



ROYAL NORWEGIAN MINISTRY OF
TRADE, INDUSTRY AND FISHERIES

European Commission
Directorate-General for Competition
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Your ref	Our ref	Date
HT.3053	14/8093-20	27.01.17

Response to the European Commission's public consultation on Evaluation of procedural and jurisdictional aspects of EU merger control

1. Introduction

The Norwegian Government welcomes the opportunity to make a submission to the European Commission on the public consultation on *Evaluation of procedural and jurisdictional aspects of EU Merger Control*.

Please find below the Norwegian Government's general comments to the functioning of the current turnover-based jurisdictional thresholds set out in the Merger Regulation in light of highly valued acquisitions of target companies that have not yet generated substantial turnover, and to the proposals regarding the post-notification case referral mechanisms in the same Regulation. The specific questions in the questionnaire are not completed.

2. Jurisdictional thresholds

The cooperation between the Norwegian Competition Authority and the European Commission in merger cases seems to work well. In light of the experience thus far, it is our view that the current rules are well-functioning. Nevertheless, the proposals for modifications address issues arising from the development of the digital economy, which merit careful consideration.

The Norwegian Government observes that the Commission considers alternative criteria to the purely turnover-based jurisdictional thresholds. The Commission raises the question of whether the current thresholds capture all transactions, which potentially could have an impact on the internal market. The Commission points out that companies, particularly in the digital economy and the pharmaceutical industry, may have considerable actual or potential

market impact that may be reflected in high acquisition values, although they don't generate substantial turnover. Thus, acquisitions of such target companies are likely not captured under the current turnover-based jurisdictional thresholds. To remedy this possible legal gap, it has been suggested to complement the existing thresholds by additional criteria, such as the transaction value ("deal size threshold").

The Norwegian Government has no strong views on the effectiveness of the current turnover based jurisdictional thresholds and the perceived legal enforcement gap at EU-level. Under Norwegian Law, we would like to point out that transactions below the existing filing thresholds may be subject to filing obligations, subject to a decision by the Competition Authority in individual cases, or as a more general obligation for individual undertakings. This legal regime has been adopted to provide for a more flexible merger control, than turnover thresholds alone would lead to.

The suggestion to complement the existing criteria in the Merger Regulation with criteria based on the transaction value, would imply that more significant transactions with cross-border effect in the EEA, which could have an impact on the internal market, would be subject to merger control by the Commission. It also implies that the competence of the Commission would be extended to the expense of the national competition authorities. The Norwegian Government would also like to point out that the possible shortcomings of the current thresholds may be sufficiently addressed by the current case-referral system. National competition authorities may request for pre and post notification referrals to the Commission under Articles 4 (5) and 22 of the Merger Regulation respectively, in cases where the merger does not have a Union dimension. It thus seems unclear to us whether it is necessary to complement the current threshold by additional criteria.

As a general remark, jurisdictional threshold criteria should be clear-cut in order to safeguard legal certainty for the undertakings involved. It should also be noted that under the current state of EEA Law, turnover in EFTA is not taken into account under the current turnover-based jurisdictional thresholds set out in the Merger Regulation. It thus seems pertinent to observe, that the geographical dimension of new jurisdictional thresholds needs to be given careful consideration.

3. Post-notification referral system

The Norwegian Government would also like to comment on the proposals regarding the post-notification referral system laid down in Article 22 of the Merger Regulation, whereby one or more Member States under certain conditions can request that the Commission assess mergers that fall below the thresholds.

The Norwegian Government observes that the Commission proposes two modifications to the current system of post-notification referrals from Member States to the Commission under Article 22 of the Merger Regulations. First, an expansion of the Commission's jurisdiction to the entire EEA if it accepts a referral request under Article 22. Currently the Commission only obtains jurisdiction in those Member States that join the referral request. Second, a renouncement of jurisdiction over the entire EEA, if one or several Member States oppose the referral request.

It is our understanding that the proposed modifications to Article 22 of the EU Merger Regulation imply that there will be no more joining in as regards requests for a post-notification referral from a Member State to the Commission. In other words, there would be no possibility for a Member State to explicitly join a referral request. Instead, a Member State wishing to retain its original jurisdiction would have the possibility to oppose the referral.

In general, this seems to be well founded. However, we would like to point out that the proposed modifications would affect specific provisions of the EEA Agreement. The Norwegian Government would in this respect bring to the attention of the Commission the current wording of Article 6 (3) first and second section in Protocol 24 to the EEA Agreement. These provisions state respectively that:

"Where the concentration may affect trade between one or more EC Member States and one or more EFTA States, the EC Commission shall inform the EFTA Surveillance Authority of any request received from an EC Member State pursuant to Article 22 of Regulation (EC) No 139/2004 without delay.

One or more EFTA States may join a request as referred to in subparagraph 1 where the concentration affects trade between one or more EC Member States and one or more EFTA States and threatens to significantly affect competition within the territory of the EFTA State or States joining the request. "

It follows that the EEA EFTA States currently lack an independent right to request a post-notification referral of a case to the European Commission. The Norwegian Government believes that it would be appropriate to review whether a formal right for the EEA EFTA States to submit an independent request for a post-notification referral to the Commission should be considered. It also appears that, in view of the abolishment of the current system, which provides for the possibility to join in on request, that the proposed amendments leave the EEA EFTA States without any possibility to initiate such referrals. The EEA EFTA States should also be provided with a veto right in relation to their own jurisdictions (right to oppose a referral request).

In the view of the Norwegian Government, it would enhance the efficiency of the enforcement of the merger rules if the right of the EEA EFTA States in this regard would be aligned with the rights of the EU Member States. That would also serve the overall objective of the EEA Agreement, which is to achieve homogenous rules within its substantive scope, and thus contributing to create a true EEA-wide merger control area.

Having regard to the above considerations, amendments to Article 6 (3) in Protocol 24 to the EEA Agreement seem to be necessary. We recognize that the amendments to the Regulation are determined by the EEA Committee through an EEA Joint Committee Decision at the time of incorporation of the Act into the EEA Agreement.

Yours sincerely,

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This document has been signed electronically and therefore it is not signed by hand.

