

*Case No COMP/M.4956 - STX/ Aker Yards*

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**REGULATION (EC) No 139/2004  
MERCER PROCEDURE**

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Article 7(3)  
Date: 19.3.2008



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19/03/2008  
SG-Greffe (2008) D/201301

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 7(3) DECISION

**To the notifying party**

Dear Sir/Madam,

**Subject: Case No COMP/M.4956 - STX/ Aker Yards**

Request for a derogation pursuant to Article 7 (3) of Council Regulation No 139/2004

1. We refer to your application for a derogation from the suspension obligation provided for in Article 7(1) of Council Regulation (EC) No 139/2004 ("EC Merger Regulation") with regard to the proposed acquisition by STX Corporation ("STX", South Korea) of control of the whole of Aker Yards A.S.A ("Aker Yards", Norway), submitted pursuant to Article 7(3) of the EC Merger Regulation on 5 March 2008 and updated by further submissions on 10, 12, 13, 14 and 17 March 2008.

**I. FACTS AND PROCEDURE**

2. On 16 November 2007 the Commission received a notification of a concentration pursuant to Article 4 of the EC Merger Regulation by which STX would acquire control, within the meaning of Article 3(1)(b) of the Council Regulation, of Aker Yards.
3. STX is a South Korean holding company active in three main areas: shipbuilding and marine equipment (including engines), shipping and logistics as well as energy and construction. As part of its shipbuilding activity, STX designs and builds various types of commercial vessels such as containerships, product tankers, chemical and oil tankers, bulk carriers and LNG carriers. STX currently operates in commercial shipbuilding through two shipyards located in Korea and has another shipyard under construction in China.
4. Aker Yards is a Norwegian shipbuilding group focusing on sophisticated vessels. Its product range includes cruise vessels and ferries, commercial vessels, offshore production and specialised vessels. Aker Yards comprises eighteen yards in various EEA countries as well as in Ukraine, Vietnam and Brazil.

5. The notified concentration consists of the acquisition by STX of a minority shareholding of 39.2% in Aker Yards on the Oslo Stock Exchange. STX acquired those shares on 23 October 2007.
6. After examining the notification, the Commission concluded that the notified operation fell within the scope of the EC Merger Regulation and it decided on 20 December 2007, in accordance with Article 6(1)(c) of the Merger Regulation, to initiate proceedings in this case.

## **II. THE APPLICATION FOR DEROGATION**

7. STX has requested a derogation from the suspension obligation pursuant to Art 7(3) of the Merger Regulation. This derogation request is based on the need to preserve the full value of STX's investment following the acquisition by a third company, Havyard Invest AS ("Havyard Invest"), of a 5.2% stake in Aker Yards and the request by this company of an Extraordinary General Shareholders Meeting ("EGSM") for the election of a new Board of Directors ("the Board").
8. On 29 February 2008, Havyard Invest declared that it had purchased a 5.2% stake in Aker Yards, which increased its participation up to 5.56%. Havyard Invest has also declared that it controls an additional 4.62%, which adds up a total stake under its control of 10.17%.
9. On 7 March 2008, Havyard Invest requested an EGSM which is scheduled to take place on 1 April 2008, well before the time set to the Commission to adopt a final decision on the proposed transaction. This EGSM has been scheduled shortly before the annual general shareholders meeting ("AGSM") to be held on 25 April, and according to the information published on Aker Yards website, the purpose of the EGSM of 1 April 2008 is the election of a new Board.<sup>1</sup>
10. On the basis of the attendance to the past AGSM it appears likely that, if STX is prevented from exercising the voting rights attached to its shares, Havyard Invest would control more than half of the voting rights at the EGSM. The attendances to the three previous AGSM was respectively 59.11% (2005), 60.44% (2006) and 16.56% (2007). It has to be taken into account the fact that an important shareholder<sup>2</sup> with 40.1% of the shares exited the company in January 2007, with a result of only 16.56% attendance at this year's AGSM. Consequently, in the absence of any other significant voting shareholders of Aker Yards, Havyard Invest may likely achieve a majority of the voting rights on the EGSM with its 10.17% percent shareholding.
11. In the light of the foregoing, Havyard Invest is likely to be a position to control the Board elected following the EGSM.
12. STX fears that Havyard Invest may take advantage of the current situation to make a new Board to adopt a number of decisions which may be detrimental to Aker Yards and/or to STX investment. In particular, STX fears that Havyard Invest would be considering divesting Aker Yards' offshore and specialized vessels division either to itself or to a third party. This division represents about 25% of

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<sup>1</sup> <http://www.akeryards.com/?page=252&xml=A/134984/PR/200803/1201294>.

<sup>2</sup> Aker ASA.

Aker Yards' turnover, and according to STX such a divestment, if implemented, might not be in the best interest of Aker Yards and would threaten the full value of STX's investment. STX explains that the offshore and specialised vessels division would be more valuable to Aker Yards in the future due to the strategic fit of these activities with STX.

13. Moreover, on the AGSM of 29 March 2007 Aker Yard's shareholders authorised the Board to increase the share capital of the company by up to NOK 100 million (which represents about 22% of the entire authorised share capital) without the previous authorisation of the shareholders, this authorisation being valid until the AGSM of 2008 (scheduled for 25 April 2008) or until 30 June 2008, whichever occurs first.<sup>3</sup> In addition, the Board also has ample powers to decide on how the new shares will be distributed (and not necessarily to the current shareholders). STX fears that a possible change in the Board due to a transitory control by Havyard Invest may lead to the issuing of such shares diluting STX's stake and reducing the financial value of its investment.
14. STX therefore requests a derogation of the suspension obligation in order to be able to maintain the status quo in the company.
15. The Commission has carefully assessed to what extent the Board of Aker Yards may be in a position to effectively divest an important part of the assets of Aker Yards or to issue new shares, and it has been confirmed that this is in fact possible. In particular, it has been confirmed that the Board is competent to spin-off assets, whether it the form of sale of particular assets/activity or in the form of sale of whole subsidiaries.<sup>4</sup> Only agreements between the company and a shareholder, a shareholder's parent company, a Board member or the general manager shall not be binding on the company unless the GSM has approved the agreement, if the divestment represents more than 5% of the share capital. Accordingly, the Board has the power to divest assets to a third party without approval by the GSM.<sup>5</sup>

### **III. THE CONDITIONS FOR A DEROGATION PURSUANT TO ARTICLE 7(3) OF THE EC MERGER REGULATION**

16. Pursuant to Article 7(1) of the EC Merger Regulation, a concentration with a Community dimension or one referred to the Commission pursuant to Article 4(5) of the EC Merger Regulation shall not be implemented either before its notification or until it has been declared compatible with the common market. Pursuant to Article 7(3) of the EC Merger Regulation, the Commission may, on reasoned request, grant derogation from the obligations imposed in Article 7(1) and (2). In deciding on the request, the Commission must take into account, *inter alia*, the effects of the suspension on one or more undertakings concerned by the

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<sup>3</sup> Point 13 of the Minutes of the Annual General shareholders' meeting of Aker Yards ASA of 29 March 2007 (extract submitted by STX as annex to its submission of 12 March 2008).

<sup>4</sup> The Board is under fiduciary duty to act in the interest of the company and in the interest of shareholders. The Board cannot cease or de facto change the nature of the activity. However, there are no particular thresholds (e.g. in terms of the value of the assets or turnover) above which the Board needs to seek the approval of the GSM if the sale is done to a third party.

<sup>5</sup> This information as explained to us by STX by describing the relevant provisions of Norwegian company law was confirmed by the representatives of Aker Yards.

concentration or on a third party and the threat to competition posed by the concentration.

**A. THE OPERATION FALLS UNDER THE SUSPENSION OBLIGATION PURSUANT TO ARTICLE 7(1) OF THE EC MERGER REGULATION**

17. In its decision of 20 December 2007 pursuant to Article 6(1)(c), the Commission found that the notified concentration constituted a concentration with a Community dimension.

**B. THE EFFECTS OF THE SUSPENSION ON THE UNDERTAKINGS CONCERNED AND THIRD PARTIES**

18. STX submits that the suspension obligation would have adverse effects on the undertakings concerned. STX claims that together with the extremely weak last financial results of Aker Yards, the divestment of the offshore and specialized vessels division would be highly detrimental for Aker Yards and to STX's investment, which in particular counts on an increased value of this business division in the future due to its strategic fit with STX. Therefore, the suspension obligation will not allow STX to take the necessary measures to preserve the full value of its investment in Aker Yards.
19. As explained in paragraph 10, the Commission considers highly likely that, if the suspension obligation is not derogated, Havyard Invest, with only 10,17% of the share capital, would be in a position to acquire control of the new Board of Aker Yards. The new Board would be, therefore, in a position to adopt decisions reflecting the individual interests of a small shareholder who may only temporarily control Aker; these interests might conflict with the best interest of Aker Yards and therefore of STX, the main shareholder in Aker Yards.
20. According to Article 7(3) of the EC Merger Regulation, a derogation from the suspension obligation should also take into account the possible effects of the suspension on third parties. The Commission has no evidence that the suspension obligation may have adverse effects on any third party. However, taking into account that a Board elected by a minority shareholder such as Havyard Invest may adopt decisions which are not in the best interest of Aker Yards it is likely that such decisions may also have a negative effect on Aker Yards' shareholders.

**C. THE THREAT TO COMPETITION POSED BY THE CONCENTRATION**

21. The parties' activities overlap in the area of shipbuilding of commercial vessels, but it only gives rise to the creation of affected markets with respect to the construction of product tankers, and only if considered separately from chemical/oil tankers.
22. However, despite the absence of overlaps, concerns were raised during the market investigation with respect to the cruise ships and ferries markets. These concerns are based on the negative effects that the removal of a potential competitor such as STX may have on competition. Moreover, it has been alleged that STX may benefit from subsidies granted by the South Korean State which, together with other advantages in terms of lower production costs, may facilitate a strategy by which STX would be in a position to undercut prices leading to the marginalization of the current competitors and finally to increases in prices. Finally, some market participants also

raised concerns regarding the vertical relationships created as a result of the transaction, since STX is also active in the production of ship engines.

23. The Commission has carefully assessed the competition concerns identified during the market investigation.. However, although no final decision has been adopted yet, it appears, at this stage of the investigation, that the proposed transaction is not likely to give rise to competition concerns.

#### **D. BALANCE OF INTERESTS**

24. In the absence of a derogation, Havyard Invest is likely to take advantage of the present situation, by which STX cannot exercise its voting rights as a shareholder, to appoint its own nominees to the Board, which may take decisions seriously compromising the full value of STX's investment. Moreover, the interest of other shareholders may also be negatively affected.
25. In case the derogation is granted, the Commission considers that the conditions of effective competition will not be affected, in particular if such derogation is narrowly construed and aimed at allowing STX to be able to preserve the *status quo* in the target company.
26. Moreover, it is unlikely that a derogation would significantly affect third parties. In any event, the Commission considers that, notwithstanding possible adverse effects on other parties, and in particular on Havyard Invest who may have an interest to give Aker Yards, via a new Board, a strategic orientation different from the current one, it is appropriate to ensure that the main and potentially controlling shareholder in Aker Yards is not unduly excluded, at the present stage of the investigation, where it appears that the proposed transaction is not likely to give rise to competition concerns, from participating in an ESHM in which a new Board with ample powers will be elected. Moreover, it has been confirmed that all current Board members are in office (with their mandate expiring at the AGSH scheduled for 25 April 2008) so an urgent renewal of the Board due to incompleteness is not necessary so as to ensure a due functioning of the company.
27. In light of the foregoing, the Commission considers that in this particular case, the risk that STX's interest may be significantly damaged overcome the possible harm that a derogation of the suspension obligation may have on third parties.
28. The suspension obligation imposed by Article 7 ECMR in particular ensures that STX would not exercise its control over the target pending the merger control approval, so as to preserve the competition situation as it was prior to the merger. The grant of a derogation which is strictly limited to preserving the status quo of the company while allowing the acquirer to ensure that the value of its investment is secured pending its merger control procedure would be thus in accordance with Article 7. in a situation where the transaction is not likely to give rise to competition concerns at this final stage of the investigation.
29. Therefore, the Commission finds that a derogation can be granted under the following terms and conditions.

#### **IV. TERMS AND CONDITIONS OF THE DEROGATION**

30. The Commission therefore grants STX a derogation from the obligations imposed by Article 7(1) and (2) of the EC Merger Regulation, subject to the condition that STX exercises its voting rights only to maintain the full value of its voting rights, as specified below:

- STX has the right to vote against any individual proposed as a member of the Board at the EGSM
- STX will have the right to vote against the removal of any existing Board member,
- STX will have the right to vote in favour of the election or re-election of any existing Board member, and
- STX will have the right to contact both the Nominating Committee and the Board members in advance of the EGSM with the following purposes
  - To make sure that the Board members are ready to stay in office and do not wish to resign until expiry of their mandate,
  - To obtain the list of the new candidates, if any, to the Board, and

However:

- STX will not have the right to have their representatives elected in the board,
- STX will not have the right to positively vote for any new candidate (different from the existing Board members) to the Board.
- The powers granted to STX under this derogation will only be exerted in the April 1 EGSM.

31. The Commission notes that, according to Article 14(2)(d) of the Merger Regulation, it may by decision impose fines not exceeding 10% of the aggregate turnover of the undertaking concerned where, either intentionally or negligently, they fail to comply with a condition or an obligation imposed by decision pursuant to Article 7(3).

## V. CONCLUSION

32. Based on the above considerations and in accordance with Article 7(3) of the EC Merger Regulation, STX is granted a derogation from the obligations imposed by Article 7(1) of the EC Merger Regulation in accordance with the conditions set out above

For the Commission

*(signed)*

Neelie KROES  
Member of the Commission