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SUBCOMMITTEE I ON THE FREE MOVEMENT OF GOODS

EEA EFTA Comments on the Commission's Green Paper on the review of Council Regulation (EEC) No 4064/89 (COM (2001) 745/6 final)

EXECUTIVE SUMMARY

The EEA EFTA States welcome the Commission's initiative to review Council Regulation (EEC) No 4064/89 and emphasise the importance of ensuring that the Merger Regulation remains an effective instrument for merger control in the EEA.

With regard to the jurisdictional issues raised in the Green Paper, the EEA EFTA States find that the most complicated question is whether the criteria contained in Article 1(3) should be revised, on the grounds that they have fallen short of achieving their underlying objective.

In principle, the EEA EFTA States would support the inclusion of all concentrations that are notified, or fall under the merger regulations in three or more Member States. Nevertheless, we are not convinced that every three-State concentration automatically has Community interest. In cases with national or regional interest, a satisfactory alternative could be closer cooperation between the national competition authorities involved.

The EEA EFTA States find it important to have a mechanism to fine-tune the effects of today's turnover-based threshold system. A well-functioning flexible referral system will be even more important if the Commission decides to introduce an automatic Community competence over cases subject to multiple filing requirements.

The EEA EFTA States see the need for a general and thorough analysis of the practical implications of a system in which "Community Dimension" is triggered by the application of national legislation.

With regard to amending the Merger Regulation's appraisal criteria aimed at establishing a concept of *substantial lessening of competition*, the EEA EFTA States believe that the SLC test is more in line with what competition authorities around the world try to accomplish. Thus, if harmonisation of the two tests is considered necessary, the Merger Regulation should be amended on the basis of an SLC test model. In any

case, it should be clarified that an efficiency defence is recognised under the EC merger control.

The EEA EFTA States support a review of the commitments procedure. We agree that there is a need to encourage timely submission of appropriate commitments and to allow a limited additional period between the oral hearing and the deadline for submission of commitments. We agree that a "stop the clock provision" could fulfil these criteria. It is of vital importance, however, that the national competition authorities are allowed sufficient time to consider the commitments.

The Green Paper raises certain EEA-related issues, *inter alia*, with regard to the incorporation of an amended Article 1(3) into the EEA Agreement. If the Commission's intention is that a merger shall be notified in at least three EU Member States, rather than three EEA States, in order to fall under the proposed amendment of Article 1(3), the distinction between the EC and EEA dimensions will remain. This means that a merger, which is notified in two EU Member States and one EEA EFTA State, or two EEA EFTA States and one EU Member State, will not be handled by the Commission, but by national competition authorities.

A possible interpretation of Article 57 EEA is that when a merger is notified in three EU Member States and one or two EEA EFTA States, the Commission will have sole competence. If so, the proposed amendment of Article 1(3) will imply a transfer of competence from the EEA States to the Commission. The "amount of competence" transferred will rely entirely on national merger legislation and the consequences are therefore unpredictable. Moreover, an extended transfer of competence to the Commission may raise constitutional problems in some EEA EFTA States.

The question of how to ensure the equal treatment of undertakings and homogeneity within the EEA needs to be discussed.

I INTRODUCTION

1. The EEA EFTA States welcome the Commission's initiative to review Council Regulation (EEC) No 4064/89 (the Merger Regulation). In this respect, it is important to ensure that the Merger Regulation also remains an effective instrument for merger control in the EEA, ensuring effective, efficient, fair and transparent control of concentrations at the most appropriate level.

2. Seeing that the amendments of 1997 have not entirely fulfilled their purpose, the EEA EFTA States appreciate the Commission's efforts to revise the Merger Regulation. We believe, however, that the Commission's arguments and considerations, in particular with regard to the problems related to multiple notifications, could have been better explained and substantiated. We also question whether the Green Paper is meant as a first initiative for a modernisation reform, rather than a traditional revision.

3. Due to the so-called two-pillar system laid down in the EEA Agreement, there is a division of competence between the EFTA Surveillance Authority (ESA) and the Commission, according to separate EU and EFTA dimensions. So far, ESA has not handled

any merger cases. In practice, therefore, the Commission handles all merger cases under the EEA Agreement.

4. The Green Paper raises certain specific EEA-related issues, which are dealt with in Chapter 5 of these Comments. The general competition policy aspects will be dealt with in Chapters 2-4.

II JURISDICTIONAL ISSUES

2.1 Community Dimension

5. The EEA EFTA States support the Commission's view that there is no need to amend Article 1 (2) or the 2/3 rule.

6. The most complicated question raised in Chapter II A of the Green Paper is whether the criteria contained in Article 1(3) should be revised, on the grounds that they have fallen short of achieving their underlying objective.

7. The proposal to include all concentrations that are notified, or fall under the merger regulations in three or more Member States, is an effect-based and technically simple solution, which we would support in principle. Nevertheless, we are not completely convinced that every three-State concentration automatically has Community interest; for instance, where a merger has appreciable competitive effects in only one Member State. Some three-State-notified mergers may therefore only have national, or regional interest. In such cases, an alternative could be closer cooperation between the national competition authorities involved. The Nordic States have had positive experience with close contact in parallel cases.

8. Rules on notification vary among the Member States. The proposed solution will transfer competence from the Member States, and possibly the EEA EFTA States (cf. Chapter 5.1), to the Commission, depending on the notification rules in the Member States. In order to rule out any uncertainty on this point, a more thorough survey of the criteria for notification in the Member States would be appreciated.

9. When drafting a new Article 1(3), the wording should reflect the fact that not all States have a compulsory notification system. One solution might be to include mergers which fall under the national merger legislation, or which have been notified voluntarily. If some Member States have low, or no thresholds for notification, or no compulsory notification, a sort of *de minimis* clause could be introduced to avoid unnecessary transfer of competence to the Commission.

10. The EEA EFTA States see the need for a general and thorough analysis of the practical implications of a system in which "Community Dimension" is triggered by the application of national legislation.

2.2 Referrals to Member States, Article 9

11. The EEA EFTA States have very limited experience with Article 9, apart from the Aker Maritime/Kvaerner II case, which was recently cleared. The EEA Agreement does not explicitly refer to Article 9, or any specific rules of procedure for contact between the Commission and the EEA EFTA States, even if, according to Article 6 of Protocol 24 to the Agreement, the Commission may refer a merger to an EEA EFTA State.

12. The EEA EFTA States find it important to have a mechanism to fine-tune the effects of today's turnover-based system of thresholds. A well-functioning flexible referral system will be even more important if the Commission decides to introduce an automatic Community competence over cases subjected to multiple filing requirements.

13. The EEA EFTA States support a simplification of the requirements for the submission of referral requests, whereby the use of Article 9(2)(b) is facilitated and Article 9(2)(a) is repealed. We agree that it should be sufficient for a request to establish that the alleged effect on competition does not extend to significant effects in terms of foreclosure, spill over on related markets of greater geographic scope, or similar cross-border effects. We also agree that the Commission should hold prior consultations with the relevant Member State(s) before referring a case. We would not, however, support a provision whereby the Commission alone should decide on a referral. It is not desirable to have a situation whereby the Commission may force a Member State to handle a merger case, which falls under Article 1 of the Merger Regulation.

14. It is difficult to have a firm view on a shortened time period, as we have no practical experience with the current time frames. Simpler criteria should, however, make it possible to reduce the time frames. In general, we agree that there is some merit in seeking to harmonise the time frames in which the final decision is taken.

15. We do not support the proposal that cases, which have been referred to national authorities, should be subjected to the procedure of the Merger Regulation. The EEA EFTA States find that national procedures should be applied in all cases dealt with by national authorities. This is important in order to secure efficiency and homogeneity at national level. It should be borne in mind, however, that the parties should not gain from a referral to a national authority which applies less strict rules than the Commission in such a manner that it would stimulate forum shopping.

16. The EEA EFTA States would welcome special guidelines on the treatment of referrals.

2.3 Joint Referrals to the Commission, Article 22(3)

17. The EEA EFTA States have experience with neither the "Dutch clause" whereby a merger may be referred from one Member State to the Commission, nor with joint referrals from two or more States. According to the EEA Agreement, the EEA EFTA States may only refer a case to ESA and not to the Commission.

18. We have noted, however, that there is a certain interest in vitalizing the joint referral provision among the members of the European Competition Authorities (ECA). We see that in some cases the Commission is better placed to handle a case than national authorities. If it were possible to overcome the current weaknesses of joint referral, we would support such a proposal in order to alleviate the multiple filing problems.

19. The EEA EFTA States support the proposed clarification and modification as specified in paragraph 98 of the Green Paper.

2.4 The concept of "concentration": relevant issues for review

20. We believe that it is timely to reconsider the concept of concentration. Our Comments are limited to some of the issues raised in Chapter II D of The Green Paper.

2.4.1 Minority Shareholdings

21. The EEA EFTA States agree that it would be difficult to sufficiently define potentially problematic acquisitions of minority shareholdings for the purposes of mandatory ex-ante notification. We are inclined to agree with the Commission that most competition concerns connected with minority shareholdings may be addressed satisfactorily under Articles 81 and 82 EC. As far as we know, however, the Commission has seldom or never applied Article 81 EC on minority shareholdings. The Guidelines on Horizontal Cooperation Agreements do not cover minority shareholdings. On this basis, there is a need for clarification of the legal situation.

2.4.2 Strategic Alliances

22. The EEA EFTA States agree that there is no need to amend the Merger Regulation to include various types of strategic alliances.

2.4.3 Partial Function Production Joint Ventures

23. These joint ventures have been discussed in relation to the proposed Modernisation Reform. Initially, the EEA EFTA States held the view that it would be desirable to maintain a prior authorisation system in relation to certain operations where substantial investment and far reaching integration is involved. We were, however, in doubt as to whether notifications should be limited to partial function Production Joint Ventures. After consultation and lengthy consideration, we have reached the same conclusion as the Commission, and do not believe there are any compelling reasons to extend the scope of the Merger Regulation to partial function production joint ventures.

2.4.4 Multiple Transactions

24. We support the view that transactions that may seem separate, but in fact are connected, should be treated as constituting a single concentration and the proposed amendments to Article 5(2)(2).

2.4.5 Venture Capital Investments

25. We have limited experience with venture capital investments, but it would be helpful to clarify the different kinds of transactions involved, *i.e.,* transaction investment and growth capital/technology investment. It may also be worthwhile to distinguish between investments in newly established ventures compared to other ventures.

2.4.6 Convergence – "Control" vs. " Group"

26. The turnover thresholds decide which concentrations are considered to have a Community interest. The calculation of turnover should therefore be as precise as possible, in order to secure that it includes the turnover of all undertakings *de facto* involved in the concentration. Against this background, the definition of a group under Article 5(4) should be harmonised with the concept of control under Article 3(3). On the other hand, it may then be more burdensome to calculate the turnover in order to decide whether the thresholds are met and thus the obligation to notify a concentration applies. This may create more legal uncertainty.

III SUBSTANTIVE ISSUES

3.1 The substantive test

27. When considering whether to amend the Merger Regulation's appraisal criteria aimed at establishing a concept of *substantial lessening of competition* (the SLC test), it is important to consider three issues. Firstly, to what extent will the two different tests lead to different outcomes in actual cases? Secondly, there is a rich case law tradition under the present EU merger control system. This means that the present wording of the Merger Regulation should not be amended unless it is of great practical importance and a hindrance for achieving the ultimate goals of competition policy. Thirdly, one has to consider whether the development in case law stretches the wording in Article 2 beyond the point of acceptance.

28. It is important to note that the dominance test only applies when the result leads to a significant restriction of competition. Thus, there are great similarities between the two tests. The main difference seems to be that under the dominance test, a dominant position is required while under the SLC test, it is not. While both tests put much emphasis on market dominance, neither of them treats dominance as a sufficient condition for unilateral, or joint market power. Of course, it cannot be ruled out that the dominance test compared to the SLC test will put more emphasis on market dominance as a *prima facie* indication of anti-competitive effects. However, the Commission still has to consider the other part of the test, *i.e.* whether effective competition would be significantly impeded in the common market. We therefore doubt that the difference in design of the two tests will be decisive in the outcome of merger analysis in actual cases.

29. It has been argued that single or joint dominance is not necessary for a merger to be anti-competitive. For instance, if the remaining competitors face capacity constraint, they will not be able to respond aggressively to any quantity reductions by the merging parties, even if the merging parties' market shares are lower than what is generally considered necessary for

market dominance. Therefore, it might be argued that the dominance test will fail to forbid anti-competitive mergers between non-dominant firms. However, this problem may also be handled within the current dominance regime by means of a narrow delimitation of the relevant market, although such a pragmatic approach might be unsatisfactory from a legal point of view, cf. our above concerns on whether development in case law stretches the wording in Article 2 beyond the point of acceptance.

30. In short, because the SLC test is more directly related to what is the concern of competition authorities, it will give more freedom to use the best analysis methodology possible and thus be more likely to result in a correct assessment of the merger in question.

31. Economic efficiency is not a pronounced objective under the Merger Regulation. Nevertheless, the Merger Regulation requires the Commission to consider the effects of the merger on "the development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition". This does seem to imply some kind of efficiency defence, although it is not clear what the outcome of the merger assessment will be if a merger creates both large efficiencies and a dominant position. We believe that an efficiency defence should be acknowledged in merger analysis, although we strongly emphasise that competition is the most effective means to achieve efficiency and consumer benefits.

32. In conclusion, we do not believe that there is a very strong tendency for the two substantive tests to produce different outcomes, and the two tests themselves would most likely pose no serious obstacle to a desired harmonisation of merger control practices. We do believe, however, that the SLC test is more in line with what competition authorities around the world try to accomplish. Thus, if harmonisation of the two tests is considered necessary, the Merger Regulation should be amended towards a SLC test. In any case, it should be clarified that an efficiency defence is recognised under the EC merger control.

3.2 Simplified Procedure

33. The EEA EFTA States supported the introduction of the Notice on Simplified Procedure last year. We also welcome further initiatives to reduce the bureaucracy in the handling of transactions that are unlikely to have negative effects on competition. It may be worth considering the possibility for the Simplified Procedure to be consolidated into a form of "block exemption" that could be built around the underlying principles of the Notice. The system of "block exemption" is familiar to most industry representatives and should therefore not be too difficult to apply. The individual undertaking should then have the responsibility to assess if it would have to notify according to the Merger Regulation, or if it is exempted, according to a "block exemption". The undertakings should also be given the possibility to discuss the matter with the Commission.

34. To safeguard transparency and to give interested third parties the opportunity to submit observations, depending on the requirements in the Regulation, there might be an obligation to notify in the Official Journal that a concentration will take place within a certain time limit. Penalties should be applicable in the event of failure to comply with the obligations.

35. The EEA EFTA States believe that if the Simplified Procedures were to be consolidated into a form of "block exemption"/*de minimis*, this would increase the efficiency of the merger control process by allowing the Commission to use its resources more economically. The Commission would be able to allocate more resources to merger cases that warrant an in-depth investigation.

36. A "block exemption"/*de minimis* that gives understandable guidelines together with the possibility to seek advice from the Commission/the Competition Authorities, in addition to a notice in the Official Journal, should ensure legal certainty for the merging parties.

37. The Commission should be open to discuss specific cases with the undertakings where appropriate, *i.e.* unresolved, genuinely new questions of interpretation and to make sure that the undertakings do not risk being fined without knowing that they are infringing the law.

38. With respect to referrals according to Article 9(2) for mergers that may fall under the provisions of simplified treatment procedures ("block exemption"), the EEA EFTA States are positive towards shortening the current three-week deadline. The EEA EFTA States cannot support that Article 9(2) should not apply, but do appreciate that the competition authorities would need less time in deciding if the concentration affects competition on a market within that Member State in such cases.

IV PROCEDURAL ISSUES

4.1 Notification – triggering event

39. The triggering event in Article 4 of the Merger Regulation may cause some problems to industry due to the considerable period of time from the date of agreement between the management and/or Board of Directors of the merging companies, until confirmation by the General Assemblies. The EEA EFTA States see no need to amend the present system. We do, however, support a further investigation of the possibility to introduce greater flexibility in order to allow better co-ordination of merger investigations in different jurisdictions.

4.2 Calculation of time limits

40. The EEA EFTA States support a concept of working days in all relevant parts of the Merger Regulation. Under the existing system the time limits may become very short, during *e.g.,* Christmas or Easter.

4.3 Administrative efficiency

41. The EEA EFTA States recognise the need for more efficient notification procedures to avoid unnecessary loss of time in the transmission of copies from the Commission to the Member States. We would therefore in principle be in favour of an amendment of Article 19 whereby notifications can be submitted directly by the notifying parties to the national authorities. The confirmation of receipt by the Commission might then have to be

supplemented by confirmations from each Member State. If we can receive the notifications directly from the notifying parties, we will be in a better position to consider a request for a referral, provided a system is established where it is ascertained that the EEA EFTA States are also included. We would like to point out, however, that such a solution might raise certain EEA specific questions, cf. chapter 5.4.

4.4 Completeness of Notification

42. Our impression is that the system functions reasonably well.

4.5 Commitments Procedure

43. The EEA EFTA States support a review of the procedure for commitments. In spite of the new Notice on Commitments, there is still a great demand for improvement. Norway has been caught a number of times by the "time squeeze", particularly in relation to the 2nd phase. It is of vital importance that the national competition authorities get sufficient time to consider the commitments, in spite of the parties' need for quick clearance.

44. We agree that what is needed is a way to encourage timely submission of appropriate commitments, whilst allowing for a limited additional period that is often needed between the oral hearing and the deadline for submission of commitments. We agree that a "stop the clock provision" could fulfil these criteria, provided the proposed procedural safeguards are taken, and that the Commission in practice has a less pragmatic approach to time limits and to the distinction between improvements and new commitments than is the case today. We propose that it should be made clear by the Commission that if the parties do not ask to "stop the clock", they should take the consequences themselves. The extension of time should be limited to 20-30 days, as proposed in the Green Paper.

45. As far as the 1st phase is concerned, a "stop the clock" provision should only be applied if the parties have good and sufficient reasons. In our view, the use of the proposed provision in the 1st phase should be restricted, because of the danger that the Commission will be under pressure from the undertakings to clear cases in the 1st phase, which actually raise serious doubt and should rather have gone to the 2nd phase.

4.6 Article 8(4)

46. The EEA EFTA States do not see an immediate need to amend the wording of Article 8(4), but would consider any proposal for improvement.

4.7 Enforcement provisions

47. The Commission's modernisation proposal for Articles 81 and 82 EC introduces a number of amendments to guarantee the protection of competition. To the extent that these adjustments relate to issues of similar importance to the merger control procedure, the EEA EFTA States agree that it is appropriate to introduce the same amendments in the Merger

Regulation. On this condition, we would support an extension of the powers of the Commission.

48. According to the Icelandic and Norwegian Competition Acts, all are required to give the Competition Authorities the information they request in order to perform their tasks in accordance with the Act, including the investigation of any possible infringement, or of decisions pursuant to the Act, or the investigation of other price and competition conditions. Such information may be required, in writing or orally, by individuals, undertakings and groups of undertakings. Any person who intentionally or negligently fails to comply with orders to provide information may be liable to fines. The EEA EFTA States find the possibility to require information to be a very useful tool both for general studies and investigations and support the introduction of the same possibilities into the Merger Regulation.

49. Since there are different national jurisdictions within the EEA, the EEA EFTA States would appreciate a clarification with regard to who is responsible for information provided by authorised representatives. If it is clearly stated that the companies are responsible, time-consuming discussions about this matter might be avoided in the future. The EEA EFTA States support the proposal that the Commission should be given the right to record oral submissions that may be used as evidence at a later stage. To ensure that the oral submission is correctly recorded, it should be duly signed by both the representatives from the Commission and the person providing the information.

50. The EEA EFTA States agree, in principle, to allow one Member State to conduct an investigation on its territory on behalf of the competition authority of another Member State. However, we foresee see certain legal problems that need to be solved, in particular as long as national merger legislation has not been fully harmonised.

4.8 Filing Fees

51. The EEA EFTA States have no experience with filing fees, and do not see any reason to introduce such fees.

4.9 Due process and “Checks and Balances”

52. The EEA EFTA States agree that it is important that consumers and employees make their views known in important merger cases. It might be an idea to introduce a new point in the CO, demanding information on the employees’ view on the market impact of the merger.

V EEA SPECIFIC ISSUES

5.1 The Concept of Dominance in Article 57 EEA

53. In Chapter 3.1, we express an understanding for a possible introduction of an SLC test in the Merger Regulation, instead of the present dominance test. The latter is, however,

reflected in the wording of Article 57 in the EEA Agreement. Therefore, a possible new test could necessitate an amendment to Article 57 EEA.

5.2 Implementation of an amended Article 1(3) into the EEA Agreement

54. If the Commission's intention is that a merger shall be notified in at least three EU Member States, rather than three EEA States, in order to fall under the proposed amendment of Article 1(3), the distinction between the EC and EEA dimensions will remain. This means that a merger, which is notified in two EU Member States and one EEA EFTA State, or two EEA EFTA States and one EU Member State, will not be handled by the Commission, but by national competition authorities.

55. A possible interpretation of Article 57 EEA is that when a merger is notified in three EU Member States and one or two EEA EFTA States, the Commission will have sole competence. Under this interpretation, the proposed amendment of Article 1(3) will imply transfer of competence from the EU Member States and the EEA EFTA States to the Commission. "The amount of competence" transferred will entirely depend on the system of notification/treating mergers in the EEA States. The consequences are therefore unforeseeable. Moreover, an extended transfer of competence to the Commission may raise constitutional problems in some EEA EFTA States.

56. The question of how to ensure equal treatment of undertakings and homogeneity within the EEA needs to be discussed.

5.3 The Referral Provisions in Article 9 and Article 22

57. As pointed out in Chapter 2.2, the EEA Agreement does not contain any procedural provision for referring cases from the Commission to the EEA EFTA States. However, in the Aker Maritime/Kvaerner (II) case, the Commission decided to refer part of the notified merger to the Norwegian Competition Authorities. The reference was made pursuant to Article 9 of the Merger Regulation on request from The Norwegian Competition Authorities. Before the referral decision, there was contact between the Commission and NCA. It was agreed that Article 9 should be applied.

58. We do not see any reason to apply different procedural rules to referrals across the pillars from the procedure used for referrals within the pillars. Consequently, we propose adding a new paragraph to Article 6 in Protocol 24, where reference is made to Article 9 of the Merger Regulation. If Article 9 is simplified in order to open up for more referrals for the Commission, the need for solving the procedural question in relation to the EFTA pillar becomes more pressing.

59. If it is expected that the referral provision in Article 22 will be intensified in the future, it might be appropriate to consider whether the EEA EFTA States may refer merger cases jointly with the EU Member States.

5.4 Administrative efficiency, cf. chapter 4.3.

60. The amending of Article 19, whereby notifications can be submitted directly by the notifying parties to the national authorities, might raise specific EEA issues, in that the EFTA Surveillance Authority, pursuant to Article 3 of Protocol 24 EEA, shall receive copies of notifications falling under Article 2 of that Protocol at the same time as the EC Member States. These notifications are thereafter further transmitted from ESA to the EEA EFTA States. Introducing an obligation of direct notification to Member States would, in practice, transfer the obligation to identify such mixed EEA cases from the Commission to the notifying parties. There is reason to believe that if left entirely to the notifying parties themselves, they may overlook the EEA co-operation aspect of certain merger cases.

61. In view of the above, a simpler solution might be to impose an obligation on the notifying parties to notify the merger electronically, either instead of, or in addition to, a notification on paper, provided that the necessary safety precautions are ensured.

5.5 Turnover Threshold for Financial Institutions

62. The definition of turnover for financial institutions in Article 3 of Protocol 22 EEA does not coincide with the corresponding definition of Article 5(3) of the Merger Regulation. The two provisions were identical until the Merger Regulation was amended in 1997. Although the definition in Protocol 22 EEA concerns Article 53 and 54 cases, and not merger cases, it would be appropriate to bring the two provisions into alignment. Our view is that the definition in the Merger Regulation gives a more correct picture of where the undertakings' turnover takes place geographically. The new definition of turnover is believed to lead to a less complicated calculation, and the definitions should not differ throughout the EEA. We cannot see any reasons for having a different definition of turnover in relation to Article 53 and 54 cases and mergers, and that the definition should depend on the EEA Agreement. Although Protocol 22 does not concern merger cases, we would propose to amend the Protocol to align it with the Merger Regulation.

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