Response to the European Commission’s public consultation” Towards more effective EU merger control”

Introduction
The Norwegian Government welcomes the opportunity to make a submission to the European Commission on the public consultation set out in the White Paper "Towards more effective EU merger control" and the Commission Staff Working Document accompanying the White Paper.

Please find below the Norwegian Government’s comments regarding the reform of the rules concerning the referral of merger cases and the regulation of acquisitions of non-controlling minority shareholdings.

The reform of the rules on referrals of merger cases
The cooperation between the Norwegian Competition Authority and the European Commission in this type of cases seems to work well. In light of the experience thus far, it is our view that the current rules in principle are well-functioning. Nevertheless, the proposals for simplification seem appropriate and timely.

It is our understanding that the proposals with regard to Article 22 in the EU Merger Regulation will imply that there will be no more joining in as regards requests for a post-notification referral from a national competition authority to the Commission. In general this seems to be well founded. The Norwegian Government would in this regard, however, bring to the attention of the Commission the current wording of Article 6(3) second section in Protocol 24 to the EEA-Agreement. This Article states that ”one of more EFTA-states may join a request as referred to in subparagraph 1 where the concentration... “. 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 EFTA States to submit an independent request for a post-notification referral to the Commission should be considered during this revision of the Merger Regulation. It also appears that, in view of the abolition of the current system, which provides for the possibility to join in on requests, that the proposed amendments leave the EFTA States without any possibility to initiate such referrals. In the view of the Norwegian Government it would enhance the efficiency of the enforcement of the merger rules if the rights of the 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 of achieving homogenous rules within its material scope, and thus contributing to create a true EEA-wide merger control area.

**The Norwegian rules on acquisitions of non-controlling minority shareholdings**

The Norwegian Competition Act have since 2004 had a specific provision giving the Norwegian Competition Authority the power to stop or reverse acquisitions of non-controlling minority shareholdings. This provision, currently found in section 16a of the Competition Act, gives the Authority an obligation to intervene against acquisitions of non-controlling minority shareholdings, on the same material conditions as interventions against acquisitions of control. The substantive test is whether the acquisition will "create or strengthen a significant restriction of competition, contrary to the purpose of the Act".

The legislative reason given for including the provision regarding acquisitions of non-controlling minority shareholdings in the Competition Act, is that economic theory dictates that such acquisitions may hinder effective competition. Specifically, the theory of harm is that minority non-controlling acquisitions in certain situations may lead the acquirer to have weaker incentives to compete than it had prior to the acquisition. The provision was controversial when adopted in 2004, and no decision has been adopted pursuant to it as yet.

In the 2013 revision of the Competition Act, the need for regulation of acquisitions of non-controlling minority shareholdings was evaluated. In the Official Norwegian Report (NOU 2012:7), submitted by an expert committee, and preceding the enactment of a series of amendments to the Competition Act, it was again concluded that minority shareholdings may have a negative impact on incentives to compete. The magnitude of such impact will depend of whether the minority shareholding is an active or a passive investment, and whether coordinated and non-coordinated effects will evolve as a result of such minority shareholding. Thus, the expert committee recommended that the provision would be maintained.

Stakeholders were divided during the revision process. The Confederation of Norwegian Enterprise (NHO) argued that the section regarding acquisitions of non-controlling minority shareholdings should be repealed, as it has never been used and there is no similar regulation in EU law. Furthermore, the Norwegian Bar Association pointed out that competition issues in connection with such acquisitions would be more properly dealt with under the rules regulating abuse of dominance and anticompetitive agreements. The Norwegian Consumer
Council and the Norwegian Competition Authority both argued for keeping the existing regulation of acquisitions of non-controlling minority shareholdings.

In the legislative process, and based on the same argument as outlined above, it was decided to maintain the provisions regulating acquisitions of non-controlling minority shareholdings without any material alterations.

Under the Norwegian Competition Act, the acquisitions of a non-controlling minority shareholding are subject to self-assessment by the parties. Hence, there is no obligation to give notification in any form for acquisitions of non-controlling minority shareholdings. The Norwegian Competition Authority can, however, intervene to request a notification of the acquisition within three months of its completion. If such a transaction is notified, a standstill obligation applies.

We remain at your disposal for any further information concerning this topic.

Yours sincerely,

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