uncertainty with regard to the Authority's inspection powers under Norwegian law. The most important question in this regard is whether the Authority can carry out an inspection in Norway, ordered by an Authority decision pursuant to Article 20(4) SCA, to which the undertaking submits without first producing a court order from a national court.

It therefore appears desirable in order to ensure that the Authority can effectively carry out inspections in Norway in the future that the Ministry clarifies the legal effects of the reference to Sections 24 and 25 of the Norwegian Competition Act in the EEA Competition Act Section 3 first paragraph, and moreover, whether Protocol 4 SCA and Regulation 966 exhaustively regulate the Authority's inspections powers in Norway in cases where undertakings submit to an inspection order by the Authority pursuant to Protocol 4 SCA and there is no need to use coercive measures.

Against this background the Authority would like to ask the Ministry the following questions:

1. Does the Ministry agree with the description of the Authority's inspection powers under Protocol 4 SCA in the annex attached to this letter?

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[1] Ot. prp. nr. 6 (2003-2004) Chapter 18 "Comments to Section 3:

"Henvisningen til konkurranseloven § 25 innebærer at det må foreligge kjennelse fra retten for å gjennomføre bevissikring. En slik begjæring kan fremmes av ESA eller Konkurransetilsynet etter anmodning fra ESA. For øvrig vil Avtale mellom EFTA-statene om opprettelse av et overvåkningsorgan og en domstol (ODA) Protokoll IV, slik disse reglene er gjennomført i norsk rett, regulere ESAs kompetanse når det gjelder bevissikring"

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2. Does, in the Ministry's opinion, Section 3 of the Norwegian EEA Competition Act, and in particular the reference to Sections 24 and 25 in the Norwegian Competition Act, correctly interpreted, in any way alter (limit or broaden) the inspection powers conferred upon the Authority in Protocol 4 SCA and Regulation 966?

3. Does the Ministry consider that the Authority can carry out inspections in Norway ordered by an Authority decision pursuant to Article 20(4) of Protocol 4 SCA to which the undertaking submits without first producing a court order from a national court?

4. If question 2 is answered in the negative and question 3 answered in the affirmative, which appropriate steps could the Ministry envisage that could remove the legal uncertainty that has arisen regarding the Authority's inspection powers in Norway?

5. However, if question 2 is answered in the affirmative, which appropriate steps could the Ministry envisage that could remove the legal uncertainty that has arisen regarding the Authority's inspection powers in Norway?

I look forward to receiving your response to these questions, preferably by 31. October 2007. Should you have questions regarding this letter, please do not hesitate to contact me or the case handler.

Yours sincerely,

Amund Utne

Amund Utne
Director
Competition and State Aid Directorate

Annex: Description of the inspection powers of the Authority as laid down in Protocol 4 to the Surveillance and Court Agreement

1.1 Inspection of business premises

According to Article 20(1) of Chapter II Protocol 4 SCA the EFTA Surveillance Authority may conduct all necessary inspections of undertakings and associations of undertakings in order to carry out the duties assigned to it by Chapter II of Protocol 4, i.e. for the application of Articles 53 and 54 of the EEA Agreement.

The officials and other accompanying persons authorised by the EFTA Surveillance Authority to conduct an inspection are empowered:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;
(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
(c) to take or obtain in any form copies of or extracts from such books or records;
(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

Inspections can be carried out on the basis of Article 20(3) or 20(4). It is established by case law that the Authority may choose between those two possibilities in the light of the special features of each case.[2]

Under Article 20(3) the officials and other accompanying persons authorised by the EFTA Surveillance Authority proceed on the basis of a written authorisation.[3] On the production of such an authorisation, the undertaking is not obliged to submit to the inspection. However, if it does submit, it must produce the required books or other records related to the business in complete form and must avoid answering question in an incorrect or misleading manner. If it does not comply with these obligations it can be subject to fines imposed by the Authority (cf. Article 23(1)(c) and (d) of Chapter II of Protocol 4 SCA).

When acting under Article 20(3) the Authority shall in good time before the inspection give notice of the inspection to the competition authority of the EFTA State in whose territory it is to be conducted.

Under Article 20(4) the Authority proceeds on the basis of a formal decision adopted by its College. It follows from the wording of Article 20(4) that undertakings and associations of undertakings are required to submit to inspections ordered by such a decision. In accordance with Article 17 SCA inspection decisions take effect when they are notified to the undertakings to whom they are addressed. Thus, the obligation to submit to the inspection applies from the moment the decision is served to its addressee. Moreover, it follows from case law that undertakings which are subject to a competition

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[2] Case 136/79 *National Panasonic*; Joined cases 46/87 and 227/88 *Hoechst*, para. 22; Case 85/87 *Dow Benelux*, para. 33; and Case C-94/00 Roquette Frères, para. 77.

[3] The authorisation may be issued by College or a person authorised by College e.g. the Member responsible for competition or the Director of CSA.

investigation are obliged to cooperate actively with the Authority.[4] On the other hand, the Authority is obliged to respect the rights of the defence at all stages of an investigation. [5]

If the undertaking does not submit to the inspection ordered by decision it may be subject to fines and periodical penalty payments imposed by the Authority pursuant to Article 23(1)(c) and Article 24(1)(e) respectively. Moreover, fines can be imposed on the undertaking if it does not produce the required books or other records related to the business in complete form, answers questions in an incorrect or misleading manner or breaks seals affixed by the officials of the Authority (cf. Article 23(1)(c) and (d) of Chapter II of Protocol 4 SCA)

The undertaking which is subject to the inspection has the right to have the decision reviewed by the EFTA Court. However, actions brought before the EFTA Court do not have suspensory effect.[6] An undertaking cannot therefore evade the inspection by bringing such action. If such action is brought and the EFTA Court finds that the decision of the Authority ordering the inspection must be set aside the information gathered during the inspection cannot be used in evidence against the undertaking.

The Authority shall take decisions under Article 20(4) only after consulting the competition authority of the EFTA State in whose territory the inspection is to be conducted.

Both the authorisation under Article 20(3) and the decision under Article 20(4) must specify the subject matter and purpose of the inspection.

That obligation is regarded in case law as:

"a fundamental requirement not merely in order to show that the investigation to be carried out on the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding the rights of the defence". [7]

Article 20(5) provides that officials and those authorised or appointed by the competition authority of the EFTA State in question shall actively assist the officials and other accompanying persons authorised by the EFTA Surveillance Authority when this is requested of the national authority or of the EFTA Surveillance Authority. To this end, they enjoy the same inspection powers as the officials of the Authority. In the past, officials of the Norwegian Competition Authority have been regular members of the Authority's inspection teams on this basis.

The Authority does not have any coercive measures at its disposal by which it can carry out the inspection against the will of the undertaking in question. For inspections under Article 20(3) this follows already from the fact that the undertaking is not obliged to submit to the inspection.

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[4] Case 374/87 Orkem, para 27. [reiterated in several later cases]

[5] Joined cases 46/87 and 227/88 *Hoechst,* paras. 14 and 15

[6] Article 40 SCA.

[7] Joined cases 46/87 and 227/88 *Hoechst*, para. 29; and Case 85/87 *Dow Benelux*, para. 40.

Should the undertaking oppose an inspection which is ordered by decision under Article 20(4) the Authority must ask the authorities of the EFTA State for assistance. Thus, Article 20(6) provides that where the officials of the Authority find that an undertaking opposes an inspection ordered pursuant to Article 20, the EFTA State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

With regard to the form of assistance provided for in Article 20(6) it is specifies in Article 20(7) that if such assistance requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Moreover, it is specified that such authorisation may be applied for as a precautionary measure.

In Article 20(8) it is specified that where an authorisation as referred to in Article 20(7) is applied for the national judicial authority shall control that the decision by the EFTA Surveillance Authority is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. However, it follows that the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the EFTA Surveillance Authority's file. Finally, the lawfulness of the decision by the EFTA Surveillance Authority shall be subject to review only by the EFTA Court.

In its control of the proportionality of the coercive measures, the national judicial authority may ask the EFTA Surveillance Authority, directly or through the EFTA State competition authority, for detailed explanations in particular on the grounds the EFTA Surveillance Authority has for suspecting infringement of Articles 53 and 54 of the EEA Agreement, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned.

Article 20(8) is based on principles which have been developed in case law, in particular in Roquette Frères.[8]

When the Authority has carried out inspections in Norway in the past it has regularly asked for an authorisation as provided for in Article 20(7) as a precautionary measure. However, it has not yet occurred that an undertaking has opposed an inspection which has been ordered by decision pursuant to Article 20 (and Article 14 in the previous version of Chapter II of Protocol 4 SCA).

1.2 Inspection of non-business premises

According to Article 21(1) of Chapter II of Protocol 4 SCA, the Authority can by decision order an inspection to be conducted in premises, land and means of transport which do not belong to undertakings or associations of undertakings. This includes the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned.

The conditions for ordering an inspection under Article 21 are (i) that there is a reasonable suspicion that books or other records related to the business and to the subject matter of the inspection are being kept in the premises land and means of transport in question and

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[8] Case C-94/00 *Roquette Frères;* see also Joined cases 46/87 and 227/88 *Hoechst*; and Case 85/87 *Dow Benelux*.

(ii) that the books and records may be relevant to prove a serious violation of Article 53 or Article 54 of the EEA Agreement.

The decision of the Authority ordering the inspection shall according to Article 21(2) specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the right to have the decision reviewed by the EFTA Court. It shall in particular state the reasons that have led the EFTA Surveillance Authority to conclude that a suspicion in the sense of paragraph 1 exists.

The Authority shall take decisions under Article 21(1) after consulting the competition authority of the EFTA State in whose territory the inspection is to be conducted.

Article 21(3) provides that a decision adopted pursuant to paragraph 1 cannot be executed without prior authorisation from the national judicial authority of the EFTA State concerned.

The national judicial authority shall control that the decision by the EFTA Surveillance Authority is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested.

The national judicial authority may ask the EFTA Surveillance Authority, directly or through the EFTA State competition authority, for detailed explanations on those elements which are necessary to allow its control of the proportionality of the coercive measures envisaged. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with information in the EFTA Surveillance Authority's file. The lawfulness of the decision by the EFTA Surveillance Authority shall be subject to review only by the EFTA Court.

It follows from Article 21(4) that the officials and other accompanying persons authorised by the EFTA Surveillance Authority to conduct an inspection ordered in accordance with Article 21(1) shall have the powers set out in Article 20(2)(a), (b) and (c), listed under point 1.1 above.

It is also provided in Article 21(4) that Article 20(5) and (6) shall apply mutatis mutandis. Thus, as long as there is no opposition on the part of the person who is subject to the inspection the Authority will on production of its decision and the authorisation from the national court proceed on the basis of its decision and its inspection powers as listed under Article 20(2)(a), (b) and (c). In doing so it may be assisted by the officials from the national competition authority as provided for in Article 20(5).

However, should the person who is subject to the inspection oppose that the inspection is conducted, the Authority does not have any coercive measures at its disposal by which it can carry out the inspection against the will of the person in question. Faced with such a situation it must thus ask the national authorities for the necessary assistance in accordance with Article 20(6), requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable the officials of the Authority to conduct their inspection.

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1.3 Inspection in merger cases

By Article 13 of Chapter XIII of Protocol 4 SCA the Authority is given the same inspection powers in merger cases as in Article 20 of Chapter II of Protocol 4 SCA. It does not have powers to conduct inspection at non-business premises in merger cases.