

# Kluwer Competition Law Blog

## Main Developments in Competition Law and Policy 2022 – Norway

Heidi Jorkjend, Brendan Kettermann (Thommessen) · Wednesday, December 14th, 2022

2022 has been an eventful year for Norwegian competition law, with a landmark judgement from the EFTA court and significant defeats by the competition authority in merger cases amongst other things. Mainly Norwegian competition law mirrors the laws of the EU. However, some deviances in policy and arguably also in the interpretation and application of the provisions may be observed. Below is a summary of the competition law developments in Norway in 2022. It includes the main developments in case law, decisional practice as well as regulatory and policy developments.

The main developments can be summarised as follows:

- The Norwegian Competition Authority (“NCA”) continues its active enforcement of cooperation cases. In particular, the NCA is an active enforcer in cases concerning information exchange and in non-traditional cartel cases, evidential from the fact that several of its cases concern publicly known cooperations between undertakings.
- The NCA continues to conclude abuse of dominance cases using commitments. Moreover, the decade long battle concerning abuse of dominance by Telenor, with parallel cases from the NCA and the EFTA Surveillance Authority (“ESA”), was brought to an end with the EFTA Court’s ruling from June this year, where Telenor’s objections to ESA’s decision were firmly rejected.
- As for mergers, decisions from the NCA have for the first time been overturned both by the Competition Appeals Tribunal (DNB/Sbanken) and by the courts (Schibsted/Nettbil – appeal pending). It remains to be seen whether the squashing of these decisions will lead to a shift in the NCA’s approach in regards to merger control. The much awaited Supreme Court judgement in Schibsted/Nettbil may answer that question next year.
- Even though the NCA may be seen as highly active compared to some other competition authorities, Norwegian legislators are considering granting additional powers, such as a market investigation tool comparable to that of the CMA in the UK.
- Lastly, private enforcement is seemingly on the rise in Norway. The development has been slow, but this year a damages claim arising from the Commission’s 2016 Trucks cartel decision was heard in Norwegian court. Furthermore, a Norwegian cartel case relating to the home alarm market has given rise to a procedural battle of whether a class action may be permitted to the courts in the instance it is financed by a third-party investor.

## **Illegal cooperation (Section 10 of the Norwegian competition act / article 53 EEA / article 101 TFEU)**

### **The NCA's decisions in the book market**

In November 2022, the NCA handed down a decision in which it issued fines totalling NOK 545 million to some of the largest publishing companies in Norway. The case concerns an online database accessible to all book shops as well as publishers, that allowed access to information about other publishers' publications. At the time of writing, a public version of the decision is not yet available. The two largest publishing companies involved have publicly stated that they intend to challenge the decision, which initially entails proceedings at the Competition Appeal Tribunal and is likely to take place in 2023. The decision follows another cooperation case in the book market that was finally decided upon in a judgment from the Supreme Court in 2021. Thus, this is a market that has been closely monitored by the NCA for several years.

### **The NCA's investigation in the grocery sector continues**

Another market subject to close monitoring by the NCA, and also by regulators (see section 5 below), is the grocery market. Three of the biggest grocery chains are under investigation for illegal information exchange due to an agreement which allowed representatives from the other chains access to their respective grocery shops in order to collect information about the other chains' retail prices. The NCA issued late 2020 a pre-notification of fines to all three undertakings. The fines amount to approximately NOK 21 billion and are far in excess of any fine previously issued by the NCA. No final decision has been made by the NCA, but the concerned parties have already publicly expressed that they are prepared to challenge any adverse decision.

## **Prohibition of abuse of dominance (section 11 of the Norwegian competition act / article 54 EEA / article 102 TFEU)**

### **EFTA Court's judgment in the Telenor case**

In 2012, Norway's biggest telecommunications provider, Telenor, was placed under investigation by both the NCA and ESA, for two separate infringements of abuse of their dominant position within the telecom sector. The case of the NCA concluded in 2021 with the Supreme Court's decision not to admit the appeal from the Court of Appeal, entailing that the fine of NOK 788 million was upheld. ESA's case was brought to a final conclusion in May 2022 by decision E-12/20 of the EFTA Court, which upheld ESA's decision as well as the fine of EUR 112 million to Telenor.

ESA's decision from 2019 found that Telenor had abused its dominant position by its pricing strategy that resulted in rivals making a loss when selling residential mobile broadband services on tablets and laptops. According to ESA, these pricing practices amounted to a margin squeeze. Telenor challenged the decision before the EFTA Court and claimed that ESA's market definition was too narrow due to wrongful assessments of both demand-side and supply-side substitution. In addition, Telenor claimed that ESA erred in its margin squeeze analysis and failed to show effects on competition. The EFTA Court dismissed these arguments in a judgment which discusses both of

these material aspects at length. The decision is particularly interesting due to its substantial guidance on the definition of the market, which is, at least in part, reflected in the EU Commission's draft revised Market Definition Notice.

### **Foodora commitment decision**

In February 2021, the NCA opened an investigation into the digital food ordering and delivery platform Foodora, concerning Foodora's use of exclusivity agreements and practices. The NCA closed the investigation in January 2022 by way of a commitment decision where Foodora, while claiming it had not infringed the competition rules, agreed to behaviour remedies to end the alleged illegal practices. The commitments, which last for three years, entail that Foodora must let the restaurants cooperate with other digital food ordering platforms and that it cannot provide incentives for exclusivity. The case illustrates a recent trend by the NCA to close investigations by way of a commitment decision, and illustrates the NCA's particular focus on digital platforms. The latter is also evidential from the case Nettbil, described subsequently.

## **Merger control**

### **Schibsted / Nettbil**

In 2019, the Norwegian media group Schibsted acquired the majority stake in the start-up company Nettbil. Schibsted is the owner of Finn, which is the largest online marketplace in Norway and advertise i.a. used cars. Nettbil offers online sales and advertising services for buying and selling used cars. The transaction was not notifiable due to Nettbil's limited turnover. However, the Norwegian Competition Act grants the NCA the right to call in transactions for review within a three-month time period as of the conclusion of the agreement. The transaction was closed at the time of filing.

In 2020, the NCA prohibited the acquisition, which the Competition Appeal Tribunal subsequently upheld in 2021. Schibsted appealed the decision to the Court of Appeal, and the court annulled the NCA's decision. The court dissented with the NCA, both on the question of market definition and in its substantial analysis of the competition law concerns. The NCA has appealed the judgment to the Supreme Court, which will hear the case in January 2023. This will be the first merger control case heard by the Supreme Court. Thus, the judgment is highly anticipated as the Court will be required to interpret and apply both the market definition criteria as well as the substantial criteria, the SIEC test, under Norwegian law.

### **DNB / Sbanken**

In March 2022, the Competition Appeal Tribunal overturned a decision by the NCA that prohibited the acquisition of Sbanken, a small actor in the retail bank services sector, by DNB, which is Norway's largest bank. The NCA was concerned about the potential adverse impact on the market for investment funds offered to consumers, a market where Sbanken was argued to have a maverick position. The Appeal Tribunal, however, found that it was not sufficient grounds to

prohibit the merger and therefore annulled the NCA's decision. As it stands, the NCA does not have the power to appeal decisions from the Appeal Tribunal and the decision is thereby final. This is the first time since the inception of the Appeal Tribunal in 2018 that it overturns a decision on substance of the NCA.

## **Regulatory and policy developments**

The Ministry of Trade, Industry and Fisheries have proposed to grant the NCA further investigative powers by giving them authority to conduct market investigations similar to that of the CMA in the UK. The proposal is a result of the challenges seen in the grocery market and in relation to digital platforms, however, the tool is proposed to apply to all sectors. The exact powers the NCA will be granted by way of this tool is not as of yet determined, as is the extent of the potential use of it. The proposal will be subject to a further consultation process which is not yet published.

Furthermore, the Norwegian parliament has requested the Government to present proposals with the view to adopt new regulations aimed at improving the competitive situation in the Norwegian grocery market. Two main remedies are to be introduced through the new regulation. Firstly, a prohibition of non-development clauses in real estate contracts, i.e. clauses prohibiting owners of land in areas surrounding grocery shops from developing the land with the view of establishing competing grocery shops. Secondly, the regulation is suggested to prohibit exclusivity clauses in rental agreements within the grocery sector.

A further regulation is proposed that, if adopted, will require objective justification for any differences in wholesale prices paid by the various retailers for the same products (i.e., prohibiting price discrimination, possibly without requiring any effect on competition). The concern of the authorities is that the biggest market incumbents have negotiated lower prices at the wholesale level that make it harder for new market entrants and smaller competitors to compete.

The latter proposition is currently subject to a consultation process that closes in December 2022. The consultation on the proposition regarding real estate contracts closed in October 2022. At this stage, it is difficult to predict when and to what extent these legislative processes will materialise into new regulations. However, it is reasonable to expect that a bill might be proposed to the Parliament in 2023.

## **Private enforcement of competition law**

In the autumn of 2022, the Oslo District Court heard a case regarding a claim for damages by Posten Norge, a customer of the manufacturers that were parties to the so-called Trucks cartel. The basis for the claim is the 2016 settlement between the truck manufacturers and the EU Commission in which the former acknowledged to have committed a 'by object' infringement of article 101 TFEU. The question is whether the cartel led to actual loss for Posten Norge by having paid an overprice. According to Norwegian tort law, the claimants must prove that they more likely than not suffered actual economic loss, which is not established when a cartel case is decided as a 'by object' infringement. The damages directive (2014/104/EU) is not as of yet implemented into Norwegian law. The proceedings thus exposed a particular challenge in the private enforcement

against ‘by object’-cartels of having to prove actual economic loss caused by the illegal cooperation. The judgment from the court is expected in the beginning of 2023.

Moreover, in November 2022, the Supreme Court admitted a case that raised the procedural question of whether a class action for damages against cartel participators may be admitted to the courts in the instance it is financed by a third-party investor. In 2020, the NCA issued an infringement decision against the top two players in the home alarm market for market sharing found to have caused an overprice for customers. A customer association wishes to claim for damages, but doing so requires financing since the individual customers are not able to foot the bill for such proceedings. Therium, an international litigation funding firm, has committed to financing the litigation. This form of litigation financing has been seen in several jurisdictions over the last couple of years, particularly in the UK. The question of whether this practice is also permitted under Norwegian Civil procedural legislation will now be answered. The Supreme Court will likely hear the case in the first half of 2023. The outcome of the Supreme Court’s hearing could possibly mark a new era for private enforcement of competition law in Norway.

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Note that Advokatfirmaet Thommessen has acted as legal advisor in several of the cases discussed in this blog post.

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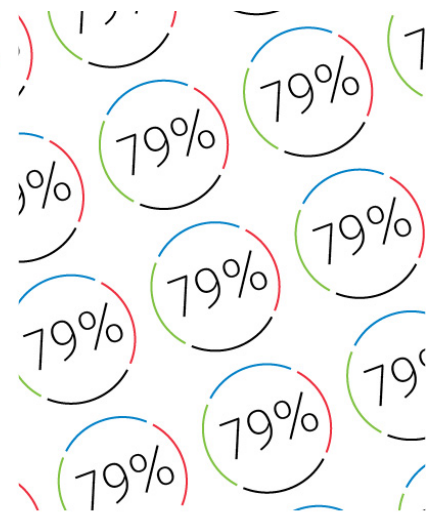
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