

Kluwer Competition Law Blog

Information Exchange in Non-Cartel Cases – A Norwegian Black Swan?

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Exchanging information with competitors can be a minefield. On 29 November 2022, the Norwegian Competition Authority (NCA) fined Norway's four largest book publishers and a database provider a total of NOK 545 million (approximately EUR 52 million) in a unique hub-and-spoke information exchange case. This is only one of several information exchange cases being pursued by the NCA and in one of them the parties may face even higher fines.

The books database case

In January 2018, the NCA carried out inspections at the premises of the four largest publishing houses in Norway (the Publishers), and *Bokbasen*, a provider of digital services for the publishing industry.

Bokbasen is jointly owned by the Publishers and creates infrastructure for digital solutions for the industry. The services are offered through different subscription models and used by small and large publishers, bookstores, libraries and schools.

The Publishers, who together make up roughly 90% per cent of the Norwegian books market, were all subscribed to *Mentor Forlag*, a subscription used to submit and access information about publications, including future releases, such as release dates and future prices. Once submitted, the information becomes available for all other subscribers, such as bookstores or schools purchasing inventory, but also for competing publishers with the same subscription. In addition to their publishing activities, all of the Publishers are active on the downstream market for direct sales to end customers.

Following further investigations, the NCA issued a statement of objections to the Publishers and *Bokbasen* in September 2020, to which all replied in January 2021.

The NCA's decision

On 29 November 2022, the NCA fined the Publishers and *Bokbasen* for illegally exchanging future

book prices and other competitively sensitive information since 2009. The NCA took the position that the information exchange constituted a by-object infringement of Section 10 of the Norwegian Competition Act, which corresponds in substance to Article 101 TFEU.

While the full text of the decision has not been published yet, the NCA states in its [press release](#) that the Publishers, through their use of *Bokbasen*, shared and received competitively sensitive information about future book releases and that this information provided the Publishers with a “*complete overview*” of each other’s market conduct. The NCA further concluded that the information was systematically entered into the database by the Publishers, knowing that it would be accessible to competitors and that this may have led to higher prices for end customers.

While *Bokbasen* did not disclose any competitively sensitive information about its own business, it was fined for acting as an intermediary that facilitated the exchange of information between the Publishers. The NCA states that the information submitted to *Bokbasen* would have been difficult for the Publishers to obtain through other means and that the subscription offered by *Bokbasen* provided the Publishers with reliable and easily accessible information about their competitors.

As a result, the NCA concluded that the information exchange made it easier for the Publishers to coordinate prices and publications, which may have led to increased prices and a reduced selection of books for end customers.

The NCA’s decision may be appealed to the Competition Tribunal. Some of the Publishers have already stated that they intend to appeal the decision. A ruling in the appeals case can be expected in the second half of 2023. By then, another information exchange case may already have been decided – where the stakes are even higher.

The price hunters case

In a case involving the three largest grocery retailers in Norway (the Retailers), the NCA has notified the parties in a statement of objections that it intends to issue fines totalling NOK 21 billion (approximately EUR 2 billion) for anti-competitive information exchange. Like in the Publishers case, the NCA seems to refrain from categorizing the cooperation as a cartel, but the notified fines would be unprecedented for a national decision.

Since 2011, the retailers have reportedly agreed to give each other access to each other’s stores, for the purpose of obtaining real-time information on shelf prices. In practice, employees (so-called “*price hunters*”) have been used to collect the price information from competitors’ stores by physically entering the stores and scanning shelf prices.

In the NCA’s [preliminary assessment](#), the practice constituted an infringement by object. This is based on the NCA’s preliminary finding that the Retailers had used the collected pricing information to coordinate prices and cooperate in a way that may have led to higher grocery prices in Norway. The NCA believed that the information exchange weakened the Retailers’ incentives to lower their prices.

According to public statements both from the Retailers and from the NCA itself, the NCA had been informed about the agreements and the use of “*price hunters*” since the beginning of the cooperation. The communication presumably took place on an informal basis. Like the EU

Commission, the NCA previously could grant individual exemptions from the competition rules following the formal notification of agreements, but this system was abolished upon the entry into force of the current [Competition Act of 2004](#). Although parties still in principle are free to approach the NCA and inform it of their planned agreements, the price hunters case illustrates that this approach does not eliminate the risk associated with potential anticompetitive agreements and practices.

In a press release, the NCA states that the investigation initiated several years later was triggered by a period of increased activity from the Retailers collecting price information. The investigation was particularly aimed at examining the pricing information flows and the actual practice of collecting the information in more detail.

In light of the NCA's position that the practice constituted an 'object' infringement, it seems likely that the NCA's prior knowledge of the matter will receive further attention should the NCA issue fines of the magnitude indicated.

The NCA is likely to conclude the matter in 2023. Should the NCA go ahead and issue the notified fines, the Retailers have already indicated that they would appeal a decision to the Competition Tribunal.

Other ongoing information exchange cases in Norway

The NCA currently also has several other information exchange cases in the pipeline. It is investigating suspected anti-competitive information exchanges within a [health-related market](#) and in the markets for [relocation services](#) and [construction services](#). These investigations were initiated during 2021 and 2022 when the NCA carried out inspections as a response to concerns about competitively sensitive information being exchanged between competitors in these sectors. Beyond the information in the press releases, little is publicly known about which suspected practices the NCA is investigating.

Comment

Irrespective of the outcome of the appeals in the books database case and the other ongoing cases, they emphasize the real competition law risk related to competitors' access to information shared with one or more third parties.

In the NCA's press release in the books database case, there are no indications that the Publishers' access to price data on other publishers' new releases was an intentional element of the service provided by *Bokbasen* or that the Publishers used the system with a view to obtaining such data. If so, the cooperation does not stand out as a typical hub-and-spoke cartel. If the information access was indeed only an incidental aspect of the system, this would make the case an unusual example of information sharing, not least in light of the significant fines that amount to approximately 10% of the involved companies' annual group turnovers in 2021.

The price hunters case stands out not only for its potential record fines but also because the information exchange concerned real-time prices rather than future prices. Outside of cartel cases,

information exchanges would normally only be considered as infringements if they involved future prices or conduct, as reflected in paragraph 448 of the Commission's 2022 draft [Horizontal Guidelines](#). The information exchange also happened in the context of an agreement the NCA apparently was informed about years back. Although it remains to be seen whether the NCA in the end will choose to issue the indicated fines, the case nonetheless illustrates that the NCA does not shy away from cracking down on information exchange cases, namely outside of the more traditional cartel cases.

The significant fines in the books database case and potentially in the price hunter cases, together with ongoing investigations in several other information exchange cases, highlight the need to consider information access issues very diligently in all projects that involve competitors. The fact that the information exchange takes place in the context of a legitimate project or practice does not prevent the NCA from issuing significant fines, even at levels otherwise seen in traditional cartel cases.

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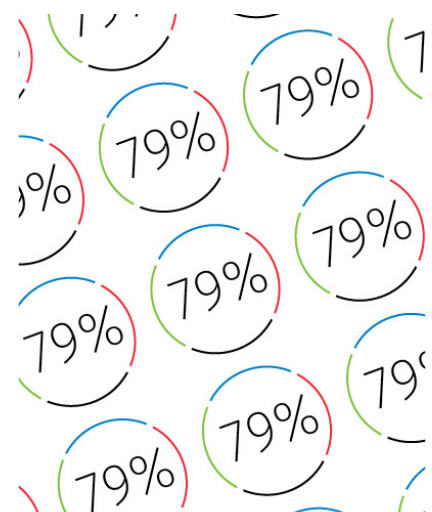
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